COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP668 **Cir. Ct. No. 2010CV424**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

NEKOOSA PORT EDWARDS STATE BANK,

PLAINTIFF-RESPONDENT,

V.

VERONIKA MCCARTHY,

DEFENDANT-APPELLANT,

ESTATE OF TIMOTHY D. MCCARTHY, M&I BANK OF MADISON, ST. JOSEPH'S HOSPITAL, CAPITAL ONE BANK (USA) NA AND DISCOVER BANK,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Adams County: JOHN P. ROEMER, JR., Judge. *Affirmed and cause remanded.*

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

¶1 BLANCHARD, J. Veronika McCarthy appeals, pro se, from a summary judgment of foreclosure granted to Nekoosa Port Edwards State Bank. McCarthy argues that the circuit court erroneously exercised its discretion in denying her request for a continuance of the summary judgment hearing based on the factors courts apply when considering a continuance request and based on ***Strook v. Kedinger***, 2009 WI App 31, 316 Wis. 2d 548, 766 N.W.2d 219, a case involving the right to an interpreter in court proceedings. She also argues that the circuit court erred in granting summary judgment to the Bank on its foreclosure action because she pled counterclaims that present disputed issues of material fact related to the merits of the summary judgment motion.

¶2 For the following reasons, we conclude that the court did not erroneously exercise its discretion in denying McCarthy's request for a continuance under the factors she cites or under ***Strook***. We also conclude that the court properly granted summary judgment on the Bank's foreclosure action. We therefore affirm the judgment. However, we remand for further proceedings on McCarthy's counterclaims.

BACKGROUND

¶3 The Bank filed a summons and complaint for foreclosure against McCarthy and others, attaching copies of a mortgage note and corresponding real estate mortgage. Acting pro se, McCarthy answered and pled counterclaims. The Bank filed a motion for summary judgment on January 21, 2011, with an accompanying evidentiary affidavit and materials in support, and served these papers on McCarthy by mail on January 20. The Bank's motion provided notice that a hearing on the motion was scheduled for 1:00 p.m. on February 17, 2011, in Courtroom B in the Adams County Courthouse.

¶4 On February 13, McCarthy sent a letter to the court requesting a continuance of the hearing. McCarthy stated in the letter that she needed more time because she was involved in a trial in separate proceedings and because an attorney, who she did not identify by name, was willing to represent her in this foreclosure action and was tied up in the other trial. McCarthy also indicated in the letter that she had sent a letter dated February 3 requesting a Slovak language interpreter so that she could understand the proceedings.[1] The Bank objected in writing to a continuance, explaining that there had been no response to its summary judgment papers and also that court records appeared to reflect that the separate case referenced by McCarthy as the basis for the continuance had been moved to March.

¶5 McCarthy appeared, pro se, at the February 17 hearing. The court had arranged for a Slovak interpreter, who appeared by telephone. After making sure that McCarthy and the interpreter understood each other, the court made findings on the record qualifying the interpreter.[2]

¶6 McCarthy renewed her request for a continuance, explaining as she had in her letter that she needed more time to prepare because she had been involved in a recent trial in separate proceedings. McCarthy further explained that an attorney willing to represent her was unable to be present that day. The court

[1] We find no copy of a February 3 letter from McCarthy in the record. However, we will assume in McCarthy's favor that she sent a letter to the court requesting that the court arrange for an interpreter, and that the court received it.

[2] McCarthy did not at the time of the February 17 hearing, and does not now, allege that she was not able to understand what anyone said during the hearing. Upon our independent review, the transcript does not reflect any evident misunderstandings based on inadequate translation.

denied McCarthy's request for a continuance and granted the Bank's motion for summary judgment on its foreclosure action. McCarthy appealed. We reference additional facts as necessary below.

DISCUSSION

¶7 Before reaching the merits of McCarthy's appeal, we address a preliminary matter regarding the finality of the judgment McCarthy appealed. The general rule is that only a final judgment or order is appealable as a matter of right. WIS. STAT. § 808.03(1) (2009-10).[3] Although the parties have briefed this case as if the judgment of foreclosure is a final judgment, we conclude upon closer examination that the judgment is not final. While it is clear that the Bank moved for and received summary judgment on its mortgage foreclosure action, we find no indication in the record that the Bank moved for dismissal of or summary judgment on McCarthy's counterclaims, or that the circuit court dismissed any of those claims.[4] In addition, we see no basis to conclude that the court's grant of summary judgment on the Bank's mortgage foreclosure action was an implicit dismissal of McCarthy's counterclaims. The counterclaims are not well pled, but they are pled well enough to raise, on their face, one or more issues that would not necessarily be barred by a judgment of foreclosure.[5] We therefore conclude that

[3] All references to the Wisconsin Statute are to the 2009-10 version unless otherwise noted.

[4] The Bank's answer to McCarthy's counterclaims, as part of its request for relief, seeks "judgment … dismissing the Counterclaims on the merits and with prejudice." But this is insufficient to show that the Bank moved for dismissal of or summary judgment on McCarthy's counterclaims, let alone that the circuit court dismissed them.

[5] McCarthy's counterclaims include the following allegations:

> 2. Defendant states that Plaintiff's conduct caused substantial damage to Defendant and incurred indebtedness when

(continued)

McCarthy's counterclaims remain pending. Because the counterclaims remain pending, the judgment of foreclosure is not final. *See* ***Republic Capital Bank v. Luchini***, 153 Wis. 2d 656, 658, 451 N.W.2d 474 (Ct. App. 1989) ("The judgment [of foreclosure] appealed from is not final because of the counterclaim yet to be resolved.").

¶8 Nonetheless, the parties have fully briefed the issues, and we conclude that permitting the appeal to move forward, on the topic of the summary judgment actually granted, would be fair to the parties, efficient, and "materially advance the termination of the litigation or clarify further proceedings in the litigation." *See* WIS. STAT. § 808.03(2)(a); ***Leavitt v. Beverly Enters., Inc.***, 2010 WI 71, ¶¶38-39, 326 Wis. 2d 421, 784 N.W.2d 683 (recognizing that court of appeals has broad discretion to grant or deny leave to appeal). Therefore, we treat

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> Plaintiff's employee, agent or representative caused a payment of Defendant's deceased husband['s] disability benefits to a party not entitled to receive [them] on December 21, 2007, a day after Defendant's husband['s] death, and that Plaintiff closed said account without being presented a death certificate at that time.
>
> ….
>
> 4. Defendant states that Defendant's sponsor, Phyllis McCarthy, and Phyllis McCarthy's allegations under a sworn statement alleging [sic] Plaintiff's fraudulent act prevented Defendant from instant enforcement of said sponsorship and put and forced Defendant, among others, into this foreclosure suit; and Defendant further states that such allegations of fraud caused Defendant stress, suffering, loss of concentration on graduate studies and pain and brought her into a significant indebtedness.

In addition, McCarthy incorporated other allegations from her answer and affirmative defenses into the counterclaims. Regardless of their merit, on their face those allegations add somewhat to the substance of her counterclaims.

McCarthy's notice of appeal as a petition for leave to appeal and, on our own motion, order the petition granted. *See* ***Bratcher v. Housing Auth. of City of Milwaukee***, 2010 WI App 97, ¶1 n.1, 327 Wis. 2d 183, 787 N.W.2d 418, *review denied*, 2011 WI 1, 330 Wis. 2d 441, 793 N.W.2d 70 (2010) (treating notice of appeal as petition for leave to appeal and granting leave to appeal on court's own motion); ***Caldwell v. Percy***, 105 Wis. 2d 354, 357 n.3, 314 N.W.2d 135 (Ct. App. 1981) (same). Having addressed this finality issue, we turn to the merits of McCarthy's arguments.

A. Continuance

¶9 McCarthy argues that the circuit court erroneously exercised its discretion in denying her request to continue the summary judgment hearing. As with any discretionary decision by the circuit court, our review is deferential:

> "It is well established in Wisconsin that a continuance is not a matter of right." ***Robertson-Ryan*** [***& Assocs., Inc. v. Pohlhammer***], 112 Wis. 2d [583,] 586[, 334 N.W.2d 246 1983] (citations omitted). The decision to deny a continuance is within the discretion of the trial court. ***Id.*** at 587. A circuit court's ruling on a motion for a continuance "will be set aside only if there is evidence of an [erroneous exercise] of discretion." ***Id.*** "An [erroneous exercise] of discretion exists if the trial court failed to exercise its discretion or if there was no reasonable basis for its decision." ***Id.***

Rechsteiner v. Hazelden, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496. Moreover, even when a circuit court's reasoning is not fully expressed, we may independently search the record to determine whether it provides a reasonable basis for the court's discretionary decision. ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 78, 443 N.W.2d 50 (Ct. App. 1989).

¶10 McCarthy argues that the circuit court erroneously exercised its discretion in denying the continuance because the court was required to grant the continuance under (1) factors typically considered when granting or denying a continuance, and (2) ***Strook***, a case involving the right to the assistance of an interpreter in court proceedings. We disagree on both points.

1. Continuance Factors

¶11 In denying the continuance, the circuit court focused on the likelihood, in light of admissions McCarthy made, that McCarthy would be unable to submit evidence to prevent summary judgment on the Bank's foreclosure action. Those admissions included that McCarthy had missed ten months of mortgage payments, having stopped paying on the mortgage as of May 2010, purportedly as part of an attempt "to lower [her] monthly payment." McCarthy also admitted that the real estate taxes on the property were not fully paid.

¶12 McCarthy does not argue that the circuit court erred in considering her admissions. Rather, she argues that the court should have granted the continuance based on other factors set forth in ***Mogged v. Mogged***, 2000 WI App 39, 233 Wis. 2d 90, 607 N.W.2d 662 (Ct. App. 1999). Those factors are "(1) the length of the delay requested; (2) whether the lead counsel has associates prepared to try the case in [lead counsel's] absence; (3) whether other continuances had been requested and received; (4) the convenience or inconvenience to the parties, witnesses and the court; and (5) whether the delay seems to be for legitimate reasons." ***Id.***, ¶14 n.9.

¶13 McCarthy's argument goes to factors (3) and (5). She points out that she had not previously requested a continuance for the summary judgment hearing. In addition, she asserts that she had a legitimate reason for delay and was

not dilatory because she needed more time to prepare as a result of her involvement in a trial in separate proceedings, and because an attorney who was willing to assist her was unavailable. As already indicated, McCarthy offered these same explanations to the circuit court.

¶14 We disagree with McCarthy that the court erroneously exercised its discretion in denying her request for a continuance in light of these factors. Rather, the circumstances show that the court had a reasonable basis to conclude that McCarthy was dilatory and lacked a legitimate reason for a continuance.

¶15 As indicated above, notice of the February 17 summary judgment hearing was sent to McCarthy on January 20. The notice included a clear reference to the summary judgment statute, WIS. STAT. § 802.08, which states the general rule that "the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing." § 802.08(2). The record reflects that McCarthy took no action in response to the Bank's motion until this deadline for filing her affidavits expired, after which she sent the February 13 letter to the court requesting the continuance. She filed no opposing affidavit. McCarthy has not asserted that she did not promptly receive the January notice of hearing or that she was unaware as early as January 20 of her other trial obligations.

¶16 In addition, McCarthy has provided no cogent explanation for why she delayed in retaining counsel. The Bank's foreclosure action had been pending for more than three months by the time of the February 17 summary judgment hearing, but no counsel had appeared as of the hearing date. In her February 13 letter to the circuit court, McCarthy stated that the attorney representing her in the separate proceedings was willing to assist in the foreclosure action but that the attorney was busy with those proceedings. Four days later, at the February 17

hearing, McCarthy indicated that "one set of lawyers" was working on the separate proceedings, and that a different attorney was willing to represent her in the instant case; however, that attorney could not be present for the February 17 hearing because that attorney had to be in Rock County that day for another matter. Based on these somewhat shifting reasons for her lack of counsel and the amount of time the foreclosure action had been pending, the circuit court had a reasonable basis to conclude that a continuance was not likely to result in McCarthy obtaining counsel for a continued hearing, or that McCarthy had been careless on this topic and failed to take seriously her pursuit of counsel.

¶17 All of these circumstances taken together support a conclusion that there was a reasonable basis for the circuit court's exercise of discretion to deny McCarthy's request for a continuance, despite McCarthy's assertion that she had a legitimate reason for the continuance because she needed more time to prepare or to obtain an attorney for the summary judgment hearing. *Cf.* ***State v. Wollman***, 86 Wis. 2d 459, 466-72, 273 N.W.2d 225 (1979) (circuit court did not erroneously exercise its discretion when denying defense request for continuance of trial after substitute defense counsel was appointed only ten days before trial date). The fact that McCarthy had not previously requested a continuance, although a relevant factor, is not so significant as to change our analysis.

2. ***Strook***

¶18 We next turn to McCarthy's argument that ***Strook*** required the circuit court to grant her request for a continuance. McCarthy failed to raise her ***Strook*** argument in the circuit court, and the argument is not well developed on appeal. We generally would not consider such an argument. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93

(arguments raised for the first time on appeal are generally deemed forfeited); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address insufficiently developed arguments). However, because McCarthy is pro se, and because ***Strook*** addresses fundamental fairness concerns pertaining to the right to an interpreter in court proceedings, we address the specific argument she makes based on ***Strook***.

¶19 In ***Strook***, a pro se defendant in a civil action indicated to the circuit court by letter from his doctor that he was deaf, would require a sign language interpreter for effective communication, and should have an interpreter for any legal proceedings. ***Strook***, 316 Wis. 2d 548, ¶4. Without addressing the letter, the court scheduled a substantive hearing. ***Id.***, ¶¶2, 4-5. Two days before the hearing, the defendant called the court via TTY.[6] ***Id.***, ¶6. He learned that the court would not provide an interpreter at the hearing, and therefore told the court employee taking the call that he would not attend. ***Id.*** The next day he filed a formal motion for an interpreter and informed the court that he would not be attending the hearing because of the lack of an interpreter. ***Id.*** The court held the hearing as scheduled without the defendant. ***Id.***, ¶7. The court addressed pending motions on the merits and ruled against the defendant in several respects. ***Id.*** The court also ruled that the defendant's motion for an interpreter was untimely. ***Id.*** In addition, the court expressed serious doubts as to the defendant's actual need for an interpreter, relying in part on facts that appeared to be outside the official court record. *See* ***id.***, ¶¶7-10.

[6] A TTY is a Teletype-writer, which allows a deaf or speech-impaired person to make telephone calls and have a conversation that is typed rather than spoken. ***Strook v. Kedinger***, 2009 WI App 31, ¶6 n.2, 316 Wis. 2d 548, 766 N.W.2d 219.

¶20 This court reversed. ***Id.***, ¶¶1, 21, 33. We stated that, "[o]nce [the defendant] properly notified the court that he needed an interpreter," the court was "required" "to act on that request—either by obtaining an interpreter or setting a hearing date so that the need for an interpreter could be determined." ***Id.***, ¶21. We concluded that, "[s]ince there is no record showing that a hearing to determine the need for an interpreter was on the docket, we must reverse on that ground alone." ***Id.***

¶21 Nothing about ***Strook*** as so far discussed indicates that the circuit court erred here. We said in ***Strook*** that the circuit court is required to act on a request for an interpreter "*either* by obtaining an interpreter *or* setting a hearing date so that the need for an interpreter could be determined." ***Id.*** (emphasis added). Here, the record shows that the court followed the first of the two options. It obtained a Slovak interpreter for McCarthy for the February 17 hearing in response to her request for an interpreter.

¶22 McCarthy apparently means to argue that the following passage in ***Strook*** stands for the proposition that a person requesting accommodation must in all instances be provided in advance with a separate hearing at which the issue of the need for an interpreter is addressed before any substantive hearing, even if there is no suggestion that the requester will not be accommodated:

> [W]e must also look at this issue through the lens of the disabled person. If the hearing on whether to provide an accommodation is scheduled at the time of the substantive hearing itself, we place the allegedly disabled person between the proverbial "rock and the hard place." One can only imagine the fear and confusion that a person with a disability might have if required to appear at an important proceeding to determine liberty or property interests not knowing whether the requested accommodation is going to be granted…. We must assure that, if a person *is* disabled and *needs* an accommodation to have access to the courts, then that disabled person should not have to worry about

> access issues when preparing for the substantive hearing…. The hearing on the accommodation should precede the substantive hearing.

Id., ¶25.

¶23 Based on this passage, McCarthy essentially argues that she was entitled to a hearing in advance of the summary judgment hearing at which she would, as she phrases it, learn with "absolute certainty that the interpreter would be present" at that hearing. However, in this case the court determined that there was no need for a hearing on accommodation, and so one was not held. The rule of ***Strook*** is that an accommodation hearing must be conducted in advance of a substantive hearing *if there is a need for an accommodation hearing,* not that a court must schedule a separate advance hearing simply to announce that there is no need for an accommodation hearing and to make any findings necessary to appoint the interpreter. Here, the court took McCarthy's assertions that she needed an interpreter at face value, and there was no dispute as to her need. McCarthy does not point to any basis for us to conclude that she reasonably feared, as the defendant did in ***Strook***, that there would be no interpreter, or that she would face a hearing on the interpreter issue at which the court might deny her interpreter request then force her to proceed on a substantive matter without an interpreter.

¶24 Moreover, McCarthy has not asserted that she sought a continuance of the summary judgment hearing because of her need for an interpreter or because of her uncertainty regarding the availability of an interpreter at that hearing. Therefore, we see no basis to conclude that she was prejudiced by the procedure that the circuit court followed, unlike the defendant in ***Strook***. *See* ***id.***,

¶1 (reversing because the process the circuit court followed "prejudicially affected the disabled person's right to a fair hearing").[7]

¶25 For all of the reasons stated above, we conclude that the circuit court did not erroneously exercise its discretion in denying McCarthy's request for a continuance.

B. Summary Judgment on Foreclosure Action

¶26 We next address McCarthy's argument that the circuit court should not have granted summary judgment to the Bank on the Bank's foreclosure action because she pled counterclaims that presented disputed issues of material fact related to the merits of the summary judgment motion. As we explain below, this argument is without merit, because it rests on a misunderstanding about what a party must do to defeat a motion for summary judgment that is supported by materials establishing a prima facie case for summary judgment.

¶27 This court reviews summary judgment de novo using the same methodology as the circuit court. ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶4, 232 Wis. 2d 53, 606 N.W.2d 590 (Ct. App. 1999).[8] We first

[7] The facts in ***Strook*** arose before WIS. STAT. § 885.38, the statute addressing interpreters in court proceedings, applied to most civil cases. *See* ***Strook***, 316 Wis. 2d 548, ¶14. McCarthy does not argue that the circuit court violated § 885.38, and we see nothing in the statute that adds to McCarthy's argument.

[8] For the standard of review, McCarthy cites ***Pietrowski v. Dufrane***, 2001 WI App 175, 247 Wis. 2d 232, 634 N.W.2d 109, which states as follows:

> [W]hen the grant of summary judgment is based on an equitable right … we apply a two-tiered standard of review. We review the legal issues *de novo*. However, the circuit court's decision to grant equitable relief is discretionary and, therefore, will not be overturned absent an erroneous exercise of discretion.

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examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. ***Danielson v. City of Sun Prairie***, 2000 WI App 227, ¶5, 239 Wis. 2d 178, 619 N.W.2d 108. "If we conclude that the complaint and answer join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment." ***Id.*** "If they do, we look to the opposing party's affidavits to determine whether any material facts are in dispute which entitle the opposing party to a trial." ***Id.***

¶28 There is no dispute here that the Bank's foreclosure action stated a claim and that issue was joined by McCarthy's answer to the Bank's foreclosure complaint. In addition, McCarthy does not argue that the Bank failed in its summary judgment affidavit to establish a prima facie case for summary judgment on its foreclosure action. Instead, McCarthy argues that her counterclaims raised sufficient factual issues to preclude summary judgment.

¶29 McCarthy's argument misconstrues how the summary judgment procedure operates before the circuit court, and on review before this court. Even assuming without deciding that some evidence in support of McCarthy's counterclaims could have prevented a summary judgment of foreclosure if submitted, the fact remains that McCarthy failed to submit any evidence. Once a summary judgment movant makes a prima facie case, the opponent "may not rest upon the mere allegations or denials of the pleadings but … must set forth specific

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Id., ¶5 (citations omitted). McCarthy appears to assert that we should apply this two-tiered standard because foreclosure proceedings are equitable in nature. We need not decide whether McCarthy is correct because we would reach the same decision regardless whether we applied a purely de novo standard or the two-tiered standard. We note that applying a more deferential standard would benefit the Bank, if anyone.

facts showing that there is a genuine issue for trial." WIS. STAT. § 802.08(3). Indeed, as noted above, McCarthy not only failed to meet the deadline to submit summary judgment materials as required at least five days before the scheduled hearing, but she also failed even to submit untimely materials by the date of the hearing. *See* § 802.08(2). Because McCarthy failed to submit evidence to counter the Bank's prima facie case for a summary judgment of foreclosure, the circuit court properly granted the summary judgment of foreclosure to the Bank.

¶30 We understand that McCarthy believes that, if the circuit court had granted her requested continuance of the hearing, the court would as part of that ruling have allowed her more time to submit evidence, and that McCarthy further believes that such evidence would have prevented summary judgment in favor of the Bank. However, even if the court had granted a continuance of the hearing, it does not necessarily follow that the court would have allowed McCarthy more time to submit evidentiary materials. Regardless, for the reasons already explained, the court had a reasonable basis to deny McCarthy's request for a continuance and, as part of that ruling, had a reasonable basis to deny McCarthy more time to submit evidentiary materials. McCarthy is bound by her failure to timely counter the Bank's summary judgment evidence.

¶31 McCarthy relies on ***A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 515 N.W.2d 904 (1994), and ***Kowske v. Ameriquest Mortgage Co.***, 2009 WI App 45, 317 Wis. 2d 500, 767 N.W.2d 309. However, these cases do not assist her. They address the circumstances under which a mortgagor in a foreclosure action must bring related counterclaims or be barred from making those claims later, based on claim preclusion and the common-law compulsory claim rule. *See* ***A.B.C.G. Enters.***, 184 Wis. 2d at 471; ***Kowske***, 317 Wis. 2d 500, ¶2. The cases do not suggest that a court is bound to

deny summary judgment on the foreclosure action any time counterclaims alleged to be factually related to the foreclosure action are pending.

¶32 Finally, we note that, as referenced above, we are not presented with a final judgment disposing of the counterclaims. We therefore express no further opinion about any aspect of the counterclaims at this juncture.

CONCLUSION

¶33 For all of the reasons stated, we affirm the circuit court's judgment on the Bank's foreclosure action and remand for further proceedings on McCarthy's counterclaims.

By the Court.—Judgment affirmed and cause remanded.

Not recommended for publication in the official reports.