COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1419 **Cir. Ct. No. 2009CV929**

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

BANK OF AMERICA N.A. F/D/B/A LASALLE BANK N.A.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

JFM1 LLC, AWM1 LLC, HMM1 LLC, HMM2 LLC, HMM3 LLC, CNM1 LLC, CNM3 LLC, CNM4 LLC, CNM6 LLC, CNM7 LLC, CNM8 LLC, CNM9 LLC, CNM11 LLC, CNM12 LLC, CNM13 LLC, CNM14 LLC, CNM15 LLC AND CHARLES NEISS,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS,

NEISS MANAGEMENT CORP.,

DEFENDANT,

LEXINGTON REALTY INTERNATIONAL,

INVOLUNTARY-DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This is an appeal from a judgment of foreclosure by the multiple corporate borrowers and guarantor Charles Neiss. The borrowers argue that the trial court erred by: (1) allowing Bank of America, N.A., to substitute for LaSalle Bank, N.A., as the plaintiff; (2) determining that Bank of America was entitled to enforce the loan documents; and (3) entering judgment against the borrowers and Neiss for a breach of and attorney fees associated with the parties' Environmental Indemnity Agreement (EIA). Bank of America cross-appeals arguing that the court erred by: (1) declining to award a portion of the attorney fees claimed in connection with enforcing the EIA; (2) determining that the borrowers and Neiss were not liable for various amounts claimed under the non-recourse provisions of the loan documents; and (3) refusing to find Neiss liable for all of the attorney fees claimed in connection with enforcing the loan documents. We affirm the judgment in its entirety.

¶2 In 2006, the borrowers executed a promissory note and mortgage to lender NRFC WA Holdings II, LLC, in connection with the purchase of a shopping mall. Neiss signed on as a personal guarantor. The note was later assigned to LaSalle. It is undisputed that in 2009, the borrowers defaulted on the loan, and a foreclosure complaint was filed naming LaSalle as the plaintiff. When the complaint was filed, LaSalle had merged into Bank of America. When the merger was discovered, the trial court permitted Bank of America's substitution as the plaintiff. Following a court trial, a judgment was entered for foreclosure including a money judgment against the borrowers and Neiss for costs and attorney fees pursuant to the EIA. The court declined to enter judgment against the borrowers and Neiss in connection with other non-recourse provisions of the loan documents.

The trial court properly allowed Bank of America to substitute as the plaintiff.

¶3 The borrowers argue that the trial court should not have allowed Bank of America to substitute for LaSalle because at the time the action commenced, LaSalle did not exist and thus, did not qualify as a "plaintiff" under WIS. STAT. §§ 801.03(2) and (3).[1] The borrowers argue that this rendered the action void from the start and so the trial court should have dismissed the action as lacking subject matter jurisdiction. We disagree. We conclude that the trial court permissibly allowed Bank of America to substitute under WIS. STAT. § 803.01(1) and that this ratified the commencement of the action.

¶4 Statutory interpretation and application of the statute to undisputed facts are questions of law that we review de novo. *See* ***State v. Jensen***, 2010 WI 38, ¶8, 324 Wis. 2d 586, 782 N.W.2d 415. WISCONSIN STAT. § 803.01(1) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

¶5 In ***Hamm v. LIRC,*** 223 Wis. 2d 183, 190, 588 N.W.2d 358 (Ct. App. 1998), this court held that the filing of an action in the name of a deceased party did not deprive the court of subject matter jurisdiction, and that ratification of the action by substituting the proper party pursuant to WIS. STAT. § 803.01(1)

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

"confirmed subject matter jurisdiction in the circuit court." ***Hamm*** is squarely on point. Bank of America's substitution confirmed subject matter jurisdiction in the circuit court.

¶6 The borrowers argue that ***Hamm*** is distinguishable because it involved review of an administrative agency decision in the circuit court and was commenced under WIS. STAT. § 102.23.[2] The borrowers assert that in ***Hamm***, ratification was permitted because Hamm was alive at the time the original agency action was started, and that the circuit court's review was simply the continuation of a properly commenced action. The fact that the circuit court action in ***Hamm*** involved the review of an administrative decision is a distinction without a difference. Circuit court review under § 102.23 requires the filing of a summons and complaint by an aggrieved party. Just like the filing of the foreclosure complaint in this case, ***Hamm*** involved the filing of a complaint in the circuit court. Under ***Hamm***, substitution is permitted even where the plaintiff was deceased when the action commenced.

¶7 We also reject the borrowers' assertion that ***Hamm*** conflicts with ***Joint School Dist. No. 1 v. Wisconsin Rapids Educ. Ass'n.***, 70 Wis. 2d 292, 302, 234 N.W.2d 289 (1975), where the court recognized the general principle that "an action cannot be maintained by one who has no capacity to sue." ***Joint School Dist.*** was not a case about substitution and, in fact, never mentions or applies WIS. STAT. § 803.01(1).

[2] WISCONSIN STAT. § 102.23 governs judicial review of worker's compensation determinations. It specifies the filing and notice requirements for obtaining review in the circuit court, and the standards to be used by the circuit court in reviewing the agency determination.

¶8 Pursuant to WIS. STAT. § 803.01(1) and ***Hamm***, the trial court properly permitted Bank of America to substitute for LaSalle, even though LaSalle did not exist when the complaint was filed.

The trial court properly determined that Bank of America was entitled to enforce the loan documents.

¶9 Because the original promissory note was payable to NRFC, Bank of America had to prove its interest in the mortgage and note. The borrowers argue that Bank of America failed to prove its ownership and possession of the mortgage and note. We disagree.

¶10 We will uphold a trial court's findings of fact unless they are clearly erroneous and against the greater weight and clear preponderance of the evidence. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). When more than one reasonable inference can be drawn, we must accept the inference drawn by the trial court. ***Id***. At trial, Bank of America produced the original note and the original recorded mortgage as well as the documents assigning the note and mortgage to LaSalle/Bank of America.[3] Bank of America's vice president testified that the loan had been transferred into the bank's trust, and bank records were admitted to prove that the note and mortgage were actually received by LaSalle/Bank of America. Brett Klein, an administrator involved with the loan, testified about various assignment transactions, including the execution of an assignment agreement from NRFC to LaSalle. The signed agreements were admitted into evidence. The trial court determined that this evidence sufficiently

[3] Borrowers agree that if the note was properly assigned to LaSalle, then the merger transferred the assignment and right of enforcement to Bank of America.

proved Bank of America's interest in and right to enforce the loan documents under WIS. STAT. § 403.203.

¶11 WISCONSIN STAT. § 403.203(1) provides that "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Section 403.203(2) states that "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course …." The trial court relied on Klein's testimony as proof that the original note was transferred to LaSalle. There was undisputed evidence that Bank of America was the successor by merger to LaSalle. On this record, there was ample evidence for the trial court to find that the note was transferred to Bank of America for the purpose of enforcing the note. The court's findings were not "against the great weight and clear preponderance of the evidence." ***Opstein***, 86 Wis. 2d at 676. The court properly concluded that Bank of America proved its right to enforce the note.[4]

¶12 The borrowers next assert that Bank of America's right to enforce the loan documents is somehow affected by trial evidence indicating that Wachovia Bank once had some unspecified interest in the note. The borrowers claim that because the nature of Wachovia's previous interest was never clarified

[4] On appeal, Bank of America makes two additional arguments in favor of the trial court's conclusion that it held and could enforce the note and mortgage. Specifically, Bank of America disputes the trial court's finding that, due to their form, the endorsements, or "allonges," were insufficient proof of assignment. The Bank also asserts its common law right to enforce and collect on the loan documents. Because we agree with the trial court that other evidence amply proved Bank of America's right to enforce the note, we need not address these arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

at trial, Wachovia might have standing to join the suit, and Bank of America therefore cannot enforce the loan documents.

¶13 We reject this claim. We fail to see how the peripheral evidence at trial concerning Wachovia's possible prior interest serves as any defense to this foreclosure action.[5] First, the only evidence at trial revealed that the purported assignment to Wachovia was never fully executed. Second, the borrowers' speculation does not change the proven and ultimate fact that Bank of America now holds the mortgage and note and is entitled to foreclose on the property and collect on the debt.

The trial court properly determined that the borrowers and Neiss were liable under the EIA.

¶14 Through the EIA, the borrowers assumed liability for loss related to "any past, present or future Environmental Activity Condition," including the presence of any hazardous material on the premises. The guaranty provides that Neiss shall be personally liable for "all obligations of Borrower (i) under the Environmental Indemnity Agreement and (ii) the Non-Recourse section of the Note …." Neiss does not dispute his liability under the guarantee for violations of the EIA. Rather, the borrowers and Neiss argue that Bank of America failed to prove any breach of the EIA.

¶15 While reviewing documents in anticipation of foreclosure, Bank of America discovered that underground storage tanks containing petroleum were stored on the property in the 1980s. Bank of America conducted further

[5] If the borrowers are trying to assert that Wachovia is a necessary party to the action, they forfeited this claim by failing to move for joinder in the trial court. *See* WIS. STAT. § 803.03(1).

investigation and confirmed petroleum contamination in the soil and groundwater. The trial court found that the contamination constituted a past environmental condition, and thus, a breach of the EIA.

¶16 The borrowers argue that they should not be responsible for any of the EIA damages because, under the contract, indemnification had to be triggered by a claim against Bank of America. We disagree. When the terms of a contract are plain and unambiguous, we will construe the contract as it stands. ***Kernz v. J.L. French Corp.,*** 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. The contract does not specify that the borrowers are liable only where an outside party actually files a claim. The contract is broad enough to require indemnification for losses incurred by the lender in connection with a past environmental activity or condition affecting the property. The trial correctly concluded that the borrowers and Neiss were liable for obligations incurred under the EIA.

The court properly determined that Neiss was not liable for various amounts under the contract's non-recourse provisions because Bank of America failed to prove the borrowers' breach of the relevant provisions.

¶17 In its cross-appeal, Bank of America argues that the trial court erred in determining that there was insufficient evidence at trial to prove that the borrowers breached the non-recourse provisions of the contract.[6] Bank of America asserts it was entitled to damages for the following breaches: (1) waste of or failure to restore the property; (2) failure to deliver condemnation proceeds to the lender; and (3) the misapplication or misappropriation of sweep funds. We

[6] As with the EIA, Neiss does not dispute his liability under the guaranty for breaches of the non-recourse provisions.

will uphold a trial court's findings of fact unless they are clearly erroneous and against the greater weight and clear preponderance of the evidence. ***Opstein***, 86 Wis. 2d at 676.

¶18 Provisions of the note specify that the borrowers are liable for "the material physical waste of the Premises or Borrower's failure to restore the premises in accordance with any Loan Document." The contract includes a covenant to "maintain the Premises and keep the Premises in good condition and repair."

¶19 Bank of America presented evidence about items of "deferred maintenance," such as seal coating and re-striping the parking lot, servicing the heating and cooling system, problems with drinking fountains, and repairing roof leaks and a door. The trial court considered the evidence as to each item and found that Bank of America failed to prove any claim rose "to the level of waste, much less material waste." The court also found that the value of the property was not substantially diminished. The court concluded:

> I have not been able to establish what would be required by any other loan document establishing a failure to restore the premises. I find that the plaintiff has not established damages in this area and, therefore, cannot order any damages.

¶20 On this record, we cannot say that the trial court's findings and conclusions were erroneous. We do not agree with Bank of America that the above statement by the trial court demonstrates its failure to consider whether the claims constituted a "failure to restore the premises" under the loan documents. Bank of America's trial brief pointed the court to the precise provisions it relied upon to establish the borrower's breach. The court was aware of the applicable contract provisions and used the diminution in value test as a measuring tool, not

as the ultimate legal standard that Bank of America was required to satisfy. The evidence supports the trial court's finding that there was no diminution in the value of the property. It could then conclude there was no failure under the contract to restore the premises or maintain the property in good condition and repair.

¶21 The court's determination that Bank of America failed to prove a breach of the contract's condemnation provision was also a proper assessment of the evidence. Bank of America claimed that the borrowers "fail[ed] to deliver … condemnation proceeds or awards … received by Borrower to Lender as required by the Loan Documents or otherwise apply such sums as required under the terms of the Loan Documents." As proof, Bank of America introduced into evidence a recorded condemnation award naming the borrowers and NRFC as parties with an interest in the property. Klein testified that Bank of America never received any money from the award. As the trial court noted, there is a failure of proof regarding the contract's requirement that condemnation proceeds be turned over to the lender. There was no proof that borrowers ever received the award or that the award was not made available for the benefit of the lender. The trial court's finding that there was no breach is not against the great weight of the evidence.

¶22 Bank of America next asserts that the trial court "abused its discretion" by "completely fail[ing] to address" and rule on its claim that borrowers misappropriated their excess cash flow following the institution of a "cash flow sweep period." By failing to file a reconsideration motion under WIS. STAT. § 805.17(3), Bank of America forfeited the ability to raise this issue on appeal. *See* ***Rodak v. Rodak***, 150 Wis. 2d 624, 634, 442 N.W.2d 489 (Ct. App. 1989) (trial court's failure to address an issue raised by the parties constitutes

"manifest error" and its correction requires application to the trial court prior to appeal).

The trial court properly determined the amount of reasonable attorney fees for which Neiss should be personally liable.

¶23 After finding Neiss liable for obligations under the EIA but not the other non-recourse provisions, the trial court ordered Bank of America to provide "evidence showing reasonable expenses and attorneys fees related to the guaranty under the [EIA]." After reviewing the relevant submissions, the trial court entered money judgments against the borrowers and Neiss, jointly and severally, for about $48,000 in connection with the EIA.[7] In a lengthy written decision and order, the trial court explained why it had considered but rejected other discrete amounts claimed by Bank of America as attorney fees incurred in connection with the EIA.

¶24 Both parties find fault with the trial court's determination of the amount of attorney fees incurred in connection with the EIA. The borrowers argue that an award of attorney fees that is three times larger than the investigation costs is patently unreasonable. Bank of America's cross-appeal asserts that the court erroneously determined that certain claimed amounts were not adequately proven to be incurred in connection with enforcement of the EIA.

¶25 We review the trial court's determination of the reasonableness of attorney fees under the erroneous exercise of discretion standard. ***Lane v. Sharp Packaging Sys., Inc.***, 2002 WI 28, ¶66, 251 Wis. 2d 68, 640 N.W.2d 788. Here, the trial court carefully reviewed each requested amount to ensure it was

[7] The money judgment was comprised of about $10,000 in costs spent investigating the EIA and about $38,000 in EIA-related attorney fees.

reasonable and related to the EIA claim. The court considered each category of attorney fees claimed by Bank of America, and for each itemized amount, the court explained the relevant facts and reasoning underlying its decision. The court's award was a proper exercise of discretion.

¶26 Bank of America's cross-appeal contends that the trial court erroneously concluded that Neiss was not liable for the following additional attorney fees: (1) attorney fees incurred in connection with enforcing the non-recourse provisions of the loan; and (2) the $200,000 worth of attorney fees incurred litigating the foreclosure action by Bank of America and entered as part of the foreclosure judgment against the borrowers. We disagree.

¶27 The guaranty states that Neiss shall be personally liable for "all obligations of Borrower (i) under the Environmental Indemnity Agreement and (ii) the Non-Recourse section of the Note …." The non-recourse provision of the note provides for attorney fees "associated with enforcing Lender's rights or remedies relating to the foregoing."[8] The trial court found that, other than the EIA, the borrower did not breach any of the non-recourse provisions. The trial court concluded that the requested attorney fees were unreasonable because there was no breach or loss under these provisions. A trial court can determine the reasonableness of attorney fees even where those fees are addressed in the parties' contract. *Cf.* ***Lakeshore Commercial Fin. Corp. v. Bradford Arms Corp.***, 45 Wis. 2d 313, 329-30, 173 N.W.2d 165 (1970) (court permitted to determine amount of reasonable attorney fees notwithstanding provision in contract setting a

[8] The EIA is part of the non-recourse provision of the note but is additionally memorialized in a separate signed agreement.

specific amount). The trial court properly determined that Neiss did not have to pay for attorney fees incurred by Bank of America in its unsuccessful attempt to collect under the loan's non-recourse provisions.[9]

¶28 We also deny Bank of America's cross-appeal requesting a personal judgment against Neiss for the over $200,000 spent on attorney fees in obtaining the foreclosure judgment. The trial court found that Bank of America was reasonably entitled to over $200,000 in attorney fees incurred in connection with the foreclosure action. As specified in the mortgage contract, the trial court included the attorney fees in the foreclosure judgment, as a cost to be taken from future sale proceeds.[10] Bank of America has obtained a judgment that accounts for all of their attorney fees. Bank of America cannot attempt to circumvent the contract's requirement that attorney fees be made part of the indebtedness and collection via sheriff sale by requesting an additional money judgment against the guarantor.

¶29 No costs to either party on appeal.

By the Court.—Judgment affirmed.

[9] Bank of America argues that its lack of success "does not make the attorneys' fees incurred in prosecuting them unrecoverable." The trial court did not determine that these attorney fees were unrecoverable as a matter of law. It exercised its discretion and determined it was unreasonable to award attorney fees in connection with these unsuccessful claims. If Bank of America is asserting that its lack of success was an improper consideration, then its argument is insufficiently developed and we will not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

[10] The mortgage states that the borrowers are liable for Bank of America's reasonable attorney fees and that unpaid sums "shall be added to the Indebtedness secured hereby …."

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.