COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1987 **Cir. Ct. No. 2009CV6511**

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

M&I MARSHALL & ILSLEY BANK,

PLAINTIFF-RESPONDENT,

V.

WILLIE J. NUNNERY AND JUDY R. NORMAN-NUNNERY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

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

¶1 LUNDSTEN, P.J. M&I Bank commenced this foreclosure action against the Nunnerys. During the course of litigation, the Nunnerys alleged race discrimination. The Nunnerys, who are both black, contended that M&I treated them differently than a similarly situated white borrower. M&I moved for

summary judgment. So far as the parties inform us, the only issue that might have prevented the circuit court from granting foreclosure was the Nunnerys' race discrimination counterclaim. The circuit court dismissed the Nunnerys' race discrimination claim, and granted foreclosure. We affirm.

Background

¶2 In 1989, the Nunnerys borrowed $243,000 from M&I Bank to purchase their home. Under the terms of the mortgage, the Nunnerys were required to pay their property taxes. If the Nunnerys failed to pay their property taxes, M&I was entitled to pay the taxes, and such payment would become part of the Nunnerys' debt to M&I.

¶3 Starting with tax year 1998, the Nunnerys commenced a pattern of often paying property taxes late or not at all. In December 2008, M&I notified the Nunnerys that their failure to pay property taxes for 2005, 2006, and 2007 constituted a default on their mortgage note.[1]

¶4 The record also discloses that the Nunnerys often failed to make timely monthly mortgage payments. Multiple times in 2005, 2006, 2007, 2008, and 2009, the Nunnerys failed to make timely mortgage payments.[2]

[1] It also appears to be undisputed that, at the time M&I commenced this action, the Nunnerys had not paid their 2008 property taxes.

[2] M&I's foreclosure and litigation supervisor submitted an affidavit that contains a partial payment history for the Nunnerys for part of 2004 to the Nunnerys' last payment in 2009. The Nunnerys' mortgage payments were due on the first of the month, with a grace period of 15 calendar days before a late fee was imposed. For purposes of this opinion, we will consider the payments made within that 15-day grace period as timely. According to the payment history, of the 58 "regular payments" due prior to the amortization decision, 34 payments were late.

¶5 By April 2009, delinquent property taxes and unpaid special assessments owed to the County by the Nunnerys totaled about $56,000. M&I employee David Roberts decided to pay the Nunnerys' delinquent taxes and assessments. In April 2009, M&I paid $56,427.03 to the Dane County treasurer for real estate taxes and special assessments on the Nunnerys' property. Subsequently, an unidentified M&I employee required the Nunnerys to repay this amount over a 12-month period, which the parties refer to as the amortization period. For summary judgment purposes, M&I does not dispute the Nunnerys' assertion that this decision had the effect of increasing the Nunnerys' monthly payments to M&I from $1,605.75 to $7,555.95. The Nunnerys failed to keep up with this payment schedule, and M&I filed this foreclosure action.

¶6 During the course of the foreclosure litigation, the Nunnerys sought to uncover evidence that they had been the victims of race discrimination. This led them to discover that, in April 2009, the same month M&I paid the Nunnerys' delinquent property taxes, M&I also paid delinquent property taxes owed by a white borrower in the amount of approximately $52,000. Although the amounts of the delinquencies were similar, the white borrower was given a much more lenient repayment schedule. M&I amortized the white borrower's $52,000 delinquency over four years instead of one, resulting in much lower monthly payments attributable to the tax delinquency.

¶7 The Nunnerys pursued and abandoned other counterclaims, including at least one theory of discrimination, that do not require our attention. What matters for purposes of this appeal is that, by the time the circuit court ruled on M&I's motion for summary judgment, the Nunnerys' sole discrimination theory for their counterclaim was that M&I discriminated against them based on their race when M&I imposed on them the one-year amortization schedule, and

that, as proof of discrimination, the Nunnerys pointed to the four-year schedule offered to the white borrower. This counterclaim is based on federal law. *See* 42 U.S.C. §§ 1981, 1982.

¶8 The circuit court granted M&I's motion for summary judgment, dismissed the Nunnerys' counterclaim, and granted foreclosure.

Discussion

¶9 The Nunnerys allege race discrimination. They contend that M&I Bank treated them differently than a similarly situated white borrower. According to the Nunnerys, they and the white borrower were in the same situation—both failed to pay property taxes and defaulted on mortgage notes and, as to both, M&I paid the delinquent taxes and then imposed a revised payment schedule that included reimbursing M&I for the property taxes. The difference, according to the Nunnerys, is that M&I amortized the tax reimbursement portion differently. M&I amortized the tax reimbursement over four years for the white borrower, but placed a greater burden on the Nunnerys by amortizing their tax reimbursement over a period of just one year.

¶10 For the reasons that follow, we affirm the circuit court's decision to grant M&I's request to dismiss the Nunnerys' counterclaim alleging discrimination.

A. The Nunnerys' Argument That, Under Wisconsin Summary Judgment Law, M&I's Prima Facie Showing Was "Destroyed"

¶11 The circuit court concluded that M&I's motion for summary judgment and supporting submissions established a prima facie entitlement to summary judgment. The Nunnerys' discrimination counterclaim initially focused

on M&I's decision to pay the Nunnerys' delinquent property taxes, thereby obligating the Nunnerys to reimburse M&I. M&I's summary judgment motion and submissions effectively asserted that M&I employee David Roberts was the person who decided to pay the taxes and require repayment, that Roberts was unaware of the Nunnerys' race, and, therefore, that M&I's decision (made by Roberts) to pay the taxes could not possibly have been influenced by an intent to discriminate based on race.

¶12 The Nunnerys do not dispute that M&I's motion and supporting submissions contain a sufficient showing that, if unrebutted, support judgment in M&I's favor with respect to the Roberts decision. Rather, the Nunnerys' argument is that deposition testimony given after the parties had made their initial summary judgment submissions, specifically deposition testimony of Roberts, caused the Nunnerys to focus on a different M&I decision, namely, the setting of a 12-month amortization schedule. The Nunnerys argue that, as to this different decision, it was undisputed that Roberts was *not* the decision maker and, therefore, the Roberts deposition "destroyed the bank's prima facie case" because it "destroyed" the Bank's defense—i.e., that Roberts did not know the Nunnerys' race. According to the Nunnerys, M&I is not entitled to summary judgment because M&I's submissions present no prima facie defense to the Nunnerys' new discrimination theory, that a different decision maker gave the Nunnerys a less favorable tax repayment amortization schedule as compared with a similarly situated white borrower.

¶13 The circuit court acknowledged that Roberts' deposition undercut M&I's prima facie case, but seemed to reason that the submission showing that Roberts was not the amortization decision maker came too late. The circuit court wrote:

> In response to the bank's *prima facie* case, the Nunnerys submitted sworn deposition testimony from Mr. Roberts himself that he was not the decision-maker, thus placing this fact in dispute. However, whether or not Mr. Roberts was the decision-maker establishing the escrow amortization payback schedule is not a *material* factual dispute. This is so because once the bank established a *prima facie* entitlement to summary judgment, the burden shifted to the Nunnerys under the summary judgment methodology set forth in *Physicians Plus Insurance Corp.* above (and *Anderson v. Liberty Lobby, Inc.* which it quotes with approval) to produce evidence from which a reasonable jury could return a verdict in their favor.

We understand the circuit court's reasoning to be that, although the Roberts deposition created a factual dispute with respect to the Nunnerys' new discrimination theory, once M&I's prior motion and submissions established a prima facie case for summary judgment with respect to the old theory, the burden shifted to the Nunnerys and this burden, under federal law, included making a prima facie showing of discrimination, which the Nunnerys failed to do.

¶14 The Nunnerys contend that the circuit court's burden-shifting reasoning was legal error. According to the Nunnerys, whether M&I made its required prima facie showing remained an open question until the time the court rendered its summary judgment decision and, armed with the Roberts deposition, the Nunnerys could reset the clock, so to speak, and undo M&I's prima facie showing. We are not persuaded that the circuit court's burden-shifting approach was legal error. But we do not dwell on that issue because we reach the same destination—the application of federal burden-shifting law—by a different route.

¶15 The Nunnerys rely on the rule that, under Wisconsin summary judgment law, a party moving for summary judgment must make a prima facie case. To this, the Nunnerys add the proposition that such a prima facie case must include evidence supporting any *defense* necessary to defeat the plaintiff's claim.

This is an accurate statement of the rule, when it applies. However, where the Nunnerys falter is in failing to explain why this Wisconsin law matters in the face of burden shifting imposed by federal discrimination law.

¶16 The Nunnerys acknowledge that, under federal law, if they did not offer "direct evidence" of discrimination, something we conclude in the next section of this opinion that they failed to do, then under ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973), and its progeny, *the Nunnerys* have an initial burden and a defendant like M&I can prevail on summary judgment simply by pointing out that a plaintiff has not produced sufficient evidence of discrimination. *See, e.g.,* ***Woodman v. WWOR-TV, Inc.***, 411 F.3d 69, 74-77, 84 (2d Cir. 2005) (failure of plaintiff to present evidence that defendant's decision maker acted with knowledge of the substantial age difference between the plaintiff and another employee entitled the defendant to summary judgment). In light of this law, the Nunnerys suggest no reason why we should not ignore the decision by Roberts to make the tax payment and focus instead on the Nunnerys' new discrimination theory regarding the amortization decision and—with respect to this new theory—determine whether the Nunnerys have an initial burden under federal law and, if so, whether they have met that burden.

¶17 In sum, although we differ with the circuit court as to why the "destruction" of M&I's defense to the Nunnerys' attack on Roberts' decision does not matter, the bottom line is the same, that is, attention shifts to burden shifting under federal law.

B. Whether The Nunnerys Have Met Their Burden Under Federal Law

¶18 As the circuit court explained, ***Oates v. Discovery Zone***, 116 F.3d 1161 (7th Cir. 1997), sets forth the general legal framework for the Nunnerys' discrimination claim:

> It is well-settled that there exist two methods of [proving discrimination]. Under the first, a plaintiff can offer direct proof of discriminatory intent to meet his burden of proof. Alternatively, the indirect, or burden-shifting approach, originally espoused in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), requires a plaintiff to initially establish, by a preponderance of the evidence, a prima facie case of racial discrimination. "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." This presumption places upon a defendant the burden of producing "evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." If the defendant meets this burden of production, the ***McDonnell Douglas*** presumption "drops from the case" and is no longer relevant. The plaintiff then must prove by a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."

Id. at 1169-70 (citations omitted).

¶19 The Nunnerys appear to argue that the circuit court should not have imposed on them the ***McDonnell Douglas Corp.*** initial burden. More specifically, they appear to contend that the submissions contain "direct evidence" of discrimination and, therefore, what is applicable here is the direct method, which does not impose an initial burden. We are not persuaded. In the following paragraphs, we assume without deciding that the Nunnerys have accurately summarized the applicable federal law on the direct and indirect method. Using this law as our legal framework, we explain why we agree with the circuit court that the Nunnerys did not present "direct evidence" and, therefore, bore the initial

burden under the indirect method. We then explain why we agree with the circuit court that the Nunnerys failed to meet their initial burden.

¶20 According to the Nunnerys, quoting ***Everett v. Cook County***, 655 F.3d 723, 729 (7th Cir. 2011), "direct evidence" of race discrimination includes evidence tantamount to "'an outright admission that an action was taken for discriminatory reasons'" or circumstantial evidence pointing directly to discrimination. Also quoting ***Petts v. Rockledge Furniture LLC***, 534 F.3d 715, 720 (7th Cir. 2008), the Nunnerys contend that circumstantial evidence constitutes "direct evidence" when it provides a "'convincing mosaic'" of evidence pointing directly to a discriminatory reason for the negative action. More specifically, the Nunnerys, citing ***Petts***, contend that this "direct evidence" can be supplied by a "convincing mosaic" of comparative evidence showing that similarly situated persons outside the protected class received better treatment. Quoting ***Radue v. Kimberly-Clark Corp.***, 219 F.3d 612, 618 (7th Cir. 2000), the Nunnerys assert that showing that they were similarly situated did not require showing "'complete identity'" with the white borrower, but rather "'substantial similarity.'" Finally, the Nunnerys direct our attention to the following language from ***Coleman v. Donahoe***, 667 F.3d 835 (7th Cir. 2012):

> [T]he similarly-situated inquiry is flexible, common-sense, and factual. It asks "essentially, are there enough common features between the individuals to allow a meaningful comparison?" There must be "sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination." In other words, the proposed comparator must be similar enough to permit a reasonable juror to infer, in light of all the circumstances, that an impermissible animus motivated the employer's decision....
>
> ....

> ... The touchstone of the similarly-situated inquiry is simply whether the [persons] are "comparable."

Id. at 841, 846 (citations omitted).

¶21 Assuming without deciding that the legal summary the Nunnerys provide is accurate and complete, we conclude that the submissions here do not present "direct evidence." The evidence showing that the Nunnerys and the white borrower are similarly situated is best described as scant—there is no "convincing mosaic." The only significant facts revealed in the submissions are that both the Nunnerys and the white borrower were in default and both failed to pay approximately the same amount of property taxes. The Nunnerys have not directed our attention to any comparative evidence regarding current income, other assets, other liabilities, and loan payment history.[3] Thus, the Nunnerys have the initial burden of making a prima facie showing of racial discrimination.

¶22 The same circumstance that causes us to conclude that the Nunnerys have not presented "direct evidence" persuades us that M&I has demonstrated that the Nunnerys failed to meet their burden to present prima facie evidence of discrimination. In the words of the Seventh Circuit, "there [are not] enough common features between the individuals to allow a meaningful comparison." ***Humphries v. CBOCS West, Inc.***, 474 F.3d 387, 405 (7th Cir. 2007), *aff'd*, 553 U.S. 442 (2008); *cf.* ***D'Amico v. City of New York***, 132 F.3d 145, 149 (2d Cir.

[3] Even though the Nunnerys do not point to comparative evidence, we have nonetheless reviewed the submissions to determine whether there is any significant comparative evidence. What we have found is an indication that the white borrower made late payments less often than the Nunnerys. An affidavit provided by M&I in response to the Nunnerys' second set of interrogatories indicates that, prior to the amortization decision, an automatic late fee was assessed against the white borrower one-third of the time (6 of 18 payments) compared with the Nunnerys' almost 60% late payment rate (34 of 58 payments).

1998) ("The non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.").

¶23 The Nunnerys complain that there is no evidence that the factors the circuit court pointed to—income, other assets, other liabilities, and loan payment history—are factors that M&I takes into account when deciding whether to give a borrower a more advantageous amortization schedule. This, however, is not a matter subject to reasonable dispute. There is no need for evidence to support the proposition that lenders treat borrowers differently based on the lenders' knowledge of the borrowers' income, assets, liabilities, and loan payment histories. The test, the Nunnerys tell us, is a common-sense test and, we think, in this regard the circuit court simply applied common sense in surmising the factors that would be considered. We follow the circuit court's lead.

¶24 The Nunnerys assert that the "similarly situated" issue is a question that should be left to a trier of fact. But what would a fact finder base a decision on? Indeed, the absence of comparative information works against the Nunnerys. The Nunnerys had the burden of presenting evidence showing a prima facie case of discrimination and, as pertinent here, that included evidence showing that they were similarly situated with the white borrower. Even after refocusing their attention to the amortization decision, we find no place in the record where the Nunnerys made a clear attempt to identify the amortization decision maker or the criteria used by that decision maker in deciding on the amortization period.

¶25 The Nunnerys contend that the circuit court erred when it concluded that the Nunnerys failed to present evidence showing that they were "qualified" or "eligible" for a more extended amortization schedule. We acknowledge that there

is no admissible evidence that M&I had any particular eligibility criteria for setting amortization periods. It is sufficient to say that we do not rely on this conclusion.

¶26 The Nunnerys assert that the circuit court failed to understand that the "direct method" of proving discrimination can rely on circumstantial evidence. We disagree with the Nunnerys that the circuit court misunderstood. However, regardless of the circuit court's understanding, we have accepted, for purposes of our de novo review, the Nunnerys' summary of the law on the topic. Accordingly, we address this assertion no further.

¶27 The Nunnerys, with respect to the amortization decisions, compare what is reflected in the record regarding M&I's interaction with the white borrower with the lack of interactions with the Nunnerys. The Nunnerys argue that this comparison provides a basis to conclude that M&I gave the white borrower a greater opportunity to obtain a longer amortization period. However, as the Nunnerys effectively concede elsewhere in their discussions on appeal, and in oral argument before the circuit court, without knowing more particulars about M&I's interaction with the white borrower, such as who initiated the interaction, there is insufficient evidence on this topic to reach any conclusion.[4]

¶28 The Nunnerys argue that the submissions create a factual dispute as to whether M&I's amortization decision maker knew the Nunnerys' race.

[4] The Nunnerys assert that M&I's internal emails show that M&I did not consider the white borrower's loan or tax payment history, her income, or her other financial assets and liabilities. We disagree. There is no reason to conclude that the emails the Nunnerys point to comprise all of the fact gathering or analysis that went into the amortization decision with respect to the white borrower.

According to the Nunnerys, it is a reasonable inference that the decision maker knew their race because of government data collection requirements on race. We will assume, without deciding, that there is a factual dispute on this topic. However, as we have explained, even assuming that the decision maker knew the race of the white borrower and the race of the Nunnerys, the Nunnerys' prima facie showing is deficient with respect to whether they and the white borrower were similarly situated.

¶29 The Nunnerys argue that M&I should not be permitted to mislead them as to the identity of the relevant decision maker and then "profit" from the Nunnerys' inability to make a showing that the same decision maker established the amortization period for both the Nunnerys and the white borrower. This argument goes nowhere for two reasons. First, as the circuit court explained, the Nunnerys had ample time to make inquiries as to the identity of the amortization decision maker. Thus, it was not unfair for the circuit court to point out that the Nunnerys had failed to present evidence that the same decision maker was involved in both amortization decisions. Second, and more importantly, we need not rely on this factor to affirm summary judgment. Even if we assume for purposes of this opinion that the decision maker was the same for both the Nunnerys and the white borrower, the Nunnerys have failed to present evidence showing that they are similarly situated.

Conclusion

¶30 For the reasons stated above, we affirm the circuit court's grant of summary judgment to M&I Bank dismissing the Nunnerys' discrimination counterclaim and granting the foreclosure.

By the Court.—Judgment affirmed.

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