COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP637 **Cir. Ct. No. 2012CV1659**

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

COMMUNITY FIRST CREDIT UNION,

PLAINTIFF-RESPONDENT,

V.

BRET N. BOGENSCHNEIDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Bret Bogenschneider appeals a judgment of foreclosure entered by the circuit court upon summary judgment relating to a note and mortgage securing commercial real property he owned in Winnebago county, Wisconsin. He also appeals the denial of his motion to dismiss alleging the

complaint was "unripe" and the dismissal of his counterclaims against Community First Credit Union (CFCU).[1] We affirm.

Background

¶2 The following facts are of record and undisputed. Bogenschneider borrowed $300,000 from CFCU in 2007 pursuant to a mortgage and promissory note for the purchase of and secured by commercial real estate property. In 2011, Bogenschneider executed a Renewal Note which provided for interest-only payments to be made once a year, with a maturity date of December 31, 2012, upon which the entire amount owing on the loan was due. The Renewal Note contained the following language: "I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor." Under the mortgage, as well as a separate Agreement to Provide Insurance, both executed as part of the original 2007 loan documents, Bogenschneider was obligated to maintain insurance on the property.

¶3 On October 8, 2012, Bogenschneider, through counsel, informed CFCU in writing that Bogenschneider had lost his employment and had incurred significant liabilities rendering him "unable to service or otherwise pay off the secured loans" on the property. Bogenschneider indicated a willingness to "negotiate a structured resolution by deeding the properties to the respective creditors without the need for protracted litigation [but was] prepared to seek

[1] Bogenschneider also complains that CFCU "has requested a personal judgment against [him] for these ridiculous and grandiose amounts even though such personal liability was expressly waived." Because he fails to sufficiently develop any argument or cite any law in support of this complaint, we do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments and arguments lacking citation to legal authority need not be addressed).

bankruptcy protection if no structured resolution [was] possible prior to the end of the year 2012." In response, CFCU requested in writing that Bogenschneider provide financial information to CFCU by October 25. Bogenschneider did not timely respond.

¶4 On October 30, 2012, the insurance company insuring the property informed CFCU that the insurance had lapsed effective October 17. After receiving no response from Bogenschneider to its written and voicemail inquiries relating to both the requested financial information and the insurance cancellation, CFCU reinstated the insurance by paying the necessary $440 premium.

¶5 On November 15, 2012, CFCU commenced this foreclosure action, alleging defaults under the loan documents due to abandonment of the property and failure to keep it insured. CFCU also recorded a lis pendens relating to the property. Bogenschneider answered and counterclaimed against CFCU alleging fraud under WIS. STAT. §§ 224.80 and 844.01 (2011-12)[2] and the Dodd Frank Act, tortious interference with real estate and professional business "causing damages pursuant to WIS. STAT. § 134.01," and fraud in the inducement.

¶6 On December 31, 2012, the Renewal Note matured, and after Bogenschneider failed to make the required payment in full, CFCU issued a notice of default related to the nonpayment on January 15, 2013. On March 15, 2013, CFCU filed an Amended Complaint seeking foreclosure on the basis of Bogenschneider's inability to service or otherwise pay off his loan, his failure to maintain insurance on the property, and his failure to make the required payment

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

upon maturation of the Renewal Note. Thereafter, Bogenschneider filed an answer to the Amended Complaint, reasserting his counterclaims. Both parties filed motions to dismiss and the circuit court denied both motions. CFCU moved for summary judgment and for reconsideration of the denial of its motion to dismiss Bogenschneider's WIS. STAT. ch. 224 claim. Bogenschneider moved for partial summary judgment, arguing that CFCU's action was not "ripe" because Bogenschneider did not receive notice of acceleration of the debt. Prior to the hearing on the summary judgment motions and remaining counterclaims, the circuit court granted CFCU's motion for reconsideration and dismissed Bogenschneider's ch. 224 claim. After briefing and a hearing, the court granted CFCU's motion for summary judgment based on Bogenschneider's default due to nonpayment, denied Bogenschneider's motion for partial summary judgment, and dismissed all of Bogenschneider's counterclaims. Bogenschneider appeals.

Discussion

¶7 We independently review a grant of summary judgment, applying the same methodology as the circuit court. ***Fabco Equip., Inc. v. Kreilkamp Trucking, Inc.***, 2013 WI App 141, ¶5, 352 Wis. 2d 106, 841 N.W.2d 542. "Summary judgment is proper when the relevant facts are undisputed and only a question of law remains." ***Id.*** We similarly independently review a circuit court's grant of a motion to dismiss counterclaims for a failure to state a claim. ***Rainbow Springs Golf Co. v. Town of Mukwonago***, 2005 WI App 163, ¶8, 284 Wis. 2d 519, 702 N.W.2d 40. "[W]e accept the truth of all alleged facts and all inferences one might reasonably draw from those facts." ***Id.*** We review de novo all legal conclusions, including whether the facts alleged state a claim upon which relief can be granted. ***Id.*** When a motion to dismiss for failure to state a claim upon

which relief can be granted includes matters outside the pleadings, we treat it as a motion for summary judgment. WIS. STAT. § 802.06(2).

¶8 Bogenschneider contends the circuit court erred in denying his motion to dismiss because at the time CFCU filed the original complaint this action was not ripe. He argues that CFCU failed to provide him a notice of acceleration regarding his failure to make payment when due. We note, however, that such failure to make any required payment was not a basis for default identified in the original complaint. That pleading alleged that Bogenschneider was in default based on abandonment of the property and failure to maintain insurance on it. We also observe that in denying Bogenschneider's motion to dismiss, the circuit court noted that Bogenschneider was attempting to improperly bring in matters outside the pleadings. Looking strictly to the pleadings, the court noted that CFCU had properly stated a cause of action. We note that the original complaint properly stated as a ground for default that Bogenschneider failed to maintain insurance on the property as required under the terms of the mortgage attached to the complaint. We also note that by the express terms of paragraph 12 of the Renewal Note, which the mortgage explicitly incorporated, Bogenschneider waived his right to notice of acceleration. *See* ***Grootemaat v. Bertrand***, 192 Wis. 519, 522, 213 N.W. 294 (1927) ("[T]here is no room for requiring … notice [where] it is expressly provided that no such notice shall nor need be given."). Based on the above, the circuit court properly denied Bogenschneider's motion to dismiss.

¶9 Bogenschneider's "ripeness" challenge also fails in relation to the entire action because there is no dispute that the Renewal Note matured on December 31, 2012, and therefore under the Amended Complaint, no acceleration of the debt in fact occurred. *See, e.g.*, ***Beal Bank v. Crystal Props., Ltd.***, 268 F.3d

743, 754 (9th Cir. 2001) ("[O]n maturity there is no debt left to accelerate."). The circuit court ultimately, and properly, granted judgment of foreclosure based on the payment default raised in the Amended Complaint, the operative complaint in this action. *See* ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 484, 487, 596 N.W.2d 358 (1999) (holding that where an amended complaint does not expressly incorporate by reference the prior complaint, the operative complaint is the amended complaint).

¶10 In seeking a reversal of the summary judgment, Bogenschneider attempts to create a question of fact regarding the existence of a document referenced in the Renewal Note—a Commercial Loan Agreement (CLA). He points out that the Renewal Note states that the CLA "further govern[s]" the Note, "including the terms and conditions under which the maturity of this Note may be accelerated." He then asserts that because he averred in an affidavit that the CLA in fact had been executed and it "provided that Notice of Acceleration was required before any full acceleration of the loan balance," a material question of fact exists and therefore this court should reverse the circuit court's grant of summary judgment to CFCU. Bogenschneider is incorrect.

¶11 While Bogenschneider submitted an affidavit averring that the CLA was executed and requires notice of acceleration, he also acknowledged at the summary judgment hearing that neither he nor CFCU has a copy of this document. In their affidavits, senior CFCU officials averred that all documents executed in a mortgage closing are provided to customers, that all documents relating to each mortgage and note are maintained in CFCU files, and in reviewing the mortgage loan file for Bogenschneider, there existed neither a CLA nor any request to prepare such a document relating to the Renewal Note. We recognize that if such an agreement in fact was executed and contained a provision requiring notice of

acceleration, such a clause could potentially negate paragraph 12 of the Renewal Note in which Bogenschneider expressly waived notice of acceleration. Ultimately, however, any discrepancy between the affidavits does not represent a material fact in dispute because, as noted, the operative complaint is the Amended Complaint, and that complaint provides as a basis for foreclosure Bogenschneider's default due to his failure to pay the note upon maturity. Bogenschneider did receive a notice of default related to this failure to pay, and as previously stated, because the note had matured, there was no acceleration of the debt and thus no need for a notice of acceleration. The judgment was granted based upon Bogenschneider's default created when he failed to pay the note upon its maturity.[3] The circuit court's grant of summary judgment to CFCU is affirmed.

¶12 Bogenschneider also appeals the denial of some of his counterclaims. He contends that because CFCU did not have a valid claim for foreclosure at the time it filed the foreclosure action and recorded a related lis pendens in November 2012, it improperly encumbered his property and led to his inability to sell the property constituting interference under WIS. STAT. § 844.01. Significantly, however, Bogenschneider does not deny that he failed in October 2012 to fulfill his duty to maintain insurance on the property.[4] His failure to maintain the required insurance constituted a default under the terms of the original promisory note, the mortgage and the Agreement to Provide Insurance,

[3] We further note that the judgment does not provide for any penalty interest accruing prior to Bogenschneider's payment default upon the maturity of the Renewal Note.

[4] Instead, Bogenschneider states in his reply brief, without citation to the record, that he informed CFCU of his "willingness to cure any late insurance payment (of the alleged trivial amount), upon the concurrent withdrawal of the foreclosure action."

executed together, and provided a valid basis for CFCU's initial filings in this action.

¶13 Bogenschneider's complaint that the filing of the foreclosure action and/or recording of the lis pendens unlawfully affected his ability to sell the property also fails because he provides no facts supporting this contention. Rather, he refers to one email from his realtor dated October 8, 2012—over a month *prior* to the filing of this action and the recording of the lis pendens—stating, "I have two parties that have expressed interest in seeing the building in its' [sic] entirety. Tentatively one for next Monday and one for next Wednesday. Will confirm with you when they confirm with me." Bogenschneider has identified nothing in the record, and we are unable to locate anything, indicating that these or any other prospective buyers were in any way impacted by the filing of the foreclosure action and/or the recording of the lis pendens.

¶14 Relatedly, Bogenschneider contends, without any citation to the record, that an agent of CFCU caused Bogenschneider's realtor to stop working to sell the property. On this point, the record also shows that the realtor testified at his deposition that he still considered himself under the listing contract through at least March 2013. The record also contains an email, attached to an affidavit supporting summary judgment, from the realtor to Bogenschneider stating the realtor maintained a sale sign in front of the property through some time in March 2013. Bogenschneider's contention is also contradicted by the realtor's deposition testimony that the real estate listing contract was renewed on January 2, 2013, and that in March 2013, the realtor had left a voicemail for Bogenschneider offering to again renew the listing contract. Bogenschneider has failed to identify any record support for his contention that the filing of the foreclosure action and/or recording of the lis pendens interfered with his ability to sell the property.

¶15 Bogenschneider next complains that the circuit court improperly dismissed his counterclaim asserting a cause of action under WIS. STAT. § 224.80.[5] On appeal, Bogenschneider limits his challenge to the circuit court's dismissal of his claim that CFCU is subject to § 224.80 because it is a mortgage loan originator under WIS. STAT. ch. 224.[6]

¶16 We interpret and apply statutes independently of the circuit court. ***Hamilton v. Hamilton***, 2003 WI 50, ¶14, 261 Wis. 2d 458, 661 N.W.2d 832. To determine whether CFCU is a mortgage loan originator covered by WIS. STAT. § 244.80, we look to the relevant definitions. Under WIS. STAT. § 224.71(6)(a), mortgage loan originator is defined as "*an individual* … who, for compensation or gain or in the expectation of compensation or gain … [t]akes a residential mortgage loan application" or "[o]ffers or negotiates terms of a residential mortgage loan." (Emphasis added.) Although Bogenschneider fails to present any argument as to why we should consider CFCU to be an "individual" under this provision, we nonetheless consider the question. In doing so, we note that the other two entities included in § 224.80—"mortgage banker" and "mortgage

[5] WISCONSIN STAT. § 224.80 states in relevant part:

> **Penalties and private cause of action.**…
>
> **(2)** PRIVATE CAUSE OF ACTION. A person who is aggrieved by an act which is committed by a mortgage banker, mortgage loan originator, or mortgage broker in violation of any provision of this subchapter [III entitled Mortgage Bankers, Loan Originators and Mortgage Brokers] … may recover … in a private action.

[6] In his reply brief, Bogenschneider appears to contend that, in the alternative, CFCU was a mortgage banker, mortgage broker or mortgage loan originator under federal law and, as such, "the private causes of action under [WIS. STAT.] §§ 224.77 and 224.80" apply to it. Bogenschneider fails to sufficiently develop any argument related to this contention; therefore, we do not address it further. ***Pettit***, 171 Wis. 2d at 646-47.

broker"—refer to a "person" as opposed to an "individual." *See* § 224.71(3)(a) ("Mortgage banker" means a person), § 224.71(4)(a) ("Mortgage broker" means a person). "Person" is generally defined in broader terms than "individual," and we note that WIS. STAT. § 990.01(26) defines "person" as including "all partnerships, associations and bodies politic or corporate." *See* ***Board of Regents-UW Sys. v. Decker***, 2014 WI 68, ¶56, 355 Wis. 2d 800, 850 N.W.2d 112 (J. Abrahamson, concurring) (noting that § 990.01(26) defines "person" more broadly than "individual"). As CFCU points out in its response brief, a credit union formed under Wisconsin law—such as CFCU—is defined under WIS. STAT. § 186.01(2) as a "cooperative, nonprofit *corporation*." (Emphasis added.) We must consider the legislature's use of different terms to signify a difference in their application. *See* ***Graziano v. Town of Long Lake***, 191 Wis. 2d 812, 822, 530 N.W.2d 55 (Ct. App. 1995) ("[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings."). While CFCU might qualify as a "person," Bogenschneider has provided us no reason, and we see none, for interpreting the word "individual" to include a credit union such as CFCU. Thus, we conclude that CFCU is not a mortgage loan originator under WIS. STAT. ch. 224, and the circuit court properly dismissed Bogenschneider's counterclaim alleging a private cause of action under § 224.80.[7]

[7] Bogenschneider also complains that the circuit court failed to protect him from his counsel's incompetence by "not re-scheduling or delaying the proceedings to allow for the submission of deposition and other factual evidence upon the incapacity of counsel to the Defendant." CFCU asserts that Bogenschneider never raised this issue before the circuit court and we should therefore not consider it on appeal. Bogenschneider contends he did raise it before the circuit court, citing to his "Defendant Notice of Objections," which he filed in circuit court. That objection states in full: "The Defendant hereby objects to the Order of the Court removing Attorney Anderegg as counsel without notice to the Defendant. The Defendant hereby objects to the entry of final order without an opportunity for hearing on objections and without notice to the (continued)

¶17 For the foregoing reasons, we affirm.

By the Court.—Judgment affirmed.

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

Defendant." Nowhere in this notice of objections, in the transcript of the summary judgment proceedings, or elsewhere in the record do we see the contentions of incapacity now being raised by Bogenschneider. Because he raises this complaint for the first time on appeal, we decline to address it. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (appellate court need not address issues raised for the first time on appeal).

In his reply brief, Bogenschneider raises new arguments on appeal, including equitable estoppel and the right of offset relating to his counterclaims. We do not address arguments raised for the first time on appeal in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (holding that it is a well-established rule that we do not consider arguments raised for the first time in a reply brief).