COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2850 **Cir. Ct. No. 2014CV156**

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

ROYAL CREDIT UNION,

PLAINTIFF-RESPONDENT,

V.

FRANCES M. SCHNEIDER AND VALLEY CREDIT UNION,

DEFENDANTS,

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES, INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004-R4,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed; attorneys sanctioned.*

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Deutsche Bank National Trust Company appeals a foreclosure judgment entered in favor of Royal Credit Union (RCU). Deutsche Bank argues the circuit court erred by denying its motion to enlarge the time to answer RCU's complaint and its motion for relief from judgment. Deutsche Bank also raises arguments based on unjust enrichment and equitable subrogation. We reject all of Deutsche Bank's arguments and affirm the foreclosure judgment.

BACKGROUND

¶2 On March 25, 2003, Frances Schneider executed a note in the amount of $41,500 in favor of RCU. As security for the loan, Schneider granted RCU a revolving credit mortgage on certain real property in Eau Claire.

¶3 Deutsche Bank asserts that, in March 2004, Schneider "refinanced the Property by executing a mortgage in favor of Ameriquest Mortgage Company[,]" and the Ameriquest mortgage was subsequently assigned to Deutsche Bank. Deutsche Bank further contends that, as part of the refinancing, it paid the outstanding balance on the RCU loan. The record contains a letter, dated March 24, 2004, by which Ameriquest sent RCU a check in the amount of $40,658.78, which Ameriquest asserted represented "payment in full of your loan." The letter requested that RCU "prepare either a release of Mortgage or a Reconveyance of the Deed of Trust."

¶4 The record also contains a "Request for Reconveyance and Estoppel," executed by Schneider on March 24, 2004. This document referenced the $40,658.78 check from Ameriquest and requested that RCU remove its lien against the subject property if the funds provided were sufficient to pay off Schneider's loan. RCU was directed to notify Ameriquest if the funds were insufficient.

¶5 RCU did not remove its lien on the property or file a satisfaction of Schneider's mortgage. Instead, on March 28, 2014, RCU filed a summons and complaint seeking to foreclose the mortgage, naming Schneider and Deutsche Bank as defendants.[1] The complaint alleged Schneider had defaulted on the note and owed RCU $43,304.78. The complaint also alleged that Deutsche Bank "may claim some interest or lien in and to the Property by virtue of the Assignment of Ameriquest Mortgage Company Mortgage from Frances M. Schneider to Ameriquest Mortgage Company dated March 24, 2004[.]" However, the complaint asserted Deutsche Bank's interest, if any, was "subsequent, subordinate, and junior" to RCU's lien.

¶6 RCU's summons and complaint were served on Deutsche Bank on April 7, 2014. The summons informed Deutsche Bank it was required to respond with a written answer within twenty days. Deutsche Bank failed to do so. On May 23, 2014, RCU moved for summary judgment. Deutsche Bank retained outside counsel to represent it in the foreclosure action on June 17, 2014.

¶7 On June 23, 2014—seventy-seven days after it was served with RCU's summons and complaint—Deutsche Bank filed a proposed answer to the complaint, along with a motion to enlarge the time to answer. Attached to the motion was an affidavit of Deutsche Bank's attorney, Thomas Dill. Dill conceded Deutsche Bank was served with the summons and complaint on April 7, 2014, but he asserted the "individual who accepted service … is not an attorney." Dill also averred that Deutsche Bank's legal department received RCU's summary

[1] Valley Credit Union was also named as a defendant. However, its interests are not relevant to this appeal, and, accordingly, we do not discuss it further.

judgment motion on May 29, 2014, but "did not receive a copy of the Summons and Complaint." Dill further asserted the RCU mortgage was "paid in full on or about March 24, 2004[,]" and Deutsche Bank's interest in the subject property was superior to RCU's.

¶8 RCU subsequently moved to strike Deutsche Bank's proposed answer and requested a default judgment. The circuit court held a hearing on both parties' pending motions on July 8, 2014. During the hearing, the court granted Deutsche Bank additional time to submit documentation regarding its claim that it had a "meritorious defense" to RCU's lawsuit.

¶9 The court granted RCU's motion to strike Deutsche Bank's proposed answer and its motion for default judgment in an August 22, 2014 oral ruling. The court also denied Deutsche Bank's motion to enlarge the time to answer RCU's complaint and its oral motion for relief from judgment. A written foreclosure judgment was entered on October 24, 2014. Deutsche Bank appeals.

DISCUSSION

I. Motion to enlarge the time to answer RCU's complaint

¶10 Deutsche Bank first argues the circuit court erred by denying its motion to enlarge the time to answer RCU's complaint. A court's decision to grant or deny a motion to enlarge time is "highly discretionary." ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982). A court properly exercises its discretion when its decision is based on the facts of record and on the application of a correct legal standard. ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. "'We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact

exercised and we can perceive a reasonable basis for the court's decision.'" ***Id.***, ¶30 (quoting ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610).

¶11 It is undisputed that Deutsche Bank failed to answer RCU's complaint within twenty days of service, as required by WIS. STAT. § 802.06(1).[2] A circuit court may enlarge the time for answering a complaint "on motion for cause shown and upon just terms." WIS. STAT. § 801.15(2)(a). However, the court's power is limited: "If the motion is made after the expiration of the specified time, it shall not be granted unless the court finds that the failure to act was the result of excusable neglect." ***Id.***

¶12 Case law states that a court may grant relief under WIS. STAT. § 801.15(2)(a), if it finds that: "(1) the noncompliance was due to excusable neglect, and (2) an enlargement of time would serve the interests of justice; that is, whether the party seeking relief acted in good faith and whether the opposing party would be prejudiced by the time delay." ***Sentry Ins. v. Royal Ins. Co. of Am.***, 196 Wis. 2d 907, 915, 539 N.W.2d 911 (Ct. App. 1995). Nevertheless, "when the circuit court determines that there is no excusable neglect, the motion [to enlarge time] must be denied." ***Hedtcke***, 109 Wis. 2d at 468. Excusable neglect is not synonymous with neglect, carelessness or inattentiveness. ***Id.*** Rather, it is "that neglect which might have been the act of a reasonably prudent person under the circumstances." ***Sentry Ins.***, 196 Wis. 2d at 915.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶13 Here, the circuit court concluded Deutsche Bank's failure to timely answer RCU's complaint was not the result of excusable neglect. The court properly exercised its discretion in this regard. In its oral decision, the court explained:

> I think the case law would suggest that there needs to be some explanation, a specific incidence, and [a] really persuasive explanation that would justify the failure to file an answer in that time frame. Here, as I said, the only explanation that was offered came in the form of an affidavit of counsel. I think that was Mr. Dill, that the Complaint was not served on an attorney. There is no explanation offered about upon whom the Summons and Complaint [were] served, what that person's job was. There is no explanation about what that person did with the Summons and Complaint once [they] were served. There is no indication that the person was inexperienced in handling summons[es] and complaints. There is no explanation as to why only an attorney is capable of receiving a summons and complaint. Indeed, there was no explanation at all about what happened in those 77 days between service and when the … proposed answer was filed, so I have to find that there has been a complete and utter failure to meet the burden of showing that there was excusable neglect here.

The court's explanation shows that it applied the correct legal standard to the facts of record. *See* ***Miller***, 326 Wis. 2d 640, ¶29. The court reasonably concluded Deutsche Bank's delay in answering the complaint was not the result of excusable neglect.

¶14 Deutsche Bank argues the circuit court erroneously exercised its discretion in three respects. First, Deutsche Bank argues the court erred by failing to consider attorney Dill's affidavit in support of the motion to enlarge time. As the basis for this argument, Deutsche Bank cites the written foreclosure judgment, which states that Deutsche Bank "failed to file any affidavits in support of its claim of excusable neglect" and "failed to file an affidavit to show there was a reasonable basis for its failure to meet the statutory time period to answer."

However, it is clear from the circuit court's oral decision that it did consider attorney Dill's affidavit. As quoted in the preceding paragraph, the court specifically noted that the only explanation provided for Deutsche Bank's delay in answering RCU's complaint was the averment in attorney Dill's affidavit that the summons and complaint were served on a non-attorney. The court properly found that the affidavit did not support Deutsche Bank's claim of excusable neglect or demonstrate a reasonable basis for its failure to meet the statutory time period to answer. We therefore reject Deutsche Bank's argument that the court erred by failing to consider attorney Dill's affidavit.

¶15 Second, Deutsche Bank argues the circuit court "misapplied Wisconsin law by imposing a heightened standard" for excusable neglect. Specifically, Deutsche Bank argues the court erred by stating Wisconsin law requires "some explanation, a specific incidence, and [a] really persuasive explanation" for the failure to timely answer a complaint. To the contrary, Deutsche Bank contends that, under ***Baird Contracting, Inc. v. Mid Wisconsin Bank of Medford***, 189 Wis. 2d 321, 525 N.W.2d 276 (Ct. App. 1994), service of a summons and complaint upon a non-attorney employee of a bank automatically makes the bank's failure to timely answer the result of excusable neglect.

¶16 Deutsche Bank reads ***Baird*** too broadly. In ***Baird***, a bank failed to timely answer a garnishee summons and complaint that were served on bank employee Lori Mahl, a bookkeeping supervisor. ***Id.*** at 323-24. The circuit court concluded the bank's failure to timely answer was due to excusable neglect. ***Id.*** at 324. The court relied on Mahl's affidavit, which indicated: (1) the bookkeeping department was "swamped" with work at the time service was made and was short staffed because of office turnover; (2) construction in Mahl's building at the time of service interrupted activities in her department; (3) Mahl had been employed in

a supervisory position for only six months, was still learning her job duties, and had no formal training in responding to summonses and complaints; and (4) Mahl set the summons and complaint aside after receiving them, and they were mistakenly "buried" on her desk while she attended to other responsibilities. ***Id.*** at 325-26.

¶17 On appeal, we concluded the circuit court properly exercised its discretion. We observed that, "[w]hile attorneys and insurance company claims employees are regularly involved with lawsuits and trained to recognize the importance of timely responding to legal documents, the same is not necessarily true of a bank." ***Id.*** at 326. Nevertheless, we stated that whether a bank's failure to answer a complaint is the result of excusable neglect "requires a case-by-case determination." ***Id.*** Based on the evidence regarding Mahl's "workload and inexperience in legal matters[,]" we concluded the circuit court's finding of excusable neglect was reasonable. ***Id.*** at 326-27.

¶18 Thus, contrary to Deutsche Bank's assertion, ***Baird*** does not stand for the proposition that a bank's failure to timely answer a complaint is automatically the result of excusable neglect whenever the summons and complaint are served on a non-attorney. Rather, ***Baird*** holds that the excusable neglect determination must be made on a case-by-case basis. If service on a non-attorney were, by itself, a sufficient basis to find excusable neglect, the ***Baird*** court would not have bothered reciting the facts set forth in Mahl's affidavit regarding the circumstances and events surrounding service of the summons and complaint.

¶19 Aside from service on a non-attorney, there is no evidence the same or similar factual circumstances that were present in ***Baird*** are present in the

instant case. As the circuit court observed, attorney Dill's affidavit is devoid of any information about who received RCU's summons and complaint, what that person's job was, the person's experience or inexperience in handling summonses and complaints, and what the person did with the summons and complaint after receiving them.[3] This did not constitute use of a "heightened standard" for excusable neglect, but rather a case-specific analysis as required by ***Baird***. Accordingly, ***Baird*** does not compel a conclusion that Deutsche Bank's failure to timely answer RCU's complaint was the result of excusable neglect.

¶20 Third, Deutsche Bank argues the circuit court erroneously exercised its discretion by failing to consider the interests of justice. *See* ***Sentry Ins.***, 196 Wis. 2d at 915. In support of this argument, Deutsche Bank asserts that it acted in good faith, RCU was not prejudiced by its delay in filing an answer, and it has a meritorious defense to RCU's lawsuit.

¶21 However, given its finding that Deutsche Bank failed to establish excusable neglect, the circuit court did not need to consider the interests of justice. "[W]hen the circuit court determines that there is no excusable neglect, the motion [to enlarge time] must be denied." ***Hedtcke***, 109 Wis. 2d at 468. Only after a court determines the movant's failure to comply with a time limit was due to

[3] Aside from the averment that the summons and complaint were served on a non-attorney, the only factual assertion in attorney Dill's affidavit that is relevant to the issue of excusable neglect is his averment that Deutsche Bank's legal department "did not receive a copy of the Summons and Complaint." However, RCU argues this assertion is inadmissible because it is not based on attorney Dill's personal knowledge, given that he was not retained as counsel for Deutsche Bank until June 17, 2014. Deutsche Bank does not respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

excusable neglect should the court consider whether the interests of justice favor granting a motion to enlarge time.

¶22 Deutsche Bank relies on three cases for the contrary proposition that a court must consider the interests of justice when addressing a motion to enlarge time, even if it has already concluded the movant did not establish excusable neglect. *See* ***Binsfeld v. Conrad***, 2004 WI App 77, 272 Wis. 2d 341, 679 N.W.2d 851; ***Sentry Ins.***, 196 Wis. 2d 907; ***Oostburg State Bank v. United Sav. & Loan Ass'n***, 125 Wis. 2d 224, 372 N.W.2d 471 (Ct. App. 1985), *aff'd*, 130 Wis. 2d 4, 386 N.W.2d 53 (1986). None of these cases stands for that proposition.

¶23 In ***Binsfeld***, we affirmed the circuit court's denial of a motion for default judgment. ***Binsfeld***, 272 Wis. 2d 341, ¶1. The circuit court had concluded both that the moving party established excusable neglect for its failure to answer the complaint and that granting a default judgment would not be in the interest of justice. ***Id.***, ¶24. Thus, there was no need for us to determine in ***Binsfeld*** whether a court is required to consider the interests of justice when it has already concluded the party seeking relief failed to demonstrate excusable neglect. Moreover, we specifically stated that "[a] party filing its answer late *must demonstrate* excusable neglect for the delay." ***Id.***, ¶23 (emphasis added).

¶24 In ***Sentry Insurance***, as in ***Binsfeld***, the circuit court concluded the dilatory party's failure to timely answer a complaint was the result of excusable neglect. ***Sentry Ins.***, 196 Wis. 2d at 913. Further, on appeal, we stated a court "may grant relief" under WIS. STAT. § 801.15(2)(a) if it finds that "(1) the noncompliance was due to excusable neglect, and (2) an enlargement of time would serve the interests of justice[.]" ***Sentry Ins.***, 196 Wis. 2d at 915. Notably,

we stated these requirements in the conjunctive, meaning that both must be present before a court may grant relief.

¶25 In ***Oostburg State Bank***, we stated a circuit court "must first determine whether the failure to meet the statutory time limits was the result of excusable neglect." ***Oostburg State Bank***, 125 Wis. 2d at 239. We then concluded the circuit court erred by determining the dilatory party failed to establish excusable neglect. ***Id.*** at 240. Accordingly, we proceeded to address the interests of justice. ***Id.*** at 241. Thus, like ***Binsfeld*** and ***Sentry Insurance***, ***Oostburg State Bank*** fails to support Deutsche Bank's argument that a court must consider the interests of justice even when it has already determined the moving party failed to demonstrate excusable neglect.

II. Motion for relief from judgment

¶26 Deutsche Bank next argues the circuit court erred by denying its oral motion for relief from the foreclosure judgment, pursuant to WIS. STAT. § 806.07(1). An order denying relief under § 806.07(1) will not be reversed on appeal absent an erroneous exercise of discretion. ***Sands v. Menard, Inc.***, 2013 WI App 47, ¶25, 347 Wis. 2d 446, 831 N.W.2d 805.

¶27 WISCONSIN STAT. § 806.07(1) provides that a court may relieve a party from a judgment or order for eight reasons, listed in paragraphs (a) through (h). Deutsche Bank argues it is entitled to relief from the foreclosure judgment under either § 806.07(1)(a), which allows a court to grant relief based on "[m]istake, inadvertence, surprise, or excusable neglect[,]" or § 806.07(1)(h), a catch-all provision allowing relief for "[a]ny other reasons justifying relief from the operation of the judgment."

¶28 The circuit court properly exercised its discretion by determining Deutsche Bank was not entitled to relief under WIS. STAT. § 806.07(1)(a). The only factor listed in that paragraph that could arguably apply under the circumstances is excusable neglect. The excusable neglect standard for granting relief from a judgment under § 806.07(1)(a) is "substantially equivalent to" to excusable neglect standard for granting a motion to enlarge time. *See* ***Hedtcke***, 109 Wis. 2d at 467 n.2. We have already concluded the circuit court properly rejected Deutsche Bank's excusable neglect argument for purposes of its motion to enlarge time. For the same reasons, we conclude the court properly exercised its discretion by determining Deutsche Bank was not entitled to relief under § 806.07(1)(a).

¶29 The circuit court also properly denied Deutsche Bank relief from the foreclosure judgment under WIS. STAT. § 806.07(1)(h). "A court appropriately grants relief from a default judgment under para. (1)(h) when extraordinary circumstances are present justifying relief in the interest of justice." ***Miller***, 326 Wis. 2d 640, ¶35. Extraordinary circumstances are those in which the "sanctity of the final judgment" is outweighed by the "incessant command of the court's conscience that justice be done in light of *all* the facts." ***Id.***, ¶35 (quoting ***Sukala***, 282 Wis. 2d 46, ¶12).

¶30 When determining whether extraordinary circumstances are present, a court must consider a "wide range" of factors, "keeping in mind the competing interests of finality of judgments and fairness in the resolution of the dispute." ***Id.***, ¶36. Specifically, the court must consider: (1) whether the judgment was the result of the conscientious, deliberate, and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether relief is sought from a judgment in which there has been no judicial consideration

of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; (4) whether there is a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief. ***Id.***

¶31 Deutsche Bank correctly notes that the circuit court failed to consider all five of the factors enumerated in ***Miller***. Deutsche Bank argues this failure, in and of itself, constitutes an erroneous exercise of discretion requiring reversal.[4] However, it is well established that, where a circuit court fails to set forth adequate reasons for a discretionary decision, we will independently review the record to determine whether the facts support the court's exercise of discretion. *See* ***id.***, ¶30. Here, our independent review of the record convinces us that the court properly exercised its discretion by denying relief under WIS. STAT. § 806.07(1)(h).[5]

¶32 The first ***Miller*** factor is whether the judgment was the result of the conscientious, deliberate, and well-informed choice of the claimant. ***Miller***, 326 Wis. 2d 640, ¶36. We acknowledge that the judgment in this case was a default judgment and was therefore not the result of a conscientious, deliberate, and

[4] Deutsche Bank relies on an unpublished, per curiam opinion in support of this argument, in violation of WIS. STAT. RULE 809.23(3). We sanction Deutsche Bank's appellate attorneys for this violation and direct them to pay $50 to the clerk of this court within thirty days of this decision. *See* WIS. STAT. RULE 809.83(2).

[5] In its brief-in-chief, Deutsche Bank asserts, with almost no supporting analysis, that "most" of the ***Miller*** factors weigh in its favor. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493. In contrast, RCU's respondent's brief contains a multi-page argument addressing each of the ***Miller*** factors individually and explaining why they do not support granting Deutsche Bank relief from the foreclosure judgment. Deutsche Bank's reply brief does not analyze the ***Miller*** factors or contend that RCU's analysis of those factors is incorrect. Again, arguments not refuted are deemed conceded. *See* ***Charolais***, 90 Wis. 2d at 109.

well-informed choice by Deutsche Bank. Yet, as the circuit court noted in its written decision, Deutsche Bank has been a party to thousands of lawsuits in the state of Wisconsin. This shows that Deutsche Bank is a sophisticated litigant and should have had procedures in place to avoid a default judgment.

¶33 The second ***Miller*** factor requires us to consider whether Deutsche Bank received effective assistance of counsel. ***Id.*** Deutsche Bank has failed to present any evidence regarding actions taken by its in-house legal department. However, the record shows that outside counsel acted promptly and appropriately once retained, both by moving to enlarge the time for answering RCU's complaint and by moving for relief from the foreclosure judgment under WIS. STAT. § 806.07(1).

¶34 The third ***Miller*** factor is whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments. ***Miller***, 326 Wis. 2d 640, ¶36. We acknowledge there was no judicial consideration of the merits in this case. However, as the circuit court noted, the defaulting party is an entity with extensive litigation experience that nevertheless "complete[ly] fail[ed]" to provide a reasonable explanation for its delay in answering the complaint. In addition, as the circuit court observed, the amount in controversy is relatively small, particularly for a large bank.[6] Based on these facts, the circuit court stated, "[M]y conscience [doesn't] make me think I need[] to

[6] As RCU points out, the $43,304.78 judgment in this case is only about 2% of the $2,000,000 judgment that was at stake in ***Miller***. *See* ***Miller***, 326 Wis. 2d 640, ¶1. We agree with RCU that, when weighing the competing interests of fairness and finality, "a $2,000,000 default judgment weighs much more [in favor of granting relief] than a $43,000 default judgment."

grant relief from this judgment in order to be sure that justice was done here." We agree with the circuit court's assessment.

¶35 The fourth ***Miller*** factor requires us to consider whether there is a meritorious defense to RCU's claim. ***Id.*** The circuit court found that Deutsche Bank's proposed answer "did meet the standards of a meritorious defense[.]" Nonetheless, the court found that entry of a default judgment against Deutsche Bank did not "shock the [court's] conscience[.]" Again, the record shows that Deutsche Bank is an experienced litigant in Wisconsin courts and the amount in controversy is relatively small. Under these circumstances, we agree with the circuit court that Deutsche Bank's purported meritorious defense does not weigh heavily in favor of granting Deutsche Bank relief from the foreclosure judgment.

¶36 The fifth and last ***Miller*** factor is whether there are intervening circumstances making it inequitable to grant relief. ***Id.*** RCU argues it would be inequitable to grant relief because Deutsche Bank's failure to timely answer the complaint "has ultimately resulted in a significant delay in the foreclosure process, which was initiated by RCU over a year ago and which will not be concluded for perhaps another ten to fourteen months given this [a]ppeal." The circuit court emphasized Deutsche Bank's litigation experience, its lack of a reasonable explanation for failing to timely answer, and the small amount in controversy. We agree that these factors would have made it inequitable to grant Deutsche Bank relief.

¶37 Thus, after considering the ***Miller*** factors, we conclude the circuit court could reasonably determine the interest in the finality of judgments outweighed the interest in resolving this dispute on the merits. *See* ***id.*** Accordingly, upon our independent review of the record, we conclude the circuit

court did not err by denying Deutsche Bank's motion for relief from the foreclosure judgment under WIS. STAT. § 806.07(1)(h).

III. Unjust enrichment and equitable subrogation

¶38 Finally, Deutsche Bank contends that the foreclosure judgment unjustly enriches RCU. Deutsche Bank also argues it should be treated as the owner of RCU's lien under the doctrine of equitable subrogation.

¶39 However, Deutsche Bank should have raised these arguments in a timely filed answer. The circuit court acknowledged that Deutsche Bank had a meritorious defense to RCU's foreclosure action, but it nevertheless concluded denying Deutsche Bank relief was not unfair, under the circumstances. Based on our independent review of the record, we agree with that assessment. In addition, we observe that Deutsche Bank never raised the specific legal theories of unjust enrichment or equitable subrogation in support of its motion for relief from the foreclosure judgment. We need not consider arguments raised for the first time on appeal. *See* ***State v. Champlain***, 2008 WI App 5, ¶17, 307 Wis. 2d 232, 744 N.W.2d 889 (WI App 2007).

By the Court.—Judgment affirmed; attorneys sanctioned.

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