COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2146 **Cir. Ct. No. 2014CV1883**

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

OCWEN LOAN SERVICING, LLC,

PLAINTIFF-RESPONDENT,

V.

CASSANDRA L. BUTCHER AND DARREL L. BUTCHER,

DEFENDANTS-APPELLANTS,

ARGENT MORTGAGE COMPANY, LLC AND PLS FINANCIAL SERVICES, INC. D/B/A PAYDAY LOAN STORE,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

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

¶1 FITZPATRICK, J. This is a foreclosure action initiated against Cassandra and Darrel Butcher by Ocwen Loan Servicing, LCC, the servicer of a loan on behalf of Deutsche Bank. The Dane County Circuit Court denied Butchers' motion to dismiss and later granted summary judgment in favor of Ocwen. Butchers appeal, arguing that the circuit court erred: (1) in denying their motion to dismiss because claim preclusion bars the present case; (2) in granting summary judgment because the complaint did not state a claim for relief; and (3) in granting summary judgment because Ocwen failed to show that there is no genuine issue of material fact that it is in possession of the original note.

¶2 We reject Butchers' argument related to the motion to dismiss. A previous foreclosure action against the Butchers was dismissed "without prejudice." The previous dismissal does not carry preclusive effect which bars the present foreclosure claim. Therefore, we affirm the circuit court's denial of the motion to dismiss.

¶3 Regarding Butchers' contentions about summary judgment, the allegations of the complaint demonstrate that Ocwen has stated a claim upon which relief may be granted. However, there is a genuine issue of material fact regarding whether Ocwen or Deutsche Bank possesses the original note. Therefore, we affirm in part and reverse in part the circuit court's grant of summary judgment.

BACKGROUND

¶4 There is no dispute as to the following facts. In 2006, Cassandra Butcher executed a note evidencing a loan for the amount of $186,400.00. The note was secured by a mortgage on real estate owned by Butchers located in

Madison, Wisconsin. Butchers do not dispute that they have not made a mortgage payment since approximately January 2010.

¶5 Later, the ownership interest in the note, endorsed in blank, was assigned to Deutsche Bank National Trust Company.[1] In 2011, Deutsche Bank initiated a foreclosure action against Butchers. The Dane County Circuit Court dismissed that case "without prejudice" after Butchers did not appear to testify at the trial and after discovering that Butchers had not been subpoenaed. At the time of that trial, Deutsche Bank requested a default judgment, but the circuit court dismissed the case without prejudice in light of Butchers' pro se status and inconsistencies noted in their answer. Butchers did not appeal the order dismissing that action without prejudice.

¶6 Ocwen Loan Servicing, LLC is the current servicer of the loan on behalf of Deutsche Bank. In June 2014, based on Butchers' continuing failure to make payments on the loan, Ocwen initiated this foreclosure action against Butchers.

¶7 Butchers moved to dismiss the complaint, arguing that the present action is precluded by the dismissal of the previous foreclosure case. The circuit court denied Butchers' motion concluding that, because the previous case was dismissed without prejudice, claim preclusion does not apply.

[1] Deutsche Bank National Trust Company is the Trustee for Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates, Series ARSI 2006-M3, under the Pooling and Servicing Agreement dated September 1, 2006 ("PSA"), in relation to the loan that is the subject of this case.

¶8 Ocwen later moved for summary judgment. The circuit court granted Ocwen's motion for summary judgment and entered a judgment of foreclosure against Butchers. Butchers appeal the circuit court's orders regarding the motions to dismiss and for summary judgment.

¶9 We will mention other facts pertinent to our discussion, below.

DISCUSSION

¶10 Butchers make three main arguments on appeal. First, they assert that the circuit court erred in denying their motion to dismiss because the dismissal of the previous foreclosure action bars the present case pursuant to the doctrine of claim preclusion. We reject this argument and conclude that the dismissal of the previous foreclosure action does not have claim preclusive effect in this action. Second, Butchers assert that the circuit court erred in granting summary judgment because Ocwen's complaint does not state a claim for relief. We reject this argument because Ocwen's complaint states a claim upon which relief may be granted. Third, we agree with Butchers' contention that Ocwen failed to prove that there is no genuine issue of material fact that it possesses the original note. As a result, we conclude that Ocwen has not made a prima facie case for foreclosure.

I. Motion to Dismiss Based on Claim Preclusion.

¶11 Butchers argue that the circuit court erred in denying their motion to dismiss and contend that this foreclosure action is barred by the doctrine of claim preclusion. They ask us to ignore that the previous foreclosure action was dismissed "without prejudice" because, according to Butchers, the substance of the present case and the previous foreclosure action are the same, and the dismissal of

the previous case was a final judgment on the merits. We reject those arguments and conclude that the circuit court properly denied the motion to dismiss.

A. Standard of Review.

¶12 Whether claim preclusion applies to a particular factual scenario is a question of law that we review de novo. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995).

B. Claim Preclusion.

¶13 For claim preclusion to apply, there must be "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Wisconsin Public Serv. Corp. v. Arby Const. Inc.***, 2012 WI 87, ¶35, 342 Wis. 2d 544, 818 N.W.2d 863 (quoting ***Northern States***, 189 Wis. 2d at 551). The parties agree that the first element is not in dispute.

C. Claim Preclusion Analysis.

¶14 The dismissal order in the previous foreclosure action reads: "This matter is therefore dismissed without prejudice. This order is a final order that disposes of the entire matter in litigation as to all parties …."

¶15 Wisconsin case law repeatedly emphasizes that dismissal without prejudice is not a final judgment on the merits. "Dismissals granted without prejudice differ from those granted with prejudice. In the former case, the defendant continues to be exposed to the risk of further litigation." ***Bishop v. Blue Cross & Blue Shield United of Wis.***, 145 Wis. 2d 315, 318, 426 N.W.2d 114 (Ct. App. 1988); *see also* ***Jason B. v. State***, 176 Wis. 2d 400, 406, 500 N.W.2d 384

(Ct. App. 1993) (quoting Black's Law Dictionary 469 (6th ed. 1990)) ("'Dismissal without prejudice,' by definition, permits 'the complainant to sue again on the same cause of action.'"). The previous foreclosure was dismissed without prejudice. So, Butchers were exposed to the risk of future litigation regarding the foreclosure of their real estate. As a result, Butchers' argument fails because the third element of claim preclusion is not met as the order of dismissal from the previous case did not finally dispose of the claim. *See* ***Northern States***, 189 Wis. 2d at 555.

¶16 In addition, the recent opinion in ***Federal Nat'l Mortg. Ass'n v. Thompson***, 2018 WI 57, ___ Wis. 2d ___, ___ N.W.2d ___, confirms the result. In that case, a previous foreclosure action between the same parties was dismissed with prejudice. ***Id.***, ¶3. But, our supreme court held that, as to a second lawsuit, the second element of claim preclusion (an identity between the causes of action in the two suits) was not met because the dismissal order from the first lawsuit did not bar a subsequent foreclosure action between the same parties based on contractual defaults which occurred *after* the dismissal of the first action. ***Id.***, ¶¶49-50. Here, Butchers failed to pay their mortgage before and after dismissal of the previous foreclosure action so it necessarily follows, from the logic of ***Federal Nat'l Mortg. Ass'n***, that Butchers cannot show an identity of causes of action in these suits, and the doctrine of claim preclusion does not bar this present suit.

¶17 In an attempt to avoid this result, Butchers rely on ***Wisconsin Public Serv. Corp. v. Arby Const. Inc.*** for the proposition that "substance, not form, matters in a claim preclusion analysis." Butchers assert that ***Wisconsin Public Serv. Corp.*** stands for the proposition that a court must look beyond form and phrasing of the dismissal to determine if there has been a final judgment. However, their analysis misinterprets our supreme court's holding. ***Wisconsin***

Public Serv. Corp. reinforced the premise that a dismissal with prejudice satisfies the third element of claim preclusion. ***Wisconsin Public Serv. Corp.***, 342 Wis. 2d 544, ¶¶64-65. It did not, as implied by Butchers, make the circuit court's dismissal of the previous case "without prejudice" somehow inconsequential. Any other interpretation would nullify the effect of "without prejudice" language in dismissal orders and clash with well-established Wisconsin precedent.[2]

¶18 We conclude that the doctrine of claim preclusion does not bar the present foreclosure action against Butchers, and the circuit court correctly denied the motion to dismiss. We now move on to the summary judgment analysis.

II. Ocwen's Motion for Summary Judgment.

¶19 Butchers' remaining arguments concern the circuit court's grant of summary judgment in favor of Ocwen. They contend, first, that Ocwen did not state a valid claim for relief in its complaint and, second, that the affidavit of Kyle Lucas does not demonstrate that Ocwen is in possession of the original note.

¶20 Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment at a matter of law. WIS. STAT. § 802.08(2). We review de novo a grant of summary judgment, employing the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. The first step in summary judgment methodology is to determine whether the pleadings set forth a

[2] Butchers also rely on ***Colonial Savings v. Fields***, No. 2012AP2000, unpublished slip op. (WI App January 30, 2014). However, that opinion may not be cited because it is not judge-authored. *See* WIS. STAT. § 809.23(3) (2015-2016). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

claim for relief. ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1.

A. The Complaint States a Claim Upon Which Relief May be Granted.

¶21 We begin with Butchers' argument that Ocwen's complaint fails to state a claim for relief because the complaint does not specifically allege that Ocwen was in possession of the original note endorsed in blank at the time the complaint was filed. We reject Butchers' argument and conclude that Ocwen stated a claim upon which relief may be granted.

¶22 Butchers' argument tests the legal sufficiency of the complaint. ***Data Key Partners v. Permira Advisers***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693 (citing ***John Doe I v. Arch Diocese of Milwaukee***, 2007 WI 95, ¶12, 303 Wis. 2d 34, 734 N.W.2d 827). In determining whether a complaint states a claim upon which relief may be granted, "we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." ***Id. Data Key Partners*** cited with approval the applicable statutory standards, which state that a complaint must only contain "(a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief" and "(b) A demand for judgment for the relief the pleader seeks." WIS. STAT. § 802.02(1). A complaint needs only to give the opposing party fair notice of what the claim is and the grounds upon which it is based. ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis., S.C.***, 2005 WI App 217, ¶47, 287 Wis. 2d 560, 706 N.W.2d 667 (citing ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986)).

¶23 We observe the following regarding Ocwen's complaint. The note is referenced in the complaint. Specifically, the complaint asserts that Cassandra Butcher executed the note and promised to pay the principal amount of $186,400.00 plus interest according to the terms of the note. The complaint also alleges that Butchers signed a mortgage to secure the loan evidenced by the note. A copy of the note and the mortgage are attached to the complaint.

¶24 A reasonable inference from the allegations in the complaint, and the attached copy of the note, is that Ocwen was in possession of the original note and it would be produced during the litigation if needed. *See* ***Bank of New York Mellon v. Klomsten***, 2018 WI App 25, 381 Wis. 2d 218, ¶26, 911 N.W.2d 364 (Ct. App. 2018).

¶25 For those reasons, we conclude that the complaint is sufficient under Wisconsin law because it contains fair notice to Butchers of the foreclosure claim and the basis for the claim.[3] Therefore, we reject Butchers' argument that the complaint did not state a claim upon which relief may be granted.

¶26 We now address Butchers' other argument regarding summary judgment.

B. Ocwen Did Not Make a Prima Facie Case that it Possesses the Note.

¶27 Butchers challenge Ocwen's assertion that the Lucas affidavit establishes a prima facie case in support of Ocwen's request for summary

[3] In addition, Butchers make other arguments which were asserted in ***Bank of New York Mellon v. Klomsten***, 2018 WI App 25, 381 Wis. 2d 218, ¶26, 911 N.W.2d 364 (Ct. App. 2018) regarding what Wisconsin "should" have for pleading requirements and "best practices" for drafting pleadings in a foreclosure action. We reject those arguments here for the same reasons those arguments were rejected in ***Klomsten***. *See* ***id.***, ¶28.

judgment. We conclude that the copy of the note attached to the Lucas Affidavit is authentic and admissible in evidence. However, we also conclude that there is a genuine issue of material fact as to whether Ocwen is in possession of the original note. As a result, we conclude that summary judgment should not have been granted.

1. Summary Judgment Standards.

¶28 When reviewing a summary judgment motion, we first examine the moving party's submissions to determine whether those constitute a prima facie case for summary judgment. ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718. If the movant has done so, we then examine the opposing party's submissions to determine if there are material facts in dispute which entitle the opposing party to a trial. ***Id.***

¶29 We view summary judgment materials in the light most favorable to the non-moving party. ***Affeldt v. Green Lake Cty.***, 2011 WI 56, ¶59, 335 Wis. 2d 104, 803 N.W.2d 56. But, "the 'mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48, 106 S. Ct. 2505 (1986)).

¶30 Affidavits in support of or in opposition to summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). "On summary judgment, the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit. That

party need only make a prima facie showing that the evidence would be admissible at trial." ***Palisades Collection***, 324 Wis. 2d 180, ¶10 (citations omitted). Only if admissibility is challenged does the court then determine whether the evidence would be admissible at trial. ***Id.***

2. Only the Note Is Disputed.

¶31 Ocwen's summary judgment motion is based on the Lucas affidavit. The circuit court determined that the information in the Lucas affidavit is admissible in evidence, and the documents attached to that affidavit are authentic and admissible in evidence.

¶32 In this court, Butchers make assertions regarding only the note mentioned in, with a copy attached to, the Lucas affidavit. There is no argument from Butchers regarding information in the Lucas affidavit, or documents attached to that affidavit, except arguments that relate to the note. Therefore, other than Butchers' arguments regarding the note, we deem Butchers' position a concession regarding the authenticity and admissibility of the documents attached to the Lucas affidavit and the accuracy of the information in the affidavit. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶33 We will now consider the authenticity of the note.

3. The Note Is Authentic.

¶34 "The testimony of a witness 'with knowledge that a matter is what it is claimed to be' is one means of authenticating evidence." ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶21, 350 Wis. 2d 411, 838 N.W.2d 119 (quoting WIS. STAT. § 909.015(1)). Here, Lucas's affidavit demonstrates his

personal knowledge that Ocwen was in possession of the Butchers' loan file, including the original note, and that the document attached to the affidavit is a true and correct copy of the original note. *See* ***id.*** As we will now discuss, the Butchers have not asserted otherwise through their answer to the complaint, by affidavit, or argument in this court.

¶35 The note is, in this context, a negotiable instrument. *See* WIS. STAT. § 403.104. Regarding authenticity of a negotiable instrument, WIS. STAT. § 403.308(1) reads: "In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." The complaint alleged that the note attached to the complaint was a copy of the original note Cassandra Butcher signed. The Butchers' answer did not specifically deny that allegation. Therefore, through the operation of § 403.308(1), it is deemed admitted that the signature on the copy of the note attached to the complaint (which Butchers do not dispute is identical to the signature on the copy of the note with the Lucas affidavit) is that of Cassandra Butcher.

¶36 Moreover, the Butchers have offered neither an affidavit nor an argument in this court asserting that the copy of the note attached to the Lucas affidavit is not an accurate copy of the original note Cassandra Butcher signed.

¶37 So, we conclude that the document entitled "Adjustable Rate Note" attached to the Lucas affidavit is authentic; that is, the document is an accurate copy of the original note Cassandra Butcher signed in which she agreed to repay $186,400.00 pursuant to the terms of the note.

4. The Copy of the Note Is Admissible.

¶38 Butchers argue that the copy of the original note attached to the Lucas affidavit is not admissible in evidence. We disagree.

¶39 WISCONSIN STAT. § 910.02 states: "To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in chs. 901 to 911, s. 137.21, or by other statute." WISCONSIN STAT. § 910.03 is an exception to the general rule regarding the requirement of an original, and it reads in pertinent part: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." "Duplicate" is defined as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original." WIS. STAT. § 910.01(4).

¶40 In this case, as discussed, Butchers do not contest the authenticity of the original or whether the copy of the original note attached to the Lucas affidavit is accurate. So, there is no genuine issue as to the authenticity of the original. *See* 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 1003.1 at 939 (3d ed. 2008). As well, the Butchers make no argument that admitting a copy of the note rather than the original would be unfair in these circumstances.

¶41 For those reasons, we conclude that the copy of the original note attached to the Lucas affidavit is admissible in evidence. *See* ***Deutsche Bank***

Nat'l Trust Co. v. Wuensch, 2018 WI 35, ¶23 n.11, 380 Wis. 2d 727, 911 N.W.2d 1.[4]

5. Who Possesses the Note?

¶42 We now turn to Butchers' argument that Ocwen did not prove that it is in possession of the original note. They assert that the Lucas affidavit did not make a prima facie showing that Ocwen is entitled to enforce the note. We agree.

¶43 A note is a negotiable instrument, as defined by WIS. STAT. § 403.104. The "holder" of a negotiable instrument endorsed in blank has the right to enforce that instrument. WIS. STAT. § 403.301; *see also* WIS. STAT. § 403.205(2) ("If endorsed in blank, an instrument becomes payable to bearer."); ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, ¶10, 346 Wis. 2d 1, 827 N.W.2d 124. The "holder" of a negotiable instrument is defined as the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." WIS. STAT. § 401.201(km)1.; ***Klomsten***, 381 Wis. 2d 218, ¶32. Therefore, whoever is in possession of the original note has standing to foreclose on the property owned by Butchers.

¶44 Ocwen argues that it made a prima facie case for summary judgement through the Lucas affidavit by establishing that it is the current holder of the original note. Lucas asserts that "Ocwen is providing mortgage loan

[4] The parties argue about the applicability of WIS. STAT. § 908.03(6), commonly known as the hearsay exception for records of regularly conducted activity. However, the note is not hearsay, so no hearsay exception need be considered. *See* ***Bank of Am. NA v. Neis***, 2013 WI App 89, ¶49, 349 Wis. 2d 461, 835 N.W.2d 527 ("contracts … are not hearsay when they are offered only for their legal effect."); *see also* ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶19, 350 Wis. 2d 411, 838 N.W.2d 119.

servicing to Deutsche Bank as Trustee, which is the party entitled to enforce a promissory note (the 'Note') for the Loan" and that, when the loan was transferred to Ocwen, the loan documents, including the original note, were also transferred to Ocwen. Lucas stated in his affidavit that a "true and correct copy" of the original note is attached to his affidavit. Those statements, as well as the copy of the note attached to the affidavit, if considered in isolation, sufficiently demonstrate that Ocwen is in possession of the original note.

¶45 But, the Lucas affidavit does not stop there. Instead, it also states the following:

> *The Note is in the possession of Deutsche Bank as Trustee as part of the Trust.* The Trust was created pursuant to the terms of the PSA. Pursuant to Section 2.01 and 2.02 of the PSA, notes were to be transferred to the Trust prior to the closing date of September 27, 2006. The pooled loans were transferred and assigned to Deutsche Bank as Trustee, for the benefit of the certificateholders. The assignment of the Defendants' Note to the Trust complied with this provision as it was assigned into the Trust on September 1, 2006. A true and correct copy of excerpts from the PSA relevant to the Defendants' allegations are attached hereto as Exhibit I.

(Emphasis added.) That language leads to the conclusion that Deutsche Bank is in possession of the original note, and, accordingly Deutsche Bank alone has the right to prosecute the present foreclosure action against Butchers. However, Ocwen argues that, regardless of that language in the Lucas affidavit, it has the right to enforce the note. We now consider, and reject, each of Ocwen's contentions in support of that proposition.

¶46 First, Ocwen contends that the portions of the Lucas affidavit quoted in the immediately preceding paragraph mean that the original note is in its possession, but ownership of the note is with Deutsche Bank. Ocwen's position is untenable. That paragraph as a whole, or in the context of the entire Lucas

affidavit, cannot reasonably be read to have the meaning Ocwen asserts. The affidavit does not state that Deutsche Bank "possesses" the note only in that it owns the note. Rather, the affidavit is contradictory on its face because it is reasonably read as saying both Ocwen and Deutsche Bank physically possess the note at the same time. We rejected a similar argument in ***Klomsten***, and we see no basis to accept Ocwen's reading of the Lucas affidavit. *See* ***Klomsten***, 381 Wis. 2d 218, ¶33-34.

¶47 Second, Ocwen argues that in a situation where, as here, there is a bank that owns the note and a servicer for the bank that is enforcing the note in a foreclosure action, both the bank and the servicer "possess" the note under Wisconsin law. For this proposition, Ocwen points to ***Ocwen Loan Servicing, LLC v. Segebrecht***, No. 2014AP764, unpublished slip op. (WI App December 23, 2014). But, that opinion does not support Ocwen's position. In ***Segebrecht***, Ocwen as servicer of the loan had standing to enforce the note because Ocwen had possession of the note. ***Id.***, ¶¶6-7. ***Segebrecht*** does not hold that a servicer of a loan for a bank can enforce the note even though the bank possesses the note. Ocwen cites no authority which supports its contention that a loan servicer may enforce a note in blank in the possession of another, even if the note is in the possession of the bank the loan servicer works for. Pursuant to WIS. STAT. §§ 401.201(km)1., 403.205(2), and 403.301, as discussed, Ocwen is not entitled to enforce the note unless it possesses the original note, and the Lucas affidavit sends mixed signals regarding who possesses the original note.

¶48 Third, Ocwen relies on our decision in ***PNC Bank, N.A. v. Bierbrauer***. There, an employee of the bank's loan servicer stated facts in an affidavit regarding the transfer of possession of the original note to the bank. ***PNC Bank***, 346 Wis. 2d 1, ¶10. However, Ocwen does not make any developed

argument that the holding in ***PNC Bank*** supports its contention that the Lucas affidavit states unequivocally that Ocwen possesses the original note.

¶49 On summary judgment, we are to draw all inferences in favor of the non-moving parties, here Butchers. ***H&R Block Eastern Enterprises, Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421. Because of the contradictory statements in the Lucas affidavit about who possesses the original note, we cannot draw the necessary inference that Ocwen possesses the original note.

¶50 Therefore, we conclude that the circuit court erred in granting Ocwen's motion for summary judgment, and we remand this matter to the circuit court for the sole purpose of determining the only issue still in dispute; that is, whether Ocwen possesses the original note. The circuit court may, in its discretion, use summary judgment to determine that issue.

CONCLUSION

¶51 For the foregoing reasons, the decision of the circuit court is affirmed in part, reversed in part, and this action is remanded for further proceedings consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.