COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-0698

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

ASSOCIATES FINANCIAL SERVICES COMPANY OF WISCONSIN, INC.,

PLAINTIFF-RESPONDENT,

V.

BRANDON HARRELL,

DEFENDANT,

SUSAN H. HETHER A/K/A SUSAN H. HARRELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Dykman, P.J., Deininger and Vergeront, JJ.

DYKMAN, P.J. Susan Harrell appeals from a summary judgment providing for the foreclosure of her home. Susan argues that summary judgment

was improper because: (1) there was an issue of fact concerning Associates Financial Services' knowledge of her incompetence at the time they entered into mortgage contracts; (2) the trial court failed to apply proper standards in determining whether the loan was unconscionable; (3) refinancing the loan without disclosing less expensive alternatives was unconscionable; (4) there was a dispute of fact regarding her qualification for the loans; and (5) the sale of insurance was unconscionable because her husband, Brandon Harrell, was potentially uninsurable. We reject Susan's arguments and affirm.

BACKGROUND

On July 31, 1995, Associates received Susan and Brandon Harrell's loan application from a mortgage broker. On August 11, 1995, the Harrells went to Associates' office and entered a loan agreement in which Associates agreed to lend them $18,327.44. Associates placed a mortgage on Susan's house to secure the debt. On September 25, 1995, Brandon sought an additional loan from Associates to purchase a refrigerator. On September 26, 1995, Associates restructured the original mortgage for a new amount of $24,082.61.

The Harrells defaulted on the loan payments. Associates began this foreclosure action and subsequently filed a motion for summary judgment. In response, Susan filed two affidavits with the trial court.

The first affidavit is that of Russell Hanson, counsel for Susan. The affidavit states in relevant part that Associates failed to inquire about Susan's ability to repay the loans and that the amount now owed was unreasonable. The affidavit concludes that these factors subjected Susan "to unconscionable fees and charges."

The second affidavit is that of Patricia Cox, an employment specialist with Riverfront Inc. of La Crosse, Wisconsin. In her affidavit, Cox states in relevant part that she has experience working with developmentally disabled people and people under guardianship. In February 1995, Cox was contacted by the La Crosse County Department of Social Services and asked to meet with Susan to determine if Cox could work with her as a guardian. Cox noted that Susan exhibits a "flat affect," or "blank appearance," that Susan appears disheveled in that her hair, make-up, and clothing are always in disorder, and that she stares inappropriately and is influenced easily. Cox believed that "anyone of normal mentality would recognize [Susan] as a person of extremely limited capability almost immediately on contact." On April 18, 1995, Cox was appointed as Susan's guardian. Susan did not contact Cox about the loans in question, and Cox did not consent to the mortgage.

In support of its motion, Associates submitted the affidavit of Scott Enervold, the Associates' employee who dealt with the Harrells. Enervold was contacted by the Harrells' mortgage broker and received their loan application from that broker. Enervold reviewed the application and on July 31, 1995, telephoned the Harrells to inform them that Associates could make the loan. Later that day, the Harrells came to Associates' office, where Enervold reviewed the application with them and informed them of various costs, after which the Harrells signed the necessary documents. On August 10, 1995, Enervold telephoned the Harrells to discuss the specifics of the loan and options regarding insurance. On August 11, 1995, the Harrells came back to Associates' office to close the loan transaction.

In the affidavit, Enervold stated that Susan answered all questions he asked her and that at no time was he made aware of the fact that Susan had a

guardian. He also stated that nothing happened in relation to his contacts with Susan that would have given him the impression that she was incompetent. Enervold stated that the loan was approved "because the application disclosed a good income to debt ratio, their joint income provided more than sufficient income available to retire the debt, and [Susan's] home provided excellent security for the transaction."

Additionally, Enervold stated that on September 25, 1995, Brandon telephoned him for the purpose of obtaining additional money to purchase a refrigerator. Enervold prepared and went over the documents relevant to the second loan with the Harrells, including an application for accidental death, dismemberment and blindness insurance. While completing that application, Enervold asked Susan if at that time she had "a serious nervous or mental disorder." Susan answered that she did not, and Brandon did not correct her answer. Again, in relation to the second loan, Enervold stated that he was not made aware of the fact that Susan had a guardian or that she was incompetent.

At the hearing on the motion for summary judgment, the trial court concluded that there was no evidence that Associates should have known of Susan's incompetence. The court concluded that there were no issues of fact which needed to be addressed. Therefore, the motion for summary judgment was granted. Susan appeals.

DISCUSSION

We review a motion for summary judgment *de novo*. ***Envirologix Corp. v. City of Waukesha***, 192 Wis.2d 277, 287, 531 N.W.2d 357, 362 (Ct. App. 1995). We must determine whether a genuine issue of material fact exists. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis.2d 639, 651, 476 N.W.2d 593, 597

(Ct. App. 1991). If the evidence presented either in support of or in opposition to the motion allows for more than one reasonable inference, then summary judgment is not appropriate. ***Wagner v. Dissing***, 141 Wis.2d 931, 939-40, 416 N.W.2d 655, 658 (Ct. App. 1987).

Susan argues that there is a genuine issue of material fact regarding Associates' knowledge of her incompetence at the time of the loan transaction. Specifically, Susan contends that the Cox affidavit created an issue of fact as to whether Associates knew or should have known of her incompetence.

The issue of incompetency in relation to a loan transaction was addressed in ***Hauer v. Union State Bank***, 192 Wis.2d 576, 532 N.W.2d 456 (Ct. App. 1995). In ***Hauer***, we concluded that it would be unfair to void a contract on incompetency grounds unless the transacting bank had actual knowledge of or "reason to know of the incompetence." ***Id.*** at 599, 532 N.W.2d at 465. In her affidavit, Cox expresses the opinion that Harrell's appearance should inform people of her limited capabilities. This affidavit does not present a genuine issue of material fact requiring a denial of the summary judgment motion.

Cox's opinion that Susan's appearance should have informed others of her extremely limited capabilities does not establish, as an issue of fact, that Associates should have known that Susan was not competent to conduct the loan transaction. We are unwilling to conclude that all persons with other than a "normal" appearance must be denied loans. Susan failed to produce any evidence suggesting that Associates knew or should have known that she was incompetent.

Susan also argues that the trial court erred in refusing to allow additional discovery regarding the issue of whether Associates took unfair advantage of her. We reject this argument for two reasons. First, Susan did not

raise this issue at the hearing. We will not consider arguments raised for the first time on appeal. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992). Second, Susan failed to follow the clearly defined procedure for requesting further time for discovery.[1]

Susan's guardian ad litem also submitted a brief. This brief sets out several additional arguments.

First, the guardian ad litem argues that it was unconscionable for Associates to refinance the original loan without disclosing less expensive alternatives. Citing § 425.107(3)(c), STATS.,[2] the guardian ad litem contends that because the Harrells could have purchased a refrigerator on a credit card for much less than the cost of refinancing the loan, the refinancing was unconscionable. In support of this argument, the guardian ad litem relies on two cases: ***Emery v. American Gen. Fin., Inc.***, 71 F.3d 1343 (7th Cir. 1995), and ***Besta v. Beneficial Loan Co.***, 855 F.2d 532 (8th Cir. 1988). We conclude that the cases cited by the guardian ad litem are distinguishable from the present case.

Emery dealt with the issue of disparity in the context of people who are known to be not competent to interpret or understand different loans. *See*

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[1] Section 802.08(4), STATS., provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[2] Section 425.107(3)(c), STATS., states that one of the considerations relevant to the issue of unconscionability is "[t]hat there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers."

Emery, 71 F.3d at 1347. Because Susan was not known by Associates to be incompetent, ***Emery*** does not apply here. In ***Besta***, the court held that it was unfair surprise to not disclose an alternative loan which would have resulted in lower monthly payments over a shorter time. *See* ***Besta***, 855 F.2d at 535. This decision is also inapplicable because Susan offered no evidence that Associates had lower priced alternatives or that it did not disclose alternatives if in fact they did exist.

The trial court found that all fees, payments, and interest due were clearly disclosed to the Harrells and that the Harrells sought this loan and agreed to its terms. While the interest rate and fees on the loan may have been high, Susan still benefited from the loan. There is no evidence on the record that Associates had any less expensive alternatives, or that if it did, that it failed to disclose those alternatives. Susan presented no evidence suggesting that there exists a dispute as to material facts regarding the issue of unconscionability. Therefore, we conclude that the trial court did not err in granting Associates' motion for summary judgment.

Susan's guardian ad litem also argues that there is a dispute as to whether the Harrells were financially qualified for the loans. But the record contains no evidence reflecting a dispute of fact as to the Harrells' ability to repay the loans. The only evidence relating to this issue was provided through the Enervold affidavit, which states that the loan was granted because the application showed a good income to debt ratio, because the Harrells' joint income was deemed sufficient to retire the debt, and because the house provided excellent security for the transaction. Susan's guardian ad litem provided no evidence disputing the ability to pay.

Finally, the guardian ad litem argues that it was unconscionable to sell insurance to Brandon because he was uninsurable. The guardian ad litem makes several argument that were not made during the hearing on the motion for summary judgment. Once again, the guardian ad litem's arguments fail in part due to deficiencies in the record. The guardian ad litem offers no evidence that the policies were not delivered. There is no evidence that the sale or the terms of the insurance were unfair or improper. There is no evidence that these policies are worthless or that Brandon is uninsurable. Therefore, we conclude that the trial court properly granted the motion for summary judgment.

Susan and the guardian ad litem raise several other arguments. However, they are arguments with no factual support in the record. On a motion for summary judgment, the trial court is to determine whether there are disputed issues of fact warranting a trial. This determination is made based on the evidence produced. It is not the duty of the trial court to develop facts or to speculate as to whether facts exist to support opposing arguments. Here, the trial court listened to the arguments, examined the facts provided, and properly concluded that there was no dispute as to any issue of material fact.

By the Court.—Judgment affirmed.

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