COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0700

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

FIRSTAR BANK OF MILWAUKEE, N.A.,
F/K/A FIRST WISCONSIN BANK LAKE GENEVA
SUCCESSOR BY MERGER TO CITIZENS NATIONAL
BANK OF LAKE GENEVA,

PLAINTIFF-RESPONDENT,

V.

CARL W. BERNTSEN AND JANE DOE BERNTSEN,
N/K/A MARION BERNTSEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Carl and Marion Berntsen have appealed from a judgment of foreclosure on a note and mortgage given by Carl on January 31,

1978, to Citizens National Bank of Lake Geneva. Citizens Bank was subsequently acquired by Firstar Bank, which commenced this foreclosure action on June 27, 1997. Judgment awarding Firstar $14,633.25, including $695 in attorney's fees, was entered pursuant to Firstar's motion for summary judgment. We conclude that material issues of fact exist which rendered summary judgment improper. We therefore reverse the judgment and remand the matter for further proceedings consistent with this decision.

¶2 Before addressing whether summary judgment was warranted, we address Firstar's contention that the Berntsens were in default for failure to file an answer to its complaint. We conclude that Firstar waived its objections to the Berntsens' failure to file a formal answer.

¶3 The record indicates that Firstar moved for default judgment when the Berntsens failed to file an answer after service of Firstar's complaint by publication. A hearing was scheduled on the motion for October 24, 1997. However, prior to the hearing the Berntsens sent a letter to the trial court disputing the amounts claimed to be owed by Firstar, alleging that Firstar was overcharging for attorney's fees, and requesting both an accounting and a hearing. The Berntsens were pro se at the time and remained so until after entry of the judgment against them.

¶4 At the hearing on the motion for default judgment, counsel for Firstar stated: "Why don't we consider the issue being joined today and either adjourn the matter for a summary judgment hearing … at a time that's convenient to the Court and the Berntsens, and then perhaps we can work something out on this." The trial court then rescheduled the hearing on the motion, explaining to the Berntsens that counsel for Firstar had asked "for a default judgment. Now he says

he may have to change and file a motion for summary judgment which would be (sic) affidavits would be filed." The trial court also informed the Berntsens that if Firstar filed a motion for summary judgment, they would be entitled to file affidavits in opposition to the motion.

¶5 Firstar subsequently filed a motion for summary judgment which was heard and granted by the trial court on December 11, 1997. In an affidavit in support of its motion, counsel for Firstar stated that "attached hereto as an exhibit is a copy of the Answer received from the defendant, Carl Berntsen," referring to a second letter response from the Berntsens.

¶6 Although the trial court referred to the Berntsens' failure to file a formal answer several times at the December 11, 1997 hearing, Firstar did not again request default judgment and instead pursued its request for summary judgment on the ground that its affidavits conclusively established that the Berntsens were in default on their loan, entitling Firstar to foreclose on the mortgage. The trial court, in turn, granted summary judgment on this basis.[1] Based upon Firstar's statement that the parties and the trial court should consider "issue being joined" and its decision to pursue summary judgment rather than default judgment, Firstar waived its right to argue on appeal that it is entitled to judgment based upon the Berntsens' failure to formally answer. *See* ***State v. Washington***, 142 Wis.2d 630, 635, 419 N.W.2d 275, 277 (Ct. App. 1987).

[1] Because Firstar did not pursue the motion for default judgment, the trial court never addressed whether judgment was warranted under the standards applicable to motions for default judgment or whether the filing of the Berntsens' letter responses affected the propriety of default judgment. *See, e.g.,* ***Maier Constr., Inc. v. Ryan***, 81 Wis.2d 463, 472-74, 260 N.W.2d 700, 704 (1978); ***Martin v. Griffin***, 117 Wis.2d 438, 441-42, 344 N.W.2d 206, 209 (Ct. App. 1984).

¶7 In its brief on appeal, Firstar also contends that the Berntsens did not file their affidavit in opposition to the motion for summary judgment within the time limit established in § 802.08(2), STATS. Firstar refers to a statement made by its counsel at the December 11, 1997 hearing that "I have to object to the timeliness of … delivery" of the Berntsens' affidavit in opposition to summary judgment. However, the transcript of the December 11, 1997 hearing indicates that counsel said nothing more about the matter and never moved to strike the affidavit or for any other relief based on untimeliness. Instead, he simply proceeded to address the merits of Firstar's motion. By failing to raise an objection to the timeliness of the Berntsens' affidavit with sufficient prominence to make clear to the trial court that it was seeking some kind of relief, Firstar waived any right to relief on appeal based on that issue. *See* ***State v. Barthels***, 166 Wis.2d 876, 884, 480 N.W.2d 814, 818 (Ct. App. 1992), *aff'd*, 174 Wis.2d 173, 495 N.W.2d 341 (1993).[2]

¶8 We therefore reach the merits of the order granting summary judgment. In reviewing the trial court's order, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis.2d 548, 555, 508 N.W.2d

[2] Even if Firstar's objection to the timeliness of the Berntsens' affidavit was sufficient to preserve the issue in the trial court, its argument on appeal concerning this issue is inadequate to warrant any relief. In its brief, Firstar states that the Berntsens did not file their affidavit in opposition to summary judgment within the time limit established in § 802.08(2), STATS., and that Firstar's counsel objected to its timeliness at the summary judgment hearing. Firstar also states that the affidavit was signed by Marion Berntsen, rather than Carl, and that she "may not have had personal knowledge of the transactions and agreements." However, instead of setting forth an argument in support of a claim that these deficiencies entitle it to relief on appeal, Firstar proceeds to discuss the merits of the summary judgment motion. Because any potential issue based on the timeliness or sufficiency of the Berntsens' affidavit is inadequately briefed, this court will decline to review it. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

610, 612 (Ct. App. 1993). An order granting summary judgment must be reversed if the trial court incorrectly decided legal issues or if material facts were in dispute. *See* ***id.*** The trial court may not decide an issue of fact and is limited to deciding whether a material factual issue exists. *See* ***id.***

¶9 In support of its motion for summary judgment, Firstar submitted affidavits of an employee of Firstar Mortgage Servicing, who attested that she had possession and responsibility for the accounting records related to the loan and mortgage signed by Carl on January 31, 1978. She further attested that the Berntsens had failed to make monthly installment payments due on or after February 21, 1997, and that the mortgage was in default with a principal balance due of $10,198.46. She also attested that Firstar had made advances for the payment of real estate taxes.

¶10 At the hearing on the motion for summary judgment, the Berntsens specifically and correctly argued that there were material issues of fact which had to be resolved before the matter could proceed to judgment. In response to the motion for summary judgment, Marion submitted an affidavit alleging that Firstar had consistently refused to provide a complete and accurate accounting of the loan and that it had collected and continued to assess attorney's fees which exceeded statutory limits. She also attested that since 1978 she had handled the records and payments on the mortgage and that, to the best of her knowledge, the Berntsens had paid the taxes on the property until 1994. Essentially, the Berntsens contended that the balance of the loan as of February 1, 1997, should have been $2266.53, as indicated in an amortization schedule provided by Firstar. They contested Firstar's claim that Citizens Bank paid the real estate taxes on the property for 1978, 1979 and 1980, contending that it was in fact Carl who purchased cashier's checks from Citizens Bank in December of 1978, 1979 and

1980 for the purpose of paying those taxes. The Berntsens further contended that the bank lacked authority to pay the taxes and add them to the principal balance because no escrow account was ever established and the taxes were not delinquent at the time they were paid. Marion attested that prior to the Berntsens' discovery of the discrepancy in the mortgage balance, all payments were made promptly by them for a period of fourteen years, with the exception of two payments which were fifteen days late.

¶11 Copies of the cashier's checks were included in the summary judgment record. On their face, they indicate that they were purchased by Carl from Citizens Bank and were made payable to the village treasurer for the payment of real estate taxes. Nothing on the face of the checks or elsewhere in the record indicates that the Berntsens were borrowing the money to pay the taxes and agreeing to add the amounts borrowed to the principal balance of the 1978 loan. The Berntsens' affidavit and the copies of the cashier's checks thus gave rise to a material issue of fact as to who paid the real estate taxes between 1978 and 1980. That issue must be resolved at trial.

¶12 Assuming that Citizens Bank paid the taxes and added the amounts paid to the balance of the loan, an issue also must be resolved as to whether it was authorized to do so. Pursuant to paragraph 7(a) of the mortgage, the Berntsens were required to escrow sufficient funds with the bank at such times as the bank designated to cover real estate taxes. However, Firstar concedes in its brief on appeal that neither it nor Citizens Bank ever required the Berntsens to make a monthly escrow payment for taxes.

¶13 Pursuant to paragraph 5 of the mortgage, if real estate taxes were not escrowed, the Berntsens were required to pay them before they became

delinquent. If they did not, paragraph 8 of the mortgage authorized the bank to make the payments and provided that "the cost shall be due on demand and secured by this Mortgage."

¶14 The Berntsens contend that the real estate taxes were not delinquent when Citizens Bank allegedly paid them, and that it therefore lacked authority to pay the taxes and add them to the principal balance. If, on remand, it is determined that Citizens Bank rather than the Berntsens actually paid the taxes, this issue must also be resolved.[3]

¶15 Because we are reversing the trial court's judgment on the ground that a material issue of fact exists, we need not address the Berntsens' claim that the summary judgment should be reversed based on the alleged insufficiency of the complaint under § 428.105, STATS. In addition, on remand the Berntsens will be entitled to receive a complete accounting if they have not done so already[4] and

[3] The Berntsens also contend that the statute of limitations bars a separate action for the recovery of real estate taxes allegedly paid by Citizens Bank between 1978 and 1980. However, we need not address this issue because Firstar has not commenced a separate action to recover payments of taxes and is simply contending that the sums were paid and secured by the mortgage and seeking to foreclose on the mortgage. The Berntsens concede that tax obligations paid by a mortgagee can be foreclosed if the mortgage properly secured them, regardless of whether the statute of limitations would bar a direct action. *See* ***First Nat'l Bank v. Kolbeck***, 247 Wis. 462, 465, 19 N.W.2d 908, 909 (1945).

[4] Firstar contends that on November 13, 1997, it provided the Berntsens with an accounting, including an account history ledger showing the application of all payments of principal and interest and all disbursements since 1978. However, while counsel for Firstar and the trial court discussed an account history which was allegedly provided to the Berntsens and given to the trial court at the summary judgment hearing, Firstar provides no record citation for this account history. In addition, after a thorough review, this court has failed to find such a document in the record on appeal.

(continued)

to pursue their request that they be awarded damages pursuant to § 428.104(2), STATS., based on Firstar's alleged failure to timely provide an accounting. Although the Berntsens request this court to address the damages issue, we will not do so because it has not yet been addressed in the trial court, nor have findings been made as to if or when Firstar provided the Berntsens with an accounting.

¶16 The Berntsens also raise several issues related to attorney's fees. However, we will not address their claim that Firstar charged attorney's fees in excess of that permitted by law in an earlier foreclosure action because the Berntsens never filed an appeal in that action.[5] Similarly, we will not address whether the attorney's fees awarded in this action were excessive because we are reversing the judgment, including the award of attorney's fees, and remanding the matter for further proceedings. Finally, in the conclusion of their brief, the Berntsens request attorney's fees on appeal pursuant to § 425.308, STATS.

It is the responsibility of the party who wants to rely upon a document to ensure that it is included in the record on appeal. *See* ***Mercury Records Prods., Inc. v. Economic Consultants, Inc.***, 91 Wis.2d 482, 506, 283 N.W.2d 613, 625 (Ct. App. 1979). We also caution counsel that in the future he must include proper record citations as required by RULE 809.19(1)(d) and (e), STATS., and may not refer to materials outside the record. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis.2d 119, 125-26, 353 N.W.2d 63, 66 (Ct. App. 1984).

[5] The first foreclosure action was dismissed by the trial court in response to a petition for voluntary dismissal filed by Firstar after the Berntsens tendered the delinquent payments, attorney's fees and costs demanded by Firstar to bring the note current. After the dismissal order was signed and entered, the Berntsens filed a letter in the trial court stating that they objected to dismissal until such time as they received a complete accounting from Firstar and could either verify the amounts claimed to be owing on the note or commence proceedings to recover overcharges.

The dismissal order disposed of the entire matter then in litigation between the parties and constituted a final appealable order under § 808.03(1), STATS. Because the Berntsens objected to the dismissal, they also had a basis for claiming that they were aggrieved by it. However, they never appealed to this court, nor filed a motion for relief from the dismissal order in the trial court. Consequently, they cannot now challenge the attorney's fees paid by them in that action.

However, they provide no argument in support of this request and fail to develop their claim in any manner. Because the request is inadequately briefed, this court will not address it further. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

By the Court.—Judgment reversed and cause remanded.

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