COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. **98-3598**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

THOMAS L. MCDONNELL, CAROL A. MCDONNELL AND STEVEN A. FRIENDSHUH,

PLAINTIFFS-RESPONDENTS,

V.

KEVIN VON FELDT AND CHAU T. TRINH, AS HUSBAND AND WIFE,

DEFENDANTS-APPELLANTS,

EAU CLAIRE PRESS COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Washburn County: FREDERICK A. HENDERSON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kevin Von Feldt and Chau Trinh (mortgagors) appeal a judgment granting a mortgage foreclosure and awarding $12,000 attorney fees to Thomas and Carol McDonnell and Steven Friendshuh (mortgagees). The mortgagors argue that: (1) § 224.81, STATS., prohibits the mortgagees from bringing this action because they are not registered as mortgage bankers; (2) Friendshuh is a creditor under the Federal Truth In Lending Act which he violated, giving the mortgagors the right to rescind; and (3) the court failed to make appropriate findings of fact to support the amount of attorney fees it awarded.[1] Because we conclude that § 224.81 does not prohibit a foreclosure action and that Friendshuh is not a creditor under the Federal Truth In Lending Act, we affirm the foreclosure. However, we reverse the award of attorney fees and remand for further proceedings to establish the amount of reasonable attorney fees.

¶2 Section 224.81, STATS., does not bar the mortgagees from collecting on their loan or foreclosing on the mortgage. The statute prohibits unregistered mortgage bankers, loan originators and brokers from collecting "a commission, money or other things of value for performing an act as a mortgage banker …." It does not prohibit them from bringing a foreclosure action to recover on the secured debt.

[1] They also argue that the court erroneously granted judgment in excess of the foreclosure sale proceeds. The judgment of foreclosure specifically notes that the mortgagees waived any deficiency. Because we conclude that there is no deficiency judgment, we need not review that issue.

The mortgagors also argue that the court improperly imposed an interest rate of 11.5% per annum. The trial court amended its judgment to reflect the correct interest rate of 11%.

¶3 The Federal Truth In Lending Act 15 U.S.C. §§ 1601-1667 does not apply to this mortgage transaction because Friendshuh is not a "creditor" under the Act.[2] The mortgagors have the burden of showing that the act applies to the subject transaction. *See* ***Gombose v. Carteret Mortgage Corp.***, 894 F. Supp. 176, 180 (E.D. Pa. 1995). The Act applies only to a person who "regularly extends consumer credit" when the person is the one "to whom the obligation is initially payable." A person "regularly extends consumer credit" if five transactions secured by a dwelling were made in the same or the preceding calendar year. *See* 15 U.S.C. § 1602.

¶4 The mortgagors contend that Friendshuh regularly extends credit because he had more than five qualifying transactions secured by a dwelling in 1996 and 1997. *See* 12 C.F.R. 226.2(a)(17)(i) n.3. They identify seven other transactions secured by a dwelling. The only evidence concerning these transactions came from Steven Friendshuh, who conclusively showed that he did not originate more than five consumer transactions secured by a dwelling in any single calendar year. One of the transactions originated in 1990 as a land contract. Friendshuh was not the person to whom the obligation was initially payable. Two of the transactions are exempt because they were undertaken for primarily business purposes. *See* 12 C.F.R. § 226.3(a)(1). Credit extended to acquire, improve or maintain rental property that is not owner-occupied is deemed to be for business purposes, regardless of the number of housing units. *See* 12 C.F.R. Part 226, Supp. 1, Official Staff interpretations, § 226.3(3)(a)(3). Two of the transactions do not qualify under the act because they did not take place in the

[2] The mortgagor's argument is directed only at Friendshuh.

same calendar year as the other transactions.[3] *See* 12 C.F.R. § 226.2(a)(17)(i) n.3. Therefore, because the mortgagors have established only three applicable transactions secured by a dwelling in the preceding year, and only two other transactions in the year in which they executed their mortgage, the Federal Truth In Lending Act does not apply to this transaction.

¶5 While the trial court recited in the judgment that it found the $12,000 attorney fees "reasonable and fair," it did not specifically consider any of the factors used to determine the reasonableness of attorney fees such as the time and labor required, the novelty and difficulty of the issues, the customary fee charged in the locality and the attorney's experience and reputation. *See* ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204-05, 496 N.W.2d 57, 62 (1993). The record discloses no basis for the specific fees charged. While the amount of attorney fees to be awarded is discretionary, discretion is not unfettered decision making. It requires a process of reasoning that depends on facts of record. *See* ***id***. Because the record does not contain facts upon which the court could determine that the $12,000 attorney fees were reasonable, we remand the cause to create a factual record upon which meaningful review is possible.

[3] The mortgagors argue that ***Redic v. Watts***, 762 F.2d 1181 (4th Cir. 1985) allows them to aggregate the transactions in the preceding year with those in the year of the loan. ***Redic*** does not support that proposition. In ***Redic***, the court noted that the lender extended credit "at least five times in the preceding or current year prior to the Redic transaction." ***Id***. at 1185 and 1187. While the court reviewed the transactions for a two-year period, its decision should not be interpreted to ignore the requirement that the five transactions occur in the same "calendar year."

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. No costs on appeal.

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