

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 27, 2004

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-1653-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-000010

**IN COURT OF APPEALS
DISTRICT III**

TOWN OF MAINE,

PLAINTIFF-APPELLANT,

V.

HARRY ZUNKER,

DEFENDANT,

EUGENE ZUNKER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. The Town of Maine commenced this action to enforce a judgment lien on lands owned by Harry Zunker.¹ It appeals a judgment holding that Eugene Zunker's mortgage on his brother Harry's land is valid. The Town argues that Eugene's mortgage is invalid because the note it purports to secure does not exist and the mortgage contains no provision to secure past indebtedness. The Town further argues that the mortgage's failure to set forth the essential terms of the debt, in the absence of a note, renders the mortgage unenforceable. We agree. We therefore reverse the judgment and remand for further proceedings consistent with this opinion.

¶2 On May 30, 1995, without the benefit of legal counsel, Harry executed a pre-printed mortgage form to his brother Eugene, purporting to secure Harry's obligation to repay certain loans Eugene made to Harry. The mortgage stated that it was

to secure payment of Thirty-Seven Thousand Five Hundred Dollars plus 7% Interest Dollars [sic] (\$37,500) evidenced by a note or notes bearing an even date executed by Eugene L. Zunker [sic] to Mortgagee, and any extensions, renewals and modifications of the note(s) and refinancings of any such indebtedness on any terms whatsoever (including increases in interest) and the payment of all other sums, with interest, advanced to protect the security of this Mortgage

¶3 Eugene admitted there was no note "of even date." He claimed that the mortgage was intended to secure past indebtedness. Eugene offered two notes to prove the indebtedness. The first was dated May 1, 1989, and was in the sum of \$12,200. The second was undated, but signed before a notary whose commission

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

expired August 22, 1993. It did not state any specific sum, but referred to “Cloverbelt Credit Union check stubs” as reflecting the amount owed.

¶4 In July 2001, the Town obtained a judgment against Harry for \$96,975.21. It obtained a judgment ordering the sale of the property to satisfy its judgment. After the property was sold for \$150,000, Eugene claimed a superior interest in the sale proceeds by virtue of his mortgage. The Town moved for an order declaring Eugene’s mortgage invalid.

¶5 Eugene responded with an affidavit stating that the amount due and owing on the notes the mortgage secured was \$56,098.49. Attached to his affidavit were numerous bank stubs and receipts from Harry indicating he regularly received sums of money from Eugene. The Town did not dispute that Eugene had loaned Harry the amount asserted. Rather, the Town essentially claimed that the mortgage was invalid due to the lack of a note as described in the mortgage.

¶6 The trial court granted judgment upholding the validity of Eugene’s mortgage. The court found that the underlying facts were undisputed and “all of the notes that evidence the debt were acknowledged by Harry Zunker” and predated the mortgage. The court found that Eugene “produced all the evidence of the debt in its original form,” and the indebtedness ran from Harry to Eugene and existed at the time the mortgage was executed. The court determined that the

parties intended the mortgage to secure a valid debt, was supported by adequate consideration, and that there was no evidence of fraud or collusion.²

¶7 The Town argues that the mortgage is invalid because it does not secure a note of even date as referred to in the mortgage and contains no provision securing past due debt. We agree. “There can be no mortgage without a debt.” *Mitchell Bank v. Schanke*, 2002 WI App 225, ¶25, 257 Wis. 2d 723, 652 N.W.2d 636.³ A note evidences indebtedness; a mortgage secures the indebtedness. *Id.* A “dragnet” clause in a mortgage may secure any existing or future individual indebtedness to the mortgagee. *Badger State Agri-Credit & Realty v. Lubahn*, 122 Wis. 2d 718, 724, 365 N.W.2d 616 (Ct. App. 1985).

¶8 “The determination as to whether the underlying debt of the mortgage is sufficiently identifiable is one of fact which shall not be set aside on appeal unless clearly erroneous.” *Mitchell Bank*, 257 Wis. 2d 723, ¶23. If the amount of debt is stated in the mortgage and is identifiable from mortgage documents, then the mortgage is enforceable. However, “if the amount of debt is not both stated in the mortgage and identifiable from the mortgage documents, the mortgage is not enforceable.” *Id.*, ¶27. In *Mitchell Bank*, there was no note and the amount of past due debt was not stated in the mortgage. *Id.*, ¶28. Nor was the

² The court found that the parties had reached an agreement and “intended the mortgage lien to secure a valid debt.” The court also found that the “parties were lay persons who used a preprinted form to execute a mortgage instrument.” The court found no fraud or collusion. The court stated that the lack of adequate identification of the debt was a technicality that “must yield to considerations of equity.” On appeal, Zunker develop an argument regarding the court’s equitable basis for its judgment. We cannot abandon our neutrality to develop the argument for him. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Therefore, the trial court’s unexplained equitable basis for enforcing the mortgage is not addressed on appeal.

³ Petition for review pending.

amount of debt identifiable from the mortgage documents because there were no documents attached to the mortgage. *Id.*

¶9 Here, there is no dispute that there was a debt running from Harry to Eugene. The court found that the evidence beyond the four corners of the documents was sufficient to identify the debt; that finding of fact is not challenged. Nonetheless, the issue is whether the amount of the debt is identifiable from the mortgage documents. *Id.*

¶10 Jurisdictions vary as to how accurate the mortgage's description of the debt must be. *See* 54A AM. JUR. 2d *Mortgages* § 79 (1996). Some jurisdictions take the view that an obligation is not secured by a mortgage unless it comes fairly within the term of the mortgage. *Id.* In other jurisdictions, "the validity of the mortgage does not depend on the description or form of the debt, but rather on the existence of the debt that it is given to secure." *Id.* Between third parties, however, "while literal accuracy of description is not required, it is essential that the debt be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage a mere cover for the perpetration of a fraud upon creditors." *Id.*, ¶80. Slight discrepancies do not invalidate the mortgage. *Id.*, ¶81.

¶11 Here, the discrepancy in the description of the debt was more than slight. The mortgage document described the note as one of "even date," and it is undisputed that no note of even date exists. The notes that do exist predate the mortgage and fail to accurately describe the debt. There were no documents attached to the mortgage describing the debt. *See Mitchell Bank*, 257 Wis. 2d 723, ¶28. In addition, the mortgage failed to contain a dragnet clause to secure past indebtedness. Therefore, the amount of the debt is not stated in the mortgage

and is not identifiable from any mortgage document. We conclude that the mortgage fails to sufficiently describe the debt as a matter of law and, therefore, does not secure the debt between Eugene and Harry. Consequently, it is not an enforceable mortgage.

By the Court.—Judgment reversed and cause remanded with directions.

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

