COURT OF APPEALS
DECISION
DATED AND FILED

April 14, 2010

David R. Schanker
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 Nos. 2009AP669
2009AP1878

Cir. Ct. No. 2008CV1407

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

FIRST BANK OF HIGHLAND PARK,

PLAINTIFF-COUNTER DEFENDANT-RESPONDENT,

V.

SUMMER HAVEN, LLC, A/K/A SUMMERHAVEN LLC, AND RICHARD J. BURKART,

DEFENDANTS-CROSS CLAIM DEFENDANTS,

VITO F. GIERON AND MARTA S. GIERON,

DEFENDANTS-COUNTER CLAIMANTS-CROSS CLAIMANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Snyder, J.

¶1 PER CURIAM. In this mortgage foreclosure action, Vito and Marta Gieron, pro se, appeal from a grant of summary judgment in favor of First Bank of Highland Park ("the bank") and from the order denying their motion for reconsideration. Because we agree with the circuit court that the Gierons' mortgage was recorded second entitling the bank to priority and that the Gierons contractually agreed that their mortgage was second to the bank's, we affirm.

¶2 The underlying facts are taken from the pleadings and summary judgment submissions. Real estate developer Summer Haven, LLC purchased several parcels of real estate using funds it borrowed from the bank, an Illinois state-chartered bank. The funds were evidenced by a promissory note dated August 3, 2005 and secured by a number of recorded mortgages, assignments of rent and other security documents. Summer Haven's manager, Richard Burkhart, personally guaranteed the loan.

¶3 Summer Haven purchased one of the real estate parcels ("Parcel 3") from the Gierons for $514,000. It was to pay $100,000 of the amount after the closing pursuant to a note secured by a mortgage it granted the Gierons, also on August 3, 2005. The mortgage states that Summer Haven warranted title to Parcel 3 except for "a first mortgage to [] First Bank." The bank's and the Gierons' mortgages both were recorded at 9:24 a.m. on August 15, 2005. The bank's was recorded as Document No. 650029, the Gierons' as Document No. 650031.

¶4 The Gierons signed closing and settlement statements at the August 3 closing. The closing statement noted: "Second mortgage and note to be held by Seller"; the line immediately above the signature line stated: "I accept this

statement as being correct." Similarly, the settlement statement twice indicated: "2ND MTG & NOTE TO BE HELD BY SELLER," and the line just above the signature line read: "I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement …."

¶5 Summer Haven defaulted on the mortgage and the bank sought a judgment of foreclosure. Neither Summer Haven nor Burkhart filed an answer. The Gierons answered, cross-claimed against Summer Haven and counterclaimed against the bank claiming their mortgage was prior and senior to the bank's.

¶6 The bank moved for summary judgment. The Gierons opposed the motion. They sought, in the alternative, to continue the hearing on the summary judgment motion to permit them to complete discovery to explore whether the bank acted in bad faith and engaged in a conspiracy with Summer Haven to extinguish the Gierons' interest in Parcel 3. The circuit court granted summary judgment against Summer Haven and Burkhart because they were in default and against the Gierons on grounds that (1) WIS. STAT. § 706.11(1)(d) (2007-08)[1] gives priority to the bank's mortgage because it was recorded first, and (2) even if the Gierons' mortgage was recorded first, the Gierons and Summer Haven contractually agreed that the Gierons' mortgage was second to the bank's. The court denied the Gierons' motion for reconsideration. Only the Gierons appeal.

¶7 We review a grant of summary judgment independently, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We need not repeat the oft-cited

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

methodology. *See, e.g.*, ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The application of statutes to a set of facts also presents a question of law we review de novo. ***Bank of New Glarus v. Swartwood***, 2006 WI App 224, ¶13, 297 Wis. 2d 458, 725 N.W.2d 944.

¶8 The main issue, as we see it, is whether the Gierons' or the bank's mortgage is in the superior position. Any duly recorded mortgage executed to a state or national bank "shall have priority over all liens upon the mortgaged premises and the buildings and improvements thereon, except tax and special assessment liens filed after the recording of such mortgage and except liens under [WIS. STAT. §§ 292.31 (8)(i) and 292.81]." WIS. STAT. § 706.11(1)(d). The Gierons insist, however, that the bank, chartered in Illinois, "does not benefit from the priority established for a 'state bank'" under § 706.11(1)(d).

¶9 This court recently put that identical argument to rest in regard to a bank chartered in Kansas that recorded a mortgage in Wisconsin. ***Lowell Mgmt. Servs., Inc. v. Geneva Nat'l PQC, LLC***, 2009 WI App 149, ¶1, 321 Wis. 2d 589, 774 N.W.2d 811, *petition for review filed* (WI Oct. 8, 2009) (No. 08AP2533). "The rational interpretation of the statute is that the exception applies to all state banks, not just Wisconsin-chartered state banks." ***Id.***, ¶8. The Gierons' assertions that our reasoning in ***Lowell Management*** is "flawed," "not 'rational' and 'violates itself'" falls short of convincing us to disregard its clear teaching.

¶10 The register of deeds received and recorded both the bank's and the Gierons' mortgages at 9:24 a.m. on August 5, 2005. The bank's mortgage was assigned number 650029, the Gierons' number 650031. The circuit court

concluded that the bank's mortgage was recorded first, a determination the Gierons challenge as "unknowable." We disagree with the Gierons.

¶11 A mortgage delivered to the register of deeds is not perfected until it is filed, accepted, recorded and endorsed in accordance with the applicable statutes. *See* WIS. STAT. §§ 706.05, 706.08 and 59.43. If properly submitted, the register shall "cause [it] to be recorded"; then must endorse upon it a certificate of the date and time it was received, "specifying the day, hour and minute of reception"; and then shall record the instrument in the order in which it was received. Sec. 59.43(1)(a), (e). Finally, the register of deeds must:

> Endorse plainly on each instrument a number consecutive to the number assigned to the immediately previously recorded or filed instrument, such that all numbers are unique for each instrument within a group of public records that are kept together as a unit and relate to a particular subject.

Section 59.43(1)(f).

¶12 "The obvious intent of this statute is to ensure that documents relating to a particular piece of property, in this case real estate, are recorded in the precise order in which they are received, thereby maintaining the priority of interests in the chain of title." ***George v. Argent Mtg. Co., LLC***, 364 B.R. 355, 360 (E.D. Wis. 2007). The purpose of the recording statute is to render record title authoritative. ***Kordecki v. Rizzo***, 106 Wis. 2d 713, 718-19, 317 N.W.2d 479 (1982). We see no error in the circuit court's determination that the bank's lower-numbered mortgage preceded the Gierons'.

¶13 The Gierons next argue that, under ***Northern State Bank v. Toal***, 69 Wis. 2d 50, 230 N.W.2d 153 (1975), their "purchase money mortgage" is superior to any other claim. Assuming without deciding that the Gierons' mortgage is, in

fact, a purchase money mortgage under WIS. STAT. § 708.09, their argument nonetheless fails because they overstate the holding of ***Toal***.

¶14 The issue in ***Toal*** was whether Toal's purchase money mortgage on real estate took precedence over a judgment a creditor held against Toal before he acquired the real estate covered by the mortgage. ***Toal***, 69 Wis. 2d at 51. Toal listed the prior judgment as a debt when he made the home mortgage loan application. ***Id.*** at 51-52. When he later defaulted on the mortgage payments, the judgment holder and the lender disputed which took priority, the prior judgment or the purchase money mortgage. ***Id.*** Relying on authority stating that a purchase money mortgage has priority over earlier judgments and judgment liens against the mortgagor, the supreme court ruled in favor of the lender. ***Id.*** at 55-56. Significantly here, the ***Toal*** court considered only the priority of a purchase money mortgage in relation to pre-existing judgments against the mortgagee, not one mortgage's priority over another. Accordingly, ***Toal*** does not control.

¶15 The Gierons also assert that their mortgage has priority because it was given in satisfaction of an October 15, 2004 land contract between them and Summer Haven, and thus "relates back" to the land contract's 2004 recording date. The bank argues that this issue is raised for the first time on appeal. For that reason, and because the Gierons do not dispute that assertion in their reply brief, we do not address the issue further. *See* ***Apex Elecs. Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998); *see also* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 We also conclude, as the circuit court did, that even if the bank's mortgage was not recorded first, it still is superior. Both the closing and settlement statements plainly stated that the Gierons' mortgage was second and

they acknowledged by their signatures that the documents were accurate. The Gierons' signatures constitute admissions against interest under WIS. STAT. § 908.01(4)(b)1. and 2. and are competent evidence of the matters admitted. *See* ***Marek v. Knab Co.***, 10 Wis. 2d 390, 397, 103 N.W.2d 31 (1960). As a third-party beneficiary to the parties' contract, the bank thus has standing to enforce its terms. *See* ***Estate of Plautz v. Time Ins. Co.***, 189 Wis. 2d 136, 146, 525 N.W.2d 342 (Ct. App. 1994). The Gierons' intent to confer a benefit upon the bank is underscored by the unambiguous language of their mortgage providing that the developer "warrants title to the Property … excepting: a first mortgage to the First Bank of Highland Park."

¶17 The Gierons nevertheless seek to avoid the effects of the contract behind the shield of being "unschooled [and] unrepresented."[2] "It is the 'firmly fixed' law in this state that, absent fraud, a person may not avoid the clear terms of a signed contract by claiming that he or she did not read or understand the contract." ***Raasch v. City of Milwaukee***, 2008 WI App 54, ¶11, 310 Wis. 2d 230, 750 N.W.2d 492 (citation omitted), *review denied*, 2008 WI 115, 310 Wis. 2d 707, 754 N.W.2d 850. The "firmly fixed law" does not make an exception for parties who freely chose to represent themselves.

[2] Incongruously, here the Gierons portray themselves as legally unsophisticated while much of their brief, like their motion for reconsideration, is overtly disdainful of Judge Kennedy's interpretation and application of the law. As just a few of many examples, they castigate him for making "legal errors of egregious magnitude warranting … his removal from the bench," and ask this court to reverse and remand "to a different judge who can follow the simple, straightforward edicts of the law." They accuse him of "pontificating," "substitut[ing] his arbitrary speculations" for a trial by jury, delivering "haltingly expressed analyses" and denying their motion for reconsideration "without … probably, even reading it." Such commentary displays an astounding disrespect for the office of the court and to Judge Kennedy in particular. Disagreeing with the outcome is one thing but, as we have remarked on other occasions, venom, arrogance and *ad hominem* attacks are inexcusable and will not be tolerated. *See, e.g.*, ***Strook v. Kedinger***, 2009 WI App 31, ¶6, 316 Wis. 2d 548, 766 N.W.2d 219.

¶18 The Gierons next claim that the circuit court "egregiously" erred by not permitting them to present at the summary judgment hearing oral argument and supporting exhibits they sought to produce for the first time. A court has considerable discretion in directing the proceedings before it. *See* ***Wengerd v. Rinehart***, 114 Wis. 2d 575, 580, 338 N.W.2d 861, 865 (Ct. App. 1983). Summary judgment proceedings require an opposing party to submit evidentiary facts by affidavit. WIS. STAT. § 802.08(3). Beyond that, § 802.08 does not require a court to allow oral argument and the Gierons cite no other authority for that proposition. The Gierons' exhibits, first produced the day of hearing, violated the local rule requiring supporting papers to be filed at least five days before the hearing. *See* Walworth County, Wis., Cir. Ct. R. 2.2 (Civil). The circuit court thus did not erroneously exercise its discretion in refusing to consider them. *See* ***Kotecki & Radtke, S.C. v. Johnson***, 192 Wis. 2d 429, 447, 531 N.W.2d 606 (Ct. App. 1995).

¶19 We also reject the Gierons' claim that the grant of summary judgment was premature because discovery was underway to possibly establish a conspiracy between Summer Haven and the bank. Under WIS. STAT. § 802.08(4), the circuit court's authority to delay ruling on a summary judgment motion to give an opposing party additional time for discovery is "highly discretionary." *See* ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (Ct. App. 1995). We affirm discretionary rulings if the circuit court applied the correct law to the facts of record and reached a reasonable result. ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 772, 582 N.W.2d 98 (Ct. App. 1998).

¶20 The circuit court observed that the Gierons' discovery requests were filed only after the bank moved for summary judgment. It also noted that their claim of conspiracy not only set forth no factual basis but "defie[d] the laws of common sense." The court concluded that the requests—such as those essentially

demanding that the bank supply documents proving it is a bank—struck it as a "fishing expedition" that "look[ed] like harassment." These findings are not clearly erroneous. *See* WIS. STAT. § 805.17(2). It was within the court's discretion to limit such discovery. *See* ***Cruz v. All Saints Healthcare Sys., Inc.***, 2001 WI App 67, ¶20, 242 Wis. 2d 432, 625 N.W.2d 344.

¶21 Finally, we address the Gierons' claim that the court erred in summarily denying their motion for reconsideration brought pursuant to WIS. STAT. § 806.07. They assert that, although their "rehearing petition was so compelling," the circuit court denied it "out of hand, without "even read[ing] it, let alone consider[ing] it."

¶22 We do not reverse a circuit court's order denying such relief unless the court erroneously exercised its discretion. ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶33, 298 Wis. 2d 200, 727 N.W.2d 38. First, the order denying the Gierons' motion plainly showed that the court read it. Second, the court's explanation revealed a proper exercise of discretion. It responded to their complaint about not being afforded the opportunity to present oral argument and more generally to their remaining contentions which, the court said, either re-argued matters already argued, asserted new conclusory facts without citation to the record or raised new unsupported facts which did not meet the evidence requirements of summary judgment methodology.

By the Court.—Judgment and order affirmed.

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