

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2010

A. John Voelker
Acting 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. 2009AP2330
2010AP19**

**Cir. Ct. Nos. 2009CV114
2009CV7**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTRYWIDE HOME LOANS SERVICING LP,

PLAINTIFF-RESPONDENT,

V.

BARBARA J. ROHLF AND WILLIAM R. WILDE,

DEFENDANTS-APPELLANTS.

CITIMORTGAGE, INC.,

PLAINTIFF-RESPONDENT,

V.

WILLIAM R. WILDE AND BARBARA J. ROHLF,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed.*

APPEAL from a judgment of the circuit court for Green Lake County: ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Barbara Rohlf and William Wilde appeal from judgments of foreclosure on their homestead in Winnebago County (hereafter the Oshkosh home) and property they own in Green Lake County (hereafter the Markesan property). They argue that Countrywide Home Loans Servicing LP did not establish that it was the holder of the note and mortgage on the Oshkosh home, that CitiMortgage, Inc. was not entitled to summary judgment because of its role in the way its mortgage was procured on the Markesan property, and that summary judgment should not have been granted before they had a reasonable opportunity to conduct discovery. We affirm the judgments.

¶2 When reviewing a circuit court's grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08 (2007-08),¹ in the same manner as the circuit court. *Williams v. State Farm Fire and Cas. Co.*, 180 Wis. 2d 221, 226, 509 N.W.2d 294 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. *Crowbridge v. Village of Egg Harbor*, 179 Wis. 2d 565, 568, 508 N.W.2d 15, 17 (Ct. App. 1993). If so, the inquiry shifts to whether any factual issues exist. *Id.*

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Summary judgment must be entered if the affidavits and other proofs “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.* at 568-69 (quoting § 802.08(2)).

¶3 In May 2007 Wilde sought to extend his line of credit at his local bank to finance activities of his law practice.² The local bank was unable to provide Wilde the funds he needed. Wilde utilized the broker services of LoanStar Mortgage Corporation in an effort to obtain a line of credit. LoanStar applied for loans with CitiMortgage. CitiMortgage refused to loan funds based on a mortgage on the Oshkosh home.

¶4 On August 24, 2007, Rohlf and Wilde gave American Sterling Bank a mortgage on the Oshkosh home to secure payment on a note for \$141,000. Rohlf and Wilde were notified that Countrywide would service the loan and payments were made to Countrywide. Countrywide’s complaint alleges that Rohlf and Wilde made no payments after the July 1, 2008 payment. In their answer Rohlf and Wilde suggested that Countrywide had no legal interest in the mortgage, that further discovery might give rise to counterclaims, and that the promised line of credit was never provided and instead they were subject to a loan with “unexpectedly exorbitant closing costs” and not provided any significant working capital. Rohlf and Wilde moved to dismiss the complaint. In response Countrywide filed a copy of the recorded December 31, 2008 assignment of mortgage assigning the mortgage and note to Countrywide.

² A substantial portion of the appellants’ statement of facts lack record citations. “An appellate court is improperly burdened where briefs fail to properly and accurately cite to the record.” *Hedrich v. Board of Regents*, 2001 WI App. 228, ¶1 n.2, 248 Wis. 2d 204, 635 N.W.2d 650. “The parties will not be heard on reconsideration to challenge facts that this court properly gleaned from briefs without accurate citation to the pagination contained in the record.” *Id.*

¶5 On August 27, 2007, Rohlf and Wilde gave CitiMortgage a mortgage on the Markesan property to secure payment of a note for \$112,000. CitiMortgage's complaint alleges that Rohlf and Wilde made no payments after July 1, 2008. The answer to the complaint alleges that the failure to make payments resulted from misrepresentations and omissions of material fact by CitiMortgage and parties to the mortgage on the Oshkosh home in an effort to induce a transaction on terms Rohlf and Wilde could not meet to the benefit of others and as "fraudulent and predatory lending tactics as described ... in hearings before the U.S. Congress." A counterclaim asserted that LoanStar had not forwarded and CitiMortgage did not consider a comprehensive description of the varying cash flow of Wilde's law practice, that "outside" appraisers set the fair market value of both properties at a level 25% to 30% higher than previous lenders and assurances were made that the appraisals were well-founded, that the proceeds of the loans were used almost entirely to pay off existing liens on the properties and the "greater than represented closing costs," such that Rohlf and Wilde received only "nominal 'pocket money'" at closing, and that promised working capital and a line of credit were never arranged. Rohlf and Wilde asserted counterclaims for conspiracy to injure business contrary to WIS. STAT. § 134.10, intentional deceit, and strict liability misrepresentation.

COUNTRYWIDE'S MOTION FOR SUMMARY JUDGMENT

¶6 Countrywide's motion for summary judgment was supported by two affidavits establishing the execution of the note and mortgage, that Countrywide is the current holder of the mortgage and note, and the default. This constituted proof of the existence of the debt, note, and mortgage for purposes of summary

judgment, and of Countrywide's right to foreclosure. Rohlf and Wilde objected to the motion for summary judgment on various grounds.³ They did not file any evidentiary affidavits putting in dispute facts regarding the execution of the note and mortgage, assignment of the mortgage and note, or their default. The opponent of a summary judgment motion may not rest on mere denials but must affirmatively counter with evidentiary materials demonstrating a factual dispute. *Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. When the party opposing summary judgment fails to respond or raise an issue of material fact, summary judgment can be rendered on that basis alone. See *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983). Because Rohlf and Wilde did not rebut the prima facie showing of entitlement to a judgment of foreclosure, the circuit court properly granted the motion for summary judgment.

¶7 Rohlf and Wilde argue that summary judgment was not appropriate because Countrywide is not the real party in interest and it did not join American Sterling Bank as a party to the action as required by WIS. STAT. § 803.03(2)(a). They argue that assignment of the mortgage from the Mortgage Electronic Registration System (MERS), which served only as a "nominee" of American Sterling Bank, was ineffectual and that Countrywide never acquired the same rights of enforcement that American Sterling Bank has. They believe American Sterling Bank to be the current noteholder.

³ The circuit court found that the objection filed the day before the summary judgment hearing was not timely filed.

¶8 Rohlfs and Wilde rely on *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 167-68 (Kan. 2009), which held that MERS was not a necessary party to a foreclosure action because it had no tangible interest in the mortgage as nominee for the lender. As guideposts the Kansas Supreme Court looked to holdings of other states that because MERS is not a holder of the note, MERS's purported transfer of the note was ineffective. *Id.* at 167 citing to *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-24 (Mo. Ct. App. 2009), and *Saxon Mortg. Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion). Rohlfs and Wilde quote *Landmark Nat. Bank's* discussion of *Bellistri* to suggest that the note was not assigned to Countrywide by MERS. *Bellistri* was based on the lack of evidence in the record that the original holder of the note authorized MERS to transfer the note. See *Landmark Nat. Bank*, 216 P.3d at 167.

¶9 Here the mortgage designates MERS as the mortgagee and American Sterling Bank as the lender. MERS is also designated American Sterling Bank's nominee which allows it to act as American Sterling Bank but not possess any ownership rights. See *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 647 (9th Cir. 1958) (citation omitted) (“[t]he taking of title by a nominee of a principal or the conveyance of title by a nominee is a familiar device in stock transactions or in the transfer of other interests represented by documents” and “connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him”). The note references the mortgage as the controlling security instrument. The mortgage provides that the note and mortgage may be sold one or more times. The note and the mortgage securing the note are to be construed together. *Glover v. Marine Bank of Beaver Dam*, 117 Wis. 2d 684, 692, 345 N.W.2d 449 (1984).

The assignment of mortgage transfers both the note and mortgage.⁴ Rohlf and Wilde presented no evidence to refute the assignment of both the note and mortgage to Countrywide. They have failed to establish that MERS designation as nominee for American Sterling Bank did not include authority to assign the note. Moreover, “[t]he judgment of foreclosure and sale determines the parties’ legal rights in the underlying obligation.” *Id.* at 693. There is no risk that Rohlf and Wilde will be made to answer in a separate action on the note such that American Sterling Bank was a necessary party to the foreclosure action.

CITIMORTGAGE’S MOTION FOR SUMMARY JUDGMENT

¶10 CitiMortgage moved for summary judgment seeking a judgment of foreclosure and dismissal of Rohlf’s and Wilde’s counterclaims. The motion was supported by an affidavit establishing the execution of the note and mortgage and the default. This constituted proof of the existence of the debt, note, and mortgage for purposes of summary judgment, and of CitiMortgage’s right to foreclosure. Affidavits from Wilde were filed in opposition to the motion. Although the affidavits sets forth the factual background of Wilde’s credit practices and his contact and communication with broker LoanStar, it does not dispute the

⁴ Indeed the note is endorsed “Pay to the order of _____ Without Recourse American Sterling Bank.” Although the payee is not named in the endorsement, the note is payable to the bearer. Countrywide established that it holds the note. Rohlf and Wilde acknowledged that they were informed at the loan closing that Countrywide would be servicing the loan.

With respect to the assignment of the note, Countrywide includes in its appendix a “Notice of Loan Transfer” dated August 31, 2007 from American Sterling Bank to Rohlf and Wilde indicating that payments should be made to Countrywide. The document is not part of the record made in the circuit court. This court may not consider assertions of fact or documents which are not part of the record before the trial court. See *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

execution of the note and mortgage or the default. Again Rohlf and Wilde did not rebut the prima facie showing of entitlement to a judgment of foreclosure and the circuit court properly granted the motion for summary judgment.

¶11 Dismissal of the counterclaims was also appropriate. Wilde's affidavits and argument are based on the conduct of LoanStar. It was LoanStar that promised Wilde a line of credit. It was LoanStar that put together the financing Wilde sought. It was LoanStar that undertook the conduct Wilde characterizes as constituting fraudulent inducement to enter the unfavorable loans. It was LoanStar that made alleged false assurances about the timing of the loans and availability of funds.

¶12 Rohlf and Wilde did not establish any representation or promise by CitiMortgage that was not fulfilled by the lending of money. Wilde's averment that he believed LoanStar to be an agent of CitiMortgage is opinion only and is not evidentiary fact. *See Snider v. Northern States Power Co.*, 81 Wis. 2d 224, 231, 260 N.W.2d 260 (1977) ("opinions do not raise evidentiary facts. They are merely conclusions which are insufficient" to fend off summary judgment). The undisputed fact is that LoanStar operated as Rohlf's and Wilde's agent. Rohlf and Wilde went in search of a mortgage broker, all information to procure financing was provided to LoanStar, all communications were with LoanStar, and all demands for a line of credit were made to LoanStar. That LoanStar acted as Rohlf's and Wilde's agent is further demonstrated by the fact that when CitiMortgage refused to give financing secured by the Oshkosh home, another financial institution was used to complete the financial package. The allegedly fraudulent conduct of LoanStar does not create a claim against CitiMortgage or a defense to foreclosure. *See Law v. Grant*, 37 Wis. 548, 558 (1875) (a party who is

free from fraud is not answerable for the fraud of a third-party where the third-party was not its agent and the party did not know of the fraud).

¶13 The only factual averment that can be gleaned from Wilde's affidavits is that appraisals had been arranged and completed by an appraisal firm chosen by CitiMortgage and that CitiMortgage worked with the same appraisal firm on a regular basis.⁵ Even considering this statement in support of Rohlf's and Wilde's claim that they were economically damaged by overinflated appraisals, there is no other evidentiary support for this claim. Nothing establishes what the appraisals and real fair market value were. The suggestion of a claim is not sufficient to survive the motion for summary judgment.

REQUEST FOR TIME FOR DISCOVERY

¶14 Rohlf and Wilde argue that in both cases summary judgment should not have been granted because they were not entitled to an opportunity to conduct discovery. WISCONSIN STAT. § 802.08(4) 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.

¶15 Whether to grant a continuance to permit a party to conduct further discovery in response to a summary judgment motion is left to the discretion of the

⁵ This statement is found in the "SUPPLEMENTAL AFFIDAVIT SUBMITTED PER § 802.08(4), WIS. STATS." which Wilde filed on the day of the summary judgment hearing. The affidavit was not timely filed in opposition to the motion for summary judgment and served only to support Rohlf's and Wilde's request for additional time.

circuit court. *Mathias v. St. Catherine's Hospital, Inc.*, 212 Wis. 2d 540, 555, 569 N.W.2d 330 (Ct. App. 1997). A proper exercise of discretion is made if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See Jorgensen v. Water Works, Inc.*, 218 Wis. 2d 761, 772, 582 N.W.2d 98 (Ct. App. 1998).

¶16 Regarding the action filed by Countrywide, Rohlf and Wilde contend that the motion for summary judgment was filed within two months of the issue being joined and that no discovery had been conducted. The complaint was filed January 20, 2009, and Rohlf's and Wilde's answer was filed February 19, 2009. The motion for summary judgment was filed April 27, 2009. However, the motion for summary judgment was not heard until June 4, 2009. Rohlf and Wilde had more than just two months to conduct discovery and they did not attempt to do so. *See Alliance Laundry Sys. LLC v. Stroh Die Casting Co. Inc.*, 2008 WI App 180, ¶24, 315 Wis. 2d 143, 763 N.W.2d 167 (three weeks was reasonable notice and the failure to request more time under WIS. STAT. § 802.08(4) or present additional evidence during that period is the party's fault).

¶17 Rohlf and Wilde also argue that the circuit court said nothing about their WIS. STAT. § 802.08(4) request so there was no exercise of discretion. Rohlf's and Wilde's objection to the motion for summary judgment included a request for a scheduling order to include a reasonable amount of time for discovery before any further dispositive motions "in the event this cause of action goes forward." This appears to invoke § 802.08(4). However, the objection was not filed until the day before the summary judgment hearing and the circuit court found it was not timely. Further, the request under § 802.08(4) was not supported by any affidavits. A party cannot complain when he or she leaves the court in an

evidentiary vacuum. *Popp v. Popp*, 146 Wis. 2d 778, 796, 432 N.W.2d 600 (Ct. App. 1988). Where there was an opportunity to conduct discovery and no compliance with § 802.08(4), the circuit court properly exercises its discretion in denying a continuance on a motion for summary judgment. See *Van Straten v. Milwaukee Journal Newspaper-Publisher*, 151 Wis. 2d 905, 920, 447 N.W.2d 105 (Ct. App. 1989).

¶18 In the action filed by CitiMortgage, Rohlf and Wilde also characterize the motion for summary judgment as made at an early stage in the proceeding and before any discovery. CitiMortgage's complaint was filed January 5, 2009, but not served on Rohlf and Wilde until February 9, 2009. Their answer was filed February 24, 2009. CitiMortgage's motion for summary judgment was not filed until six months later, on September 1, 2009. The motion was not heard until November 13, 2009. Again there was opportunity for discovery. Rohlf and Wilde waited until the day of the hearing to file an affidavit requesting a continuance under WIS. STAT. § 802.08(4).

¶19 At the summary judgment hearing the circuit court denied the request for a continuance. It found there was no need for additional discovery because the potential claims were against broker LoanStar and not CitiMortgage and those claims did not constitute a legal basis to stall the foreclosure. Where discovery will not lead to a cause of action, it is a proper exercise of discretion to deny a party an opportunity to go on a discovery fishing expedition. See *Farmers Auto. Ass'n v. Union Pac. Ry. Co.*, 2008 WI App 116, ¶28, 313 Wis. 2d 93, 756 N.W.2d 461, *aff'd*, 2009 WI 73, ¶2 n.2, 319 Wis. 2d 52, 768 N.W.2d 596. Also, if discovery will simply confirm the facts already known, denial of a continuance is a proper exercise of discretion. See *Mathias*, 212 Wis. 2d at 555-56. The circuit

court properly exercised its discretion in denying the request for further discovery under WIS. STAT. § 802.08(4).

By the Court.—Judgments affirmed.

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

