

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2011

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 No. 2010AP60

Cir. Ct. No. 2008CV350

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PHH MORTGAGE CORPORATION,

PLAINTIFF-RESPONDENT,

v.

**ROBERT L. KOLODZIEJ AND DEBRA SNOBL, AS CO-PERSONAL
REPRESENTATIVES OF THE ESTATE OF MARCELLA L. KOLODZIEJ,
DECEASED,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Vilas County:
NEAL A. NIELSEN, III, Judge. *Reversed and cause remanded for further
proceedings.*

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 VERGERONT, P.J. This case arises out of a foreclosure action initiated by PHH Mortgage Corporation against Robert Kolodziej and Debra Snobl as co-personal representatives of the Estate of Marcella Kolodziej (collectively, the Estate). The circuit court granted summary judgment in favor of PHH, concluding that the undisputed facts show that PHH is the owner and holder of the note and mortgage, that there is a default, and that PHH may therefore foreclose on the property. On the Estate's appeal we conclude the documents on which PHH relies to establish that it is the owner and holder of the note and mortgage do not meet the requirements of WIS. STAT. § 802.08(3) (2009-10)¹ because they are not properly authenticated. We therefore agree with the Estate that PHH did not establish a *prima facie* case for summary judgment. However, we disagree that the Estate is entitled to dismissal of the complaint as a sanction against PHH. Accordingly, we reverse the summary judgment and remand for further proceedings.

BACKGROUND

¶2 In September 2006, Marcella Kolodziej executed a promissory note in favor of Citizens Bank, secured by a mortgage on her property in Lac du Flambeau, Wisconsin. At the time of her death, Marcella Kolodziej still owed money on the note. The Estate stopped making the required payments on the note, and PHH initiated this action to foreclose on the property.

¶3 PHH alleged in its complaint that it was the owner and holder of the note and mortgage, and that copies of the note and mortgage were attached. Both

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

attached documents identify Citizens Bank as the lender. The attached note is not endorsed.

¶4 PHH moved for summary judgment. PHH supported the motion with the affidavit of Marc Hinkle, a PHH vice-president. Hinkle averred that PHH was “the current owner and holder of [the] mortgage and note,” and that the note was in default. The Estate opposed the motion on the grounds that PHH did not have standing to pursue the action. The circuit court adjourned this hearing to allow PHH the opportunity to submit additional materials establishing its standing.

¶5 PHH then submitted the affidavit of PHH records custodian Mike Damelag. Attached to this affidavit was an assignment of mortgage indicating that the Mortgage Electronic Registration Service (MERS) assigned the property to PHH. The Estate objected to the adequacy of this affidavit to establish the admissibility of the assignment. The circuit court adjourned this hearing to give PHH an opportunity to meet this objection.

¶6 PHH’s next submission was the affidavit of Brian Quirk, one of PHH’s attorneys. Quirk averred that attached to the affidavit was a true and correct copy of the original note. The attached note contains two endorsements. One endorsement is to PHH by KariAnn Moore, for “Citizens Bank by PHH Mortgage Corporation The Attorney in Fact.” The other is an endorsement in blank by Rita Calendo, PHH Assistant Vice President.² The Estate objected to the adequacy of this submission and the court again adjourned the hearing, this time to

² By “endorsement in blank,” we mean that no person’s name appears following the words “PAY TO THE ORDER OF.”

give PHH the opportunity to provide evidence of Moore's authority to endorse the mortgage on behalf of Citizens Bank.

¶7 When PHH failed to submit the requested proof by the deadline and asked for an extension of time, the court granted the request over the Estate's objection. Both the Estate and PHH submitted additional materials that are unnecessary to describe for purposes of this appeal. Ultimately, the court granted PHH's motion for summary judgment.

DISCUSSION

¶8 On appeal, the Estate contends the circuit court erred in granting summary judgment in favor of PHH and, in the alternative, that the complaint should be dismissed with prejudice as a sanction because PHH has committed fraud on the court and conducted this litigation in bad faith.

I. Summary Judgment

¶9 The Estate argues that PHH failed to make a *prima facie* case for summary judgment for three reasons: the complaint fails to state a claim for foreclosure; the materials PHH submitted in support of its motion would not be admissible at trial as required by WIS. STAT. § 802.08(3); and, even if they would be admissible, they do not create a *prima facie* case for summary judgment.

A. Legal Standard

¶10 We review *de novo* the grant of summary judgment, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary

judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶11 Under summary judgment methodology, the first step is to determine whether the complaint states a claim for relief. *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. If the complaint does state a claim for relief and the answer joins issue, then the court considers the affidavits of the moving party to determine if they make a *prima facie* case for that party. *Id.* If they do, the court examines the affidavits of the opposing party to determine if there are genuine issues of material fact requiring a trial. *Id.*

B. Sufficiency of the Complaint

¶12 The Estate argues that the complaint does not state a claim for relief because it fails to show that PHH has standing to bring this action. “‘Standing’ is a concept that restricts access to judicial remedy to those who have suffered some injury because of something that someone else has either done or not done.” *Three T’s Trucking v. Kost*, 2007 WI App 158, ¶16, 303 Wis. 2d 681, 736 N.W.2d 239. We are to apply the standing requirement in a liberal manner, although plaintiffs must show that they suffered or were threatened with an injury to a legally protectable interest. *Krier v. Vilione*, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517.

¶13 PHH’s complaint alleges that it is the “current owner and holder of a certain note and recorded mortgage on real estate located in this county, true copies of which are attached hereto … and incorporated by reference.” The note and mortgage attached to the complaint both identify Citizens Bank as the lender and neither contains an endorsement. There are no allegations in the complaint that either the note or the mortgage was assigned to PHH.

¶14 The Estate argues that the terms of the documents are inconsistent with the allegations of the complaint and therefore the allegation that PHH is “the current owner and holder” must be ignored. *See Peterson v. Volkswagen of America, Inc.*, 2005 WI 61, ¶15, 281 Wis. 2d 39, 697 N.W.2d 61 (Documents attached to the complaint prevail over inconsistent allegations in the complaint.). Without that allegation, according to the Estate, the complaint does not allege facts showing that PHH has standing to bring this action.

¶15 We disagree that we must disregard the allegation that PHH “is the current owner and holder” of the attached note and mortgage. In determining the sufficiency of a complaint, the allegations in the complaint are to be liberally construed, with all reasonable inferences drawn in favor of the plaintiffs. *Scarpaci v. Milwaukee Cnty.*, 96 Wis. 2d 663, 669, 292 N.W.2d 816 (1980). The note states that the lender may transfer the note and “anyone who takes this note by transfer and who is entitled to receive payment under this Note is ... the ‘Note Holder.’” The note also states that the “Note Holder” may enforce the note. It is reasonable to infer from the allegations of the complaint and the incorporated documents that the documents are copies of the original note and mortgage signed by Marcella Kolodziej and that these were subsequently assigned to PHH. Viewed this way, the documents are not inconsistent with the allegation in the complaint that PHH is “the current owner and holder” of the note. The complaint need not specifically allege that the note and mortgage were assigned to PHH.

C. Sufficiency of PHH’s Submissions to Establish a Prima Facie Case

¶16 The Estate contends that PHH’s submissions do not establish a prima facie case because they do not meet the requirements for proper summary judgment submissions under WIS. STAT. § 802.08(3). PHH responds that the

mortgage, assignment of mortgage, and endorsed note are the only documents necessary to establish a *prima facie* case for summary judgment. The Estate does not dispute this and does not contend that the mortgage does not meet the requirements of § 802.08(3). Therefore, we focus our attention on the assignment of mortgage and the endorsed note. Because we conclude that neither of these documents meets the requirements of § 802.08(3), we do not address the Estate's arguments on other submissions.

¶17 WISCONSIN STAT. § 802.08(3) states that affidavits submitted in support of a motion for summary judgment must be “made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.” The party relying on the evidence must make a *prima facie* showing that the evidence would be admissible. *Gross v. Woodman’s Food Mkt., Inc.*, 2002 WI App 295, ¶31, 259 Wis. 2d 181, 655 N.W.2d 718. The burden then shifts to the opposing party to show that the evidence is inadmissible. *Id.* If a party challenges the admissibility of evidence, the circuit court must determine whether the evidence would be admissible. *Id.*

1. Assignment of Mortgage

¶18 The Estate contends that the assignment of mortgage, attached to Mike Damelag’s affidavit, is not properly authenticated by that affidavit or other means and therefore would be inadmissible at trial. Documents must be authenticated in order to be admissible. WIS. STAT. § 909.01. This requirement is satisfied “by evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* PHH contends that the assignment is authenticated as a record of regularly conducted activity under § 909.02(12) or as a record of a land conveyance under § 889.17. We disagree on both points.

¶19 Pursuant to WIS. STAT. § 909.02(12), the original or duplicate of a record of regularly conducted activity is self-authenticating if the record's custodian or other qualified person certifies, among other things, “[t]hat the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge” PHH does not explain how a mortgage assignment can be a “*record* of regularly conducted activity.” § 909.02(12) (emphasis added). Even if it were, Damelag’s affidavit does not show any basis for first-hand knowledge of how the assignment was made. *See Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶21, 324 Wis. 2d 180, 781 N.W.2d 503 (“qualified person” means a person who has first-hand knowledge of how the records were prepared and that they were prepared as part of the ordinary course of the business). Damelag avers that he is employed by PHH, he has custody of the regularly maintained business records of PHH, and these records are “kept in the course of the regularly conducted business activity” and “as regular practice.” There is no averment that refers specifically to the attached assignment of mortgage. The fact that Damelag is the custodian of the mortgage assignment and that the assignment is part of PHH’s regular business is insufficient to authenticate the assignment under § 909.02(12).

¶20 WISCONSIN STAT. § 889.17 provides that “[e]very instrument entitled by law to be recorded or filed in the office of a register of deeds, and the record thereof and a certified copy of any such record ... is admissible in evidence without further proof thereof....” PHH appears to read “every instrument” to mean an uncertified copy of the instrument, but that is not a reasonable reading. The copy must be certified. We note the certified copy option under § 889.17

tracks the self-authentication option under § 909.02(4) for public records.³ An uncertified copy of a public record is admissible evidence only if the document's contents are "testified to be correct by a witness who has compared it with the original." § 910.05. Damelag's affidavit makes no such averments.

¶21 Because the assignment of the mortgage is neither authenticated by averments in an affidavit that would suffice at trial nor self-authenticated by means of a certified copy, it cannot be considered in determining whether PHH made a *prima facie* case for summary judgment.⁴

³ WISCONSIN STAT. § 909.02 provides, in relevant part:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to any of the following:

....

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with sub. (1), (2) or (3)....

⁴ PHH contends we should not consider the Estate's argument on the assignment of the mortgage because, according to PHH, in the circuit court its counsel abandoned the argument that PHH failed to demonstrate that it held the mortgage. PHH cites to a portion of a hearing transcript in which the Estate's counsel stated: "Now, they can be the appropriate assignee of the mortgage, that may in fact be the case. But they have produced no evidence that they are the assignee of the debt. And as we make clear, that it what is necessary." We are not persuaded by PHH's argument. First, the quoted portion does not clearly show abandonment of this argument. Second, in subsequent hearings the Estate's counsel continued to make arguments addressing the validity of the assignment of mortgage, including the statement: "I have never conceded the assignment of mortgage is valid ... there is no evidence whatsoever." Finally, at a hearing subsequent to the Estate's counsel's alleged abandonment, the circuit court directed PHH to file a supplement affidavit as to the "[a]ssignment of note, and mortgage...."

2. Endorsed Note

¶22 The Estate asserts that the copy of the endorsed note, attached to Quirk's affidavit, is not authenticated because Quirk does not establish in the affidavit his personal knowledge regarding the note's authenticity and the note is not self-authenticating as a business record. PHH does not respond to these arguments or present alternative grounds for authentication. Instead, PHH contends that the endorsed note itself is not required as part of its *prima facie* case because, in its view, the Hinkle affidavit contains admissible evidence that PHH is the holder of the note.

¶23 In the following paragraphs we conclude that the Estate is correct that neither of the two grounds for authentication it mentions is established by Quirk's affidavit. We then discuss and reject PHH's position that the endorsed note is unnecessary for its *prima facie* case.

¶24 The testimony of a witness "with knowledge that a matter is what it is claimed to be" is one means of authenticating the endorsed note. WIS. STAT. § 909.015(1). Quirk avers that the original note is in his possession and that the attached copy "is a direct copy of the original Note." However, there is no averment that shows a basis for his personal knowledge that it is the original note. For example, Quirk does not aver that he witnessed Marcella Kolodziej or either of the endorsers sign the note. *Cf. Forbus v. City of LaCrosse*, 21 Wis. 2d 171, 174, 124 N.W.2d 66, 68 (1963) (attorney's affidavit relating facts received from witnesses does not properly put these facts before the court). Nor does he aver that he is able to identify the note based on his knowledge of its contents. *See Flejter v. Estate of Flejter*, 2001 WI App 26, ¶¶37-38, 240 Wis. 2d 401, 623

N.W.2d 552. We conclude that Quirk's affidavit is insufficient to authenticate the endorsed note under § 909.015(1).

¶25 As to self-authentication under WIS. STAT. § 909.02(12) for a record of regularly conducted activity, we have already discussed this in conjunction with the mortgage assignment. Again, we have the fundamental question whether a note, or an endorsed note, is a record of a regularly conducted activity. But, as we concluded with the mortgage assignment, even if this requirement is met, there is nothing in Quirk's affidavit to satisfy the remainder of § 909.02(12). Specifically, no averment shows that he has any first-hand knowledge of the making of the note or the endorsements. *See Palisades*, 324 Wis. 2d 180, ¶21.

¶26 Because PHH does not present any other basis for authentication, we conclude the endorsed note is not properly authenticated.

¶27 Turning to PHH's assertion that Hinkle's affidavit makes admissibility of the endorsed note irrelevant, we focus on the averment that PHH "is the current ... holder of [the] mortgage and note."⁵ PHH contends that this averment is admissible testimony and in itself establishes that PHH has the right to enforce the note. As relevant here, "holder" is a legal term that means "the person in possession of a [note] that is payable either to bearer⁶ or to an identified person that is the person in possession." WIS. STAT. § 401.201(2)(km). Thus, the term "holder" in Hinkle's affidavit is a legal conclusion. We disregard legal

⁵ Hinkle avers that PHH was "the current owner and holder" of the mortgage and note, but does not explain what "owner" adds to the concept of "holder" in this context. Accordingly, we confine our attention to the status of "holder."

⁶ A "bearer" is "a person in control of a [note] ... payable to bearer or endorsed in blank." WIS. STAT. § 401.201(2)(cm).

conclusions in summary judgment affidavits. *See Bilda v. Milwaukee Cnty.*, 2006 WI App 159, ¶48, 295 Wis. 2d 673, 722 N.W.2d 116. Therefore, Hinkle's affidavit does not substitute for the inadmissibility of the endorsed note. Given that the endorsed note is inadmissible because not authenticated, there is no factual showing that the note is payable either to bearer or to PHH, the person in possession.

¶28 Because PHH's submissions do not provide authentication for the mortgage assignment and for the endorsed note, its submissions do not make a *prima facie* showing that it is the holder of the mortgage and note. The court therefore erred in granting summary judgment in PHH's favor. This conclusion makes it unnecessary to address the Estate's argument that, even assuming these documents were authenticated, PHH still did not make a *prima facie* case for foreclosure.⁷

II. Sanctions

¶29 The Estate contends that PHH's complaint should be dismissed because PHH committed fraud upon the court and conducted this litigation in bad faith. The Estate's factual premise for these assertions appears to be the inference it draws from the submissions that PHH is not in fact the holder of the mortgage and note. We do not discuss the validity of this inference because the Estate's legal argument is undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). It is not clear whether the Estate is arguing that this

⁷ The Estate also contends that the circuit court erroneously exercised its discretion in allowing PHH to supplement its summary judgment filings several times. We do not address this argument because we are reversing the summary judgment on other grounds.

court should dismiss the complaint, or whether it contends that the circuit court erred in not dismissing the complaint. To the extent the Estate is arguing that this court should dismiss the complaint, it does not present any legal authority for us to do so. To the extent the Estate is arguing that the circuit court erred in not dismissing the complaint for this reason, it does not describe any motion it made to the circuit court with this request.

CONCLUSION

¶30 We reverse the summary judgment and remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed, and cause remanded for further proceedings.

Not recommended for publication in the official reports.

