COURT OF APPEALS
DECISION
DATED AND FILED

December 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1457-FT **Cir. Ct. No. 2010CV4657**

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

THE EQUITABLE BANK S.S.B.,

PLAINTIFF-RESPONDENT,

V.

THOMAS L. BELL, DIANE D. BELL AND EQUIFIRST CORPORATION,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas L. Bell, Diane D. Bell, and Equifirst Corporation have appealed from an order for judgment of foreclosure entered in favor of The Equitable Bank S.S.B. (Equitable). Pursuant to this court's order of July 14, 2011, and a presubmission conference, the parties have submitted memo

briefs. Upon review of those memoranda and the record, we affirm the order of the trial court.

¶2 The trial court granted summary judgment to Equitable, foreclosing on the Bells' personal residence on Elmwood Road in Elm Grove, Wisconsin. The Bells had borrowed money from Equitable to construct a home on land they owned on Patti Lane in Brookfield. The loan was secured by a mortgage on the Patti Lane property. When the Bells defaulted on the loan, Equitable obtained a foreclosure judgment on the Patti Lane property, waiving a deficiency judgment. Because $351,693.78 remained owing on the loan after the sheriff's sale of the Patti Lane property, Equitable commenced this action to foreclose on the Elmwood Road property.[1] Equitable relied on a real estate security agreement (RESA) executed by the Bells on January 17, 2007.[2] Equitable moved for and was granted summary judgment on the ground that the Elmwood Road property secured the loan to the Bells.

¶3 On appeal, the Bells contend that the trial court erred by granting summary judgment of foreclosure to Equitable. They contend that they submitted prima facie evidence that the underlying debt was discharged when they attached to their supplemental response to Equitable's motion a 1099-C federal tax form allegedly filed by Equitable with the Internal Revenue Service and sent to them.

[1] A copy of the order confirming the sheriff's sale of the Patti Lane property was submitted by Equitable as an exhibit in support of its motion for summary judgment. The order stated: "The balance owed on the Note and Mortgage is $351,693.78, which amount remains secured by the remaining property securing the debt, but no deficiency judgment is awarded against the Mortgagors."

[2] Paragraph four of the RESA indicates that it was signed on January 17, 2006. However, the Bells concede that this was an error, and that the signing date was January 17, 2007.

The form indicated that the debt for the Patti Lane property in the amount of $901,133.28 was canceled on October 11, 2010. The Bells also contend that summary judgment was unwarranted because the Elmwood Road property did not secure the note on which they defaulted. Alternatively, they contend that a material issue of fact exists as to whether the Elmwood Road property was additional collateral for the defaulted note.

¶4 We review a trial court's grant of summary judgment de novo. ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Upon review we apply the same standards as those used by the trial court, as set forth in WIS. STAT. § 802.08 (2009-10).[3] ***Krier***, 317 Wis. 2d 288, ¶14. If the pleadings state a claim and demonstrate that material factual issues exist, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. ***Id.*** Evidentiary facts as set forth in the affidavits or other proof of the moving party are taken as true if not contradicted by opposing affidavits or other proof. ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to

[3] All references to the Wisconsin Statutes are to the 2009-10 version.

judgment as a matter of law. ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶5 We conclude that the Bells waived their argument that the underlying debt was discharged as indicated in the 1099-C tax form. We further conclude that the affidavits and documents submitted by Equitable in support of its motion for summary judgment made a prima facie case that the Elmwood Road property secured the debt on which the Bells defaulted. Because the Bells failed to present affidavits or other proof that gave rise to material issues of fact as to whether the Elmwood Road property secured the loan, summary judgment was properly granted.

¶6 We first address the Bells' argument that they presented prima facie evidence that the underlying debt was discharged or canceled when they attached a copy of the 1099-C form allegedly filed by Equitable with the Internal Revenue Service and sent by Equitable to them. Equitable contends that the issue was waived because it was not raised in the trial court. We agree.

¶7 The record establishes that the Bells attached the 1099-C tax form to their supplemental response to Equitable's motion for summary judgment. However, they did not argue in any of their trial court briefs or motion papers or at the summary judgment hearing that the issuance of the 1099-C form discharged or canceled their debt to Equitable. Instead, they relied on the document to argue that Equitable had failed in its duty of good faith and fair dealing with regard to the matter, and was attempting to recoup losses that it was not entitled to recover

based on its waiver of a deficiency judgment in the Patti Lane foreclosure action.[4] The Bells did not argue that Equitable discharged their debt by filing the 1099-C form with the Internal Revenue Service and sending the form to them.

¶8 Courts generally will not consider an issue raised for the first time on appeal. ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). Because the Bells failed to raise their claim that the underlying debt was discharged or canceled by the 1099-C form in a clear and timely manner in the trial court, it is waived for purposes of appeal. *See* ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476. We address the matter no further.[5] *See* ***Greene v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657.

¶9 As set forth above, we also conclude that the documents submitted by Equitable with its affidavits prima facie established that the Elmwood Road property was additional collateral securing the debt on which the Bells defaulted. Equitable established that on October 23, 2006, it sent a loan commitment letter to the Bells, which approved their application for a loan in the amount of $900,500, at an interest rate of 7.125%. Section I of the commitment letter was captioned "UNDERWRITING CONDITIONS," and stated: "YOUR MORTGAGE WILL SECURE 2 PROPERTIES, THE SUBJECT PROPERTY AND 12905 ELMWOOD ROAD. SUBJECT TO 3 DAY RIGHT OF RESCISSION." The

[4] On appeal, the Bells have not pursued their claim that Equitable waived its right to bring this foreclosure action by waiving a deficiency judgment in the Patti Lane foreclosure. We therefore need not address that matter.

[5] This court may, in appropriate circumstances, address an issue that was waived in the trial court. *See, e.g.*, ***Apex Electronics Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998). We are not persuaded that any basis exists to do so here.

commitment letter also contained a section labeled "Expiration," which stated: "This commitment shall expire and Equitable reserves the right to rescind this commitment if not accepted within fifteen (15) days of the date of this letter, or in the event the transaction is not closed by 1/26/2007."

¶10 The Bells signed and accepted the October 23, 2006 commitment letter. On January 17, 2007, the Bells executed the RESA, identifying their Elmwood Road property as their homestead property and identifying themselves as customers. The RESA provided that each customer:

> 2. Grants Lender a continuing lien on the Property to secure all debts, obligations and liabilities arising out of credit previously granted, credit contemporaneously granted or credit granted in the future by Lender to any Customer, …, provided, that if granted primarily for personal, family or household purposes that parties agree in documents evidencing the transaction to be secured by this Agreement ("Obligations").

¶11 On January 17, 2007, the Bells also executed a document captioned "RELEASE AGREEMENT," which was subtitled "(Additional Collateral)." In the Release Agreement the Bells agreed to provide their Elmwood Road property as additional collateral for the $900,500 loan from Equitable that was secured by the Patti Lane property. In the Release Agreement, the Bells further stated that they had executed a note and mortgage "of even date herewith," and that they had "executed a Security Agreement of even date herewith, conveying the Additional Collateral and providing additional security for the Loan, hereinafter the Security Agreement."[6]

[6] The Release Agreement also provided that Equitable would issue a satisfaction of the security agreement releasing the additional collateral upon the Bells' payment of $400,000 and a release fee, subject to Equitable's reservation of the right to adjust the amount required for release.

¶12 On January 30, 2007, the Bells executed the mortgage on the Patti Lane property, and a note (the Note) in the amount of $903,000, payable at an interest rate of 7.25%. Paragraph 11 of the Note is captioned "UNIFORM SECURED NOTE" and states in part:

> In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note.

¶13 The Note, mortgage, RESA, and Release Agreement all reference the same loan number. It is undisputed that the Bells executed these documents, as well as the commitment letter. In the commitment letter, the Bells accepted that the loan from Equitable was conditioned on providing a security interest in both the Patti Lane and Elmwood Road properties. They reaffirmed this agreement when they executed the Release Agreement, expressly agreeing to provide the Elmwood Road property as additional collateral for the loan, which was identified by the same loan number as the loan number referenced in the Note. As indicated in the Release Agreement, they also executed the RESA on the same day as the Release Agreement, expressly granting Equitable a continuing lien on the Elmwood Road property.

¶14 Based on these uncontroverted documents, the trial court properly determined that the Elmwood Road property was additional collateral securing the loan on which the Bells defaulted. The Bells' arguments to the contrary are unavailing.

¶15 In contending that the RESA did not secure the debt set forth in the Note, the Bells rely on the language in the RESA that limited the security provided

by the Elmwood Road property to situations where the "parties agree in documents evidencing the transaction to be secured by this Agreement." However, as contended by Equitable, the requisite written documentation is present here. Both the commitment letter and the Release Agreement stated that the Elmwood Road homestead property was security for the loan to the Bells. In addition, as already noted, the Note, mortgage, RESA, and Release Agreement all refer to the same loan number, and thus to the same loan.

¶16 The Bells also contend that summary judgment was unwarranted because the Note did not specifically reference the RESA or state that the Elmwood Road property was provided as collateral. They contend that paragraph 11 of the Note unambiguously required that any collateral be identified in the Note or be granted by a security agreement dated the same date as the Note in order to constitute security for the debt. We disagree. Paragraph 11 of the Note merely provided that the Bank was protected from possible losses by the protections afforded in the Note itself and by any mortgage, deed of trust, or security instrument dated the same day as the Note. It did not state that the Bank was protected only as detailed in the Note or in a security instrument dated the same day as the Note. While the Bells did not sign the Note and mortgage until thirteen days after the date they signed the RESA and Release Agreement, Equitable submitted an affidavit indicating that a delay in signing the Note was necessary to afford the Bells their three-day right of rescission, since the Elmwood Road property was homestead property. Nothing in paragraph 11 of the Note provides a basis to conclude that the Bells' execution of the RESA and their agreement to provide the Elmwood Road property as additional collateral for the loan was invalidated merely because the RESA and Release Agreement were signed on a different date than the Note.

¶17 In concluding that reference in the Note to the RESA or the Elmwood Road collateral was unnecessary, we also point out that a promissory note is a unilateral instrument containing the express and absolute promise of the signer to pay to a specified person or bearer a definite sum of money at a specified time. ***United Finance Corp. v. Peterson***, 208 Wis. 104, 105, 241 N.W. 337 (1932). Because the Note was a unilateral promise to pay, there was no need for it to set forth the security for the loan or refer to the RESA. Moreover, while the Note was evidence of the Bells' debt, *see* ***Mitchell Bank v. Schanke***, 2004 WI 13, ¶41, 268 Wis. 2d 571, 676 N.W.2d 849, and the debt was secured by the RESA, the RESA did not require that the Note identify the Elmwood Road property as additional collateral. The RESA required only that, if the Elmwood Road property was to be security for a loan that was granted primarily for personal, family, or household purposes, the Bells had to agree in writing. As already discussed, the loan commitment and Release Agreement signed by the Bells, and their signature on the Note bearing the same loan number as the Release Agreement and RESA, constituted written confirmation of their agreement to provide the Elmwood Road property as additional collateral for the loan documented in the Note.

¶18 The Bells' remaining arguments are also without merit. They contend that the loan commitment made in the October 23, 2006 commitment letter expired on January 26, 2007, and thus was expired when the Note was signed on January 30, 2007. This argument provides no basis for relief. The RESA and Release Agreement were executed by the Bells before January 26, 2007. Most importantly, the Bells clearly elected to waive any contingency related to the closing date when they elected to execute the Note on January 30, 2007, to accept the loan proceeds, and to make payments for several years. *See* ***Godfrey Co. v. Crawford***, 23 Wis. 2d 44, 49, 126 N.W.2d 495 (1964) (a party to a

contract can waive a condition that is for his or her benefit). For similar reasons, no basis exists to conclude that the Bells are entitled to relief because the loan amount and the interest rate in the Note are slightly different from the loan amount and interest rate set forth in the commitment letter and Release Agreement. The amount of the loan and the interest rate are not at issue in this case. The sole issue is whether the debt was secured by the RESA and the Elmwood Road property. The summary judgment record clearly establishes that the debt set forth in the Note was secured by the RESA and the Elmwood Road property, regardless of any slight discrepancy in the interest rate and loan amount. The trial court therefore properly granted summary judgment of foreclosure.

By the Court.—Order affirmed.

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