

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2012

Diane M. Fremgen
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. 2012AP756-FT

Cir. Ct. No. 2009CV847

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ARCH BAY HOLDINGS, LLC-SERIES 2010A,

PLAINTIFF-RESPONDENT,

V.

DAVID L. GARTLAND,

DEFENDANT-APPELLANT,

**MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AND
DISCOVER BANK,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Columbia County:
ALAN J. WHITE, Judge. *Reversed and cause remanded for further proceedings.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. David Gartland appeals a judgment of foreclosure entered by the circuit court, which granted summary judgment in favor of Arch Bay Holdings, LLC—Series 2010A (“Arch Bay”).¹ On appeal, Gartland argues that the circuit court erred in granting summary judgment because an affidavit filed in support of Arch Bay’s motion does not show that the affiant has personal knowledge to establish the admissibility of attached records that are necessary to establish a prima facie case that the mortgage note is in default and that the amount alleged to be owed by Gartland is correct. We agree. We reverse the summary judgment, and remand for further proceedings.

BACKGROUND

¶2 GMAC Mortgage, LLC (“GMAC”) filed a foreclosure complaint alleging that David Gartland defaulted on a promissory note held by GMAC and secured by a mortgage on real estate in Columbia County. GMAC later assigned its interest in the mortgage to Arch Bay, and the circuit court entered an order substituting Arch Bay as the plaintiff in the foreclosure proceeding.

¶3 Arch Bay filed a motion for summary judgment, and Gartland filed a brief opposing the motion. In support of its motion, Arch Bay submitted an affidavit of one of its attorneys² and an affidavit of a person whose handwritten

¹ Pursuant to this court’s order of April 24, 2012, the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17 (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Arch Bay does not contend that its attorney’s affidavit supplies the evidence necessary to make out a prima facie case even if the Susan Ceduc affidavit is lacking.

name looks like Susan Ceduc,³ an employee of Marix Servicing, LLC (“Marix”). In the affidavit, Ceduc refers to Marix as a “loan servicer” and lists her title as “Contested Foreclosure Liaison.” Copies of the following documents are attached as exhibits to Ceduc’s affidavit: an assignment of mortgage from GMAC or another entity to Arch Bay; an unsigned letter addressed to Gartland and dated October 2, 2009, representing that his mortgage was “in default” with the “amount due and owing” allegedly totaling \$3,233.75; and a five-page document purporting to be a “history for account” of GMAC, reflecting payments made or not made on the mortgage loan. The circuit court granted summary judgment in favor of Arch Bay, finding that Gartland owed Arch Bay a total of \$161,695.89, plus postjudgment attorney’s fees and costs, and ordering a sheriff’s sale of the property after a six-month redemption period. Gartland now appeals.

STANDARD OF REVIEW

¶4 Whether the circuit court properly granted summary judgment is a question of law that we review de novo. *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294. Although we employ the summary judgment methodology de novo, this court has recognized that there may be a deferential standard of review for deciding whether an affidavit meets the requirements that it be made on personal knowledge and set forth such evidentiary facts as would be admissible in evidence, pursuant to WIS. STAT. § 802.08(3), because such decisions may involve discretionary evidentiary rulings by the circuit

³ The affiant is referred to as “Susan Ceduc” in the parties’ summary judgment briefs filed in circuit court and in their appellate briefs. However, the circuit court record index lists the affiant’s name as “Susan Leder.”

court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶13, 324 Wis. 2d 180, 781 N.W.2d 503.

¶5 However, in this case, as in *Palisades*, we conclude that it does not matter whether we employ a de novo or deferential standard of review. *See Palisades*, 324 Wis. 2d 180, ¶15. We conclude that, under no reasonable view of the Ceduc affidavit does it demonstrate that Ceduc has personal knowledge as to whether the attached records were made contemporaneously, who created the records, and whether they were made in the course of regularly conducted activity. *See id.*

DISCUSSION

¶6 Summary judgment is appropriate under WIS. STAT. § 802.08 only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Schmidt*, 305 Wis. 2d 538, ¶24.

¶7 Under WIS. STAT. § 802.08(3), affidavits in support of a motion for summary judgment “shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.” *Palisades*, 324 Wis. 2d 180, ¶10. The party submitting an affidavit on summary judgment need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies upon in the affidavit, but need only make a prima facie showing that the evidence would be admissible at trial. *Id.* “If admissibility is challenged, the court must then determine whether the evidence would be admissible at trial.” *Id.*

¶8 Gartland argues on appeal that the Ceduc affidavit does not establish a prima facie case for Arch Bay because the affidavit is insufficient in several

aspects. He asserts that the affidavit does not demonstrate that Ceduc has personal knowledge of the information contained in the attached records, nor does it establish a foundation as to how the records were created. Gartland further argues that, as an employee of Marix, and not of GMAC or Arch Bay, Ceduc provides no foundation in the affidavit for her alleged capacity to authenticate the assignment of mortgage to Arch Bay, an unsigned letter addressed to Gartland, and a document purporting to be an account history of Gartland's GMAC mortgage account. Gartland argues that, due to these insufficiencies in the affidavit, Arch Bay cannot establish that the mortgage note was in default and that the amount alleged to be owed is correct. Specifically, Gartland argues that, of the \$161,695.89 alleged to be owed, evidence in support of \$158,168.54 of that amount is contained solely in material attached to the Ceduc affidavit, in the form of the purported GMAC "history for account" document.

¶9 We have reviewed the Ceduc affidavit contained in the circuit court record. The affidavit states that Ceduc, "as a custodian of the businesses records" has "possession, control, and responsibility for the accounting and other mortgage loan records relating to the defendants' mortgage loan[,]'" including those records attached to the affidavit. The affidavit further provides that the statements within it are made based upon Ceduc's "personal inspection" of the records and from her "personal knowledge of how these records are created and kept and maintained." Arch Bay argues that this is adequate to establish the records as business records under WIS. STAT. § 908.03(6).

¶10 We disagree. As this court explained in *Palisades*, simply stating that the affiant is the current custodian of records is insufficient to satisfy the requirements of WIS. STAT. § 908.03(6). *Palisades*, 324 Wis. 2d 180, ¶20. A testifying custodian of records "must be *qualified* to testify that the records

(1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.” *Id.* The Ceduc affidavit does not meet these qualification requirements. Other than simply reciting that Ceduc has inspected the records, the affidavit does not state facts showing that Ceduc has personal knowledge of how the attached records were prepared and whether they were prepared in the ordinary course of GMAC’s business.

¶11 Arch Bay fails to point to other evidence in the record available to the circuit court for summary judgment purposes that would establish the amount alleged to be owed by Gartland on his mortgage loan. Therefore, we conclude that Ceduc’s affidavit does not establish a *prima facie* case for summary judgment because it does not reflect that she is a witness qualified, based on personal knowledge, to testify to the elements required for admissibility of the attached “history for account.”

¶12 Arch Bay asserts that, because Gartland did not object to substitution of Arch Bay in place of GMAC as plaintiff, and because a bankruptcy court granted Marix relief from the automatic stay, Gartland should be precluded from challenging the affidavit of Ceduc that Arch Bay submitted on summary judgment. We reject this argument because Arch Bay fails to establish that the issue of how much Gartland owes on the note and mortgage was actually litigated and determined in the prior proceeding, and whether the determination was essential to the judgment. *See Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, ¶¶37-39, 300 Wis. 2d 1, 728 N.W.2d 693 (discussing the analysis for issue preclusion).

¶13 Arch Bay also asserts that one of the exhibits attached to the Ceduc affidavit, the assignment of mortgage, was notarized and recorded and, therefore,

is admissible as a self-authenticating document under WIS. STAT. § 909.02. We note that, although the assignment of mortgage document appears to have been notarized and recorded, the photocopy attached to the affidavit does not appear to be a certified copy. We further note that Ceduc does not include any specific assertions in her affidavit as to whether the attached documents are true and correct copies of originals and, if so, how she obtained them and from whom.

¶14 Finally, Arch Bay argues that, if not admissible as business records, the records attached to the Ceduc affidavit are admissible as exceptions to the hearsay rule under WIS. STAT. § 908.03(7), (8), (14), (15), or (24). However, Arch Bay does not develop these arguments beyond a conclusory statement that the exceptions apply. This court need not consider arguments that are unsupported by adequate factual and legal citations or are otherwise undeveloped. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Here, Arch Bay does not develop its arguments regarding hearsay exceptions, other than the exception for business records under § 908.03(6), with legal authority or facts from the record and, therefore, we need not address those arguments.

CONCLUSION

¶15 In sum, Arch Bay fails, through the Ceduc affidavit and other evidence in the record, to make a prima facie case that the mortgage note was in default and that the amount alleged to be owed by Gartland was correct. Accordingly, we reverse the summary judgment and remand for further proceedings.

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

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

