

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2013

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. 2012AP1836

Cir. Ct. No. 2007CV242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE-HOLDERS
CWABS, INC. ASSET-BACKED CERTIFICATES SERIES 2006-14 C/O
BAC HOME LOANS SERVICING, L.P.,**

PLAINTIFF-RESPONDENT,

v.

DIANE G. CANO AND MARIO CANO,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

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

¶1 PER CURIAM. This is the second time this foreclosure action has been before this court. See *Bank of New York v. Cano*, No. 2010AP477,

unpublished slip op. (WI App Jan. 20, 2011). In our prior decision in this case, we reversed an order granting foreclosure to the Bank of New York¹ on summary judgment. On remand, the circuit court allowed the Canos to amend their answer to include affirmative defenses and counterclaims, granted partial summary judgment to the Bank, and held a bench trial on the Bank's foreclosure action and the Canos' remaining affirmative defenses and counterclaim. The court then granted foreclosure to the Bank.

¶2 The Canos contend that the circuit court erred by granting foreclosure to the Bank. Specifically, they contend that the court erred by: (1) requiring the Canos to present evidence of fraud in support of their unclean hands defense; and (2) relying on a misinterpretation of Mario Cano's testimony. We reject both contentions, and accordingly affirm the judgment of foreclosure.

Background

¶3 The Bank initiated foreclosure against the Canos in April 2007. The circuit court dismissed the action without prejudice to allow the parties to negotiate a repayment schedule, and reopened the action on the Bank's motion when those negotiations failed. The Bank obtained foreclosure by summary judgment in December 2009. In our decision reversing the foreclosure judgment, we held that the circuit court had properly reopened the foreclosure action, but that the Bank had not established a prima facie case for summary judgment. *See Cano*,

¹ The plaintiff in this foreclosure action, and thus the named respondent on appeal, is "Bank of New York as Trustee for the Certificate-Holders CWABS, Inc. Asset-Backed Certificates Series 2006-14 c/o BAC Home Loans Servicing, L.P." In this appeal, the Canos do not dispute that this is the proper party to seek foreclosure of their mortgage. For ease of reading, we refer to the respondent as the Bank.

No. 2010AP477, unpublished slip op. (WI App Jan. 20, 2011). We remanded the matter to the circuit court for further proceedings.

¶4 Following remand, the Canos amended their answer to assert affirmative defenses, including that the Bank lacked standing and had “committed intrinsic fraud,” and to raise counterclaims for fraud and violation of the Wisconsin Consumer Act. On the Bank’s motion for summary judgment, the circuit court dismissed the Canos’ counterclaim for a violation of the Wisconsin Consumer Act and their affirmative defense as to standing. The circuit court set the remaining issues for trial.

¶5 At the bench trial, the Canos stipulated to the authenticity of the mortgage held by the Bank on the Canos’ property and that they were in default on their mortgage payments. The parties also stipulated to the authenticity and admissibility of bank documents showing that the Canos’ mortgage, which was initially held by S&L investments, was transferred to Countrywide Home Loans, Inc., on September 1, 2006. That loan was later transferred to the Bank of America, N.A.

¶6 Mario Cano testified that the Canos made all required mortgage payments to S&L through April 2007, when the Bank initiated foreclosure proceedings. However, a Bank of America employee testified that the last payment received towards the Canos’ mortgage was a transfer of payments by S&L to Countrywide in February 2007, which brought the mortgage payments current only to December 2006.

¶7 The circuit court noted that the evidence indicated that the Canos had made the required payments to S&L through April 2007, but that S&L had not made the required transfer of payments to Countrywide. Thus, the court noted,

S&L, rather than the Bank or the Canos, was the entity that was really at fault. The court then addressed the equities, and determined that it was not equitable to hold the Bank responsible for S&L's wrongful conduct. The Canos appeal from the subsequent judgment of foreclosure.

Standard of Review

¶8 Foreclosure is an equitable remedy. *Harbor Credit Union v. Samp*, 2011 WI App 40, ¶19, 332 Wis. 2d 214, 796 N.W.2d 813. We review a circuit court decision in equity for an erroneous exercise of discretion. See *Production Credit Ass'n of Madison v. Jacobson*, 131 Wis. 2d 550, 555, 388 N.W.2d 655 (Ct. App. 1986). A circuit court properly exercises its discretion if it relies on the facts in the record and the proper legal standard to reach a reasonable determination. *Harbor Credit Union*, 332 Wis. 2d 214, ¶19.

Discussion

¶9 The Canos argue that the circuit court erred by requiring them to provide evidence of fraud in support of their unclean hands defense to the Bank's foreclosure action. They point out that the unclean hands defense requires only a showing that the plaintiff is seeking relief from harm that is the result of the plaintiff's own "wrongful" conduct. See *Security Pac. Nat'l Bank v. Ginkowski*, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987). The Canos assert that the circuit court applied the wrong legal standard by requiring the Canos to provide evidence of "fraud" rather than "wrongful" conduct.

¶10 In support, the Canos cite correspondence from the circuit court following its summary judgment ruling, in which the circuit court apparently sought to clarify the scope of the upcoming trial.² The Bank asserts that the court did not preclude the Canos from presenting their equitable arguments at trial and points out that the court did, in fact, allow the Canos to argue the equities at trial.

¶11 According to the parties, the court informed them of the following regarding the Canos' surviving claims:

[Counsel] argued that a fraud was committed on the court by a “robo-signer.” I ruled that the factors of this “fraud” could not be precluded through summary judgment methodology [and the Canos] would be put to [their] proof at trial (further warning that failure to establish fraud by law or fact could result in a finding of frivolousness.) Thus, [the Canos] must show fraud [and] as a result, “unclean hands” to preclude the equitable remedy of foreclosure.

¶12 At the outset, we note that the Canos' argument that the circuit court applied the wrong legal standard by requiring them to show proof of fraud to maintain an unclean hands defense is insufficiently developed. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992). The argument consists, in its entirety, of citation to the unclean hands doctrine and to the circuit court's correspondence, and then a conclusory statement that the Canos were unable to present any evidence of their unclean hands defense at trial. Accordingly, we need not address this argument further. *See id.*

² We note that the parties agree as to the content of the circuit court letter, and both include a copy of the letter in their appendices, but that the letter is not in the record. Our review is limited to the record, and we normally do not consider items outside the record. Here, because we determine that the letter does not establish that the court applied the wrong legal standard to the Canos' unclean hands defense, we will accept the parties' undisputed assertions as to the correspondence from the circuit court.

¶13 Additionally, we deny the argument, as best we understand it, on its merits. The Canos' amended answer raised "fraud" as an affirmative defense and as a counterclaim. The circuit court's letter to the parties following summary judgment apparently clarified that the Canos' claim of "fraud" had survived summary judgment. The court indicated that the Canos would be required to show proof of the claimed fraud at trial.³ The court did *not* state that it would *only* consider an unclean hands defense based on a claim of fraud; rather, the court was responding to the claims the Canos had raised. Significantly, the Canos do not point to any place in the record where the court excluded evidence that the Canos offered of unclean hands based on wrongful, but not fraudulent, conduct. Accordingly, we reject the Canos' contention that the circuit court required them to establish fraud in order to maintain an unclean hands defense.

¶14 Within this argument, the Canos also assert that the circuit court erred by granting foreclosure despite evidence that the Bank did have "unclean hands." We note that the Canos' assertion that they established the Bank's wrongful conduct at trial appears to contradict their argument that they were prevented from doing so. However, these sub-arguments are even less developed; and, to the extent we are able to understand and address these arguments, we reject them on the merits.

¶15 The Canos assert that the Bank did not engage in good faith negotiations with them before seeking to reopen this foreclosure action and that the mortgage documents are flawed. However, the Canos point to no evidence that the Bank acted in bad faith during settlement negotiations. As to the

³ It is undisputed that the Canos did not present any evidence of fraud at trial.

mortgage documents, the Canos assert only that “a delay in the notarization” of the assignment of their mortgage to the Bank renders it fundamentally flawed, asserting that the assignment was dated July 27, 2006, and notarized May 10, 2007. However, the assignment is dated and notarized May 10, 2007, with a reference to the original mortgage that was dated July 27, 2006. We are not persuaded that the circuit court erroneously exercised its discretion by granting foreclosure to the bank despite these claims of “unclean hands.”

¶16 Next, the Canos argue that the circuit court misinterpreted Mario Cano’s trial testimony. They cite the following statement by the circuit court:

Compelling here, is Mario’s testimony that he was aware of proper payment credit issues prior to foreclosure and that he was aware that Countrywide was the proper mortgage holder and that he even understood he was to deal with Countrywide in 2006 on an issue dealing with an [insufficient funds] check that was supposed to be applied to his mortgage.

In contrast, the Canos cite Mario’s testimony that he never received notice to direct his payments to Countrywide prior to foreclosure. Again, the Canos offer the conclusory argument that this requires reversal of the foreclosure judgment, without a sufficiently developed argument. Again, however, we also reject their argument as we understand it on the merits.

¶17 The circuit court found that neither the Canos nor the Bank had acted wrongfully. It found that Countrywide had sent notice to the Canos that the Canos’ mortgage with S&L was being transferred to that lender beginning September 1, 2006. That finding is not challenged on appeal. Rather, the Canos argue that Mario Cano’s testimony established that the Canos did not receive the notice Countrywide sent, and did not have actual knowledge of the mortgage transfer. However, the Canos do not explain how that fact renders the circuit

court's exercise of discretion erroneous. That is, we are not persuaded that the circuit court's finding that Mario Cano had actual notice of the transfer was relevant to the court's determination that the Bank did not act wrongfully. In sum, whether or not the Canos received Countrywide's notice or otherwise had actual notice of the transfer has no bearing on the circuit court's decision that the Bank did not act wrongfully, defeating the Canos' unclean hands defense. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

