COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 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. 2012AP2077 **Cir. Ct. No. 2012CV191**

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

GMAC MORTGAGE, LLC,

PLAINTIFF-RESPONDENT,

V.

JAMES A. POLEY,

DEFENDANT-APPELLANT,

YVONNE POLEY, FIA CARD SERVICES N.A., LANDMARK SERVICES COOPERATIVE AND NCEP LLC,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

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

¶1 BLANCHARD, P.J. In this foreclosure action, the circuit court granted summary judgment in favor of the mortgagee, GMAC Mortgage LLC. On appeal, mortgagor James Poley argues that the court should have stayed this foreclosure action as a result of a federal bankruptcy proceeding initiated by GMAC during the pendency of this action and, in any case, erred in granting summary judgment in favor of GMAC.

¶2 We conclude that the court did not err in determining that the bankruptcy proceeding did not prevent Poley from opposing summary judgment. We also conclude that the court properly granted summary judgment. We therefore affirm the decision of the circuit court in all respects.

BACKGROUND

¶3 In January 2012, GMAC filed a complaint for foreclosure, alleging that Poley had defaulted on a real estate mortgage and a note held by GMAC.[1] GMAC attached to the complaint a copy of the note, endorsed in blank, and an uncertified copy of the mortgage. On March 1, 2012, Poley filed an answer, denying most of GMAC's allegations.

¶4 On April 23, 2012, GMAC filed a motion for summary judgment. In support of this motion, GMAC submitted affidavits purporting to show that GMAC was the holder of the note at issue. Attachments to affidavits included a payment history ledger purporting to show default and a certified copy of the assignment of the mortgage from Mortgage Electronic Registration Systems, Inc.

[1] Although GMAC filed the circuit court action against James Poley and several other defendants, James Poley appeals as the sole appellant.

(MERS) to GMAC. Poley did not respond to the summary judgment motion with any papers or affidavits prior to or at the June 20, 2012 hearing on summary judgment.

¶5 After GMAC initiated this foreclosure action, but prior to the summary judgment motion hearing, Residential Capital, LLC, and certain of its affiliates, including GMAC, filed for bankruptcy in United States District Court for the Southern District of New York under Chapter 11 of the bankruptcy code. Pursuant to 11 U.S.C. § 362(a) (2012), a stay was automatically imposed on any actions brought against GMAC, as a debtor in the bankruptcy proceeding. However, the bankruptcy court issued an "Interim Order" on May 16, 2012 and a "Supplemental Order" on June 15, 2012, providing limited relief from the bankruptcy stay.[2] The interim order allowed "borrowers" to "assert and prosecute counter-claims related to the subject matter of the foreclosure complaint in connection with foreclosure proceedings" initiated by a debtor such as GMAC. The supplemental order superseded the interim order, allowing any "borrower" or "mortgagor," to "assert and prosecute direct claims and counter-claims relating exclusively to the property that is the subject of the loan owned or serviced by a Debtor, in defense of any foreclosure" initiated by a debtor such as GMAC.

¶6 On June 20, 2012, the circuit court held a hearing in this action on GMAC's summary judgment motion.[3] At that hearing, Poley asserted that he had

[2] A third, "Final Order" was issued on June 15, 2012. This order, however, stated that the Supplemental Order governed the applicability of the automatic stay to borrowers in foreclosure proceedings. We do not discuss the Final Order further.

[3] We note that page number six is missing from the eleven-page transcript of the hearing. However, neither party comments on this omission, and we conclude that we may ignore its absence based on the arguments raised on appeal.

not responded to GMAC's summary judgment motion because he could not do so without violating federal law. More specifically, his position was that the automatic stay triggered by GMAC's bankruptcy proceeding prevented Poley from responding to the summary judgment motion. The circuit court ordered the parties to brief the issue of whether the foreclosure action could proceed in light of the automatic stay and the bankruptcy orders providing limited relief from the stay. The circuit court gave Poley seven days to brief this issue and either "withdraw[] [his] objection" to the foreclosure action proceeding or "provide statutory and case law support as to why the automatic bankruptcy stay does apply [to the foreclosure action] and is still in place," and allowed GMAC seven days for a response.

¶7 Also during the summary judgment hearing, the circuit court addressed the substance of the summary judgment motion, specifically seeking information regarding Poley's defenses to summary judgment:

> THE COURT: …. Otherwise, as I understand it, you would have no defenses to the summary judgment motion, Mr. Peterson?
>
> [POLEY'S COUNSEL]: No, I do.
>
> ….
>
> … [I]f the Court looks at the … mortgage assignment, it's [assigned by MERS][4] to GMAC Mortgage, LLC. The original mortgage was [held by] Monona State Bank. And there's no indication in what has been submitted by the plaintiff that [MERS] has any interest in this mortgage document or had any interest in this mortgage document to be able to assign it.

[4] The transcript uses the term MRZ, not MERS, but there appears to be no confusion between the parties regarding the entity being referred to.

> THE COURT: … [D]oes GMAC Mortgage, LLC hold the original note?
>
> ….
>
> [GMAC'S COUNSEL]: Yes, Your Honor. [GMAC] actually provided it to our office, and we are now currently in possession of the note.
>
> THE COURT: That's the wet-ink version?
>
> [GMAC's COUNSEL]: I believe yes, Your Honor.
>
> THE COURT: … [I]f they've got the wet-ink version, what does it matter if [MERS] had any interest or not?
>
> [POLEY'S COUNSEL]: Well, it is my position and always has been my position that not only must the note be transferred but the mortgage must be transferred in conjunction with the note.

Counsel for GMAC argued in response that GMAC was a proper assignee of the mortgage. Separately, GMAC argued that it does not matter whether GMAC had shown a proper chain of assignments from Monona State Bank to MERS to GMAC, so long as GMAC had shown that it possesses the original note. At the end of this exchange, the circuit court asked that GMAC include, in its response to the new supplemental brief that Poley would be submitting, authority supporting GMAC's assertion that proof of the chain of assignment of the mortgage does not matter, given its possession of the note.

¶8 On June 22, 2012, prior to any additional filing by Poley, GMAC filed a supplemental brief with the circuit court. In a letter attached to this brief, GMAC asserted that, as an original matter, the automatic stay does not apply to Poley as the defendant in a foreclosure action. GMAC further contended that, even if the stay did apply, the bankruptcy court's orders allowed the foreclosure action to proceed. In this letter, GMAC also repeated its assertion that GMAC's

attorney, on behalf of GMAC, was in possession of the note. On June 29, 2012, GMAC supplied the circuit court with a certified copy of the assignment of mortgage from Monona State Bank to MERS to supplement the assignment of mortgage between MERS and GMAC already in the record.

¶9 In a letter submitted to the court on July 17, 2012, Poley repeated his position that he would not be filing "a response to [GMAC's] summary judgment motion" because the bankruptcy court had not "granted relief that would allow [Poley] to do so." At the same time, Poley argued in a brief that the circuit court "should not allow [the foreclosure action] to proceed until the bankruptcy court enters an order granting relief from the automatic stay that allows [Poley] to litigate all claims, defenses, and counterclaims in full" in the foreclosure action, and that "the burden should be placed on [GMAC] to obtain such an appropriate order."

¶10 On August 2, 2012, the circuit court granted GMAC's motion for summary judgment and entered an order and judgment of foreclosure against Poley. Poley appeals.

DISCUSSION

¶11 Poley contends that GMAC's bankruptcy proceeding automatically stayed all aspects of the pending foreclosure action, and that the bankruptcy court orders did not grant him relief from that stay. Poley makes two specific arguments regarding the stay. First, Poley argues that the circuit court did not have jurisdiction to interpret the bankruptcy court orders providing relief from the automatic stay, and, therefore, the circuit court was obligated to stay this action pending closure of the bankruptcy action, in the absence of clarification from the bankruptcy court specifically regarding the foreclosure action between GMAC and

Poley. Second, Poley argues that, in any case, the bankruptcy court orders did not provide relief from the automatic stay that would allow Poley to respond in opposition to GMAC's summary judgment motion, and it was therefore a violation of Poley's due process rights to force Poley to chose between violating the stay and opposing summary judgment.

¶12 Alternatively, Poley argues that, even if the circuit court could proceed to address the summary judgment motion following the filing of the bankruptcy, the court should not have granted summary judgment in favor of GMAC. This is so, Poley argues, because the note at issue was not a "negotiable instrument," and GMAC's prima facie case for summary judgment rests entirely on the premise that GMAC is the "holder" of the note as a "negotiable instrument." From this, Poley argues that the circuit court erred in granting summary judgment to GMAC, because GMAC did not make a prima facie case that it was entitled to enforce the note, and, therefore, Poley did not need to submit a response in opposition to GMAC's summary judgment materials. We reject each of Poley's arguments and affirm the decision of the circuit court.

I. The Automatic Stay and Bankruptcy Court Orders

¶13 Before addressing Poley's specific arguments regarding the automatic stay and bankruptcy court orders, we frame Poley's first argument in the context of this appeal. This is an appeal from a grant of summary judgment in which counterclaims play no role. As far as Poley explains his arguments on appeal, the first issue is whether Poley was, as he argues, precluded by the bankruptcy proceeding from submitting to the circuit court affidavits or other papers necessary to create a genuine issue of material fact, which could have prevented summary judgment in favor of GMAC. If he was so precluded, the

court erred in granting summary judgment. It is not pertinent to the summary judgment issue whether Poley could have separately made counterclaims against GMAC, because Poley does not point to any potential counterclaim that would have prevented summary judgment in favor of GMAC.

¶14 We provide this clarification because some of Poley's arguments on appeal seem to confuse whether he was prevented by operation of federal bankruptcy law (1) from opposing GMAC's motion for summary judgment or (2) from pursuing counterclaims against GMAC. It is true that some language in the orders granting limited relief from the stay allowed for the assertion of "direct claims and counter-claims … in defense of any foreclosure." However, this appeal is concerned only with whether the orders granted relief for Poley to respond in opposition to summary judgment. As discussed below, we construe the orders to have permitted "borrowers" or "mortgagors" such as Poley to answer and generally defend against foreclosure actions, including by opposing motions for summary judgment, with the obvious purpose of allowing debtors such as GMAC to resolve foreclosure actions during the pendency of the bankruptcy.

¶15 With this context in mind, we address the arguments that Poley makes regarding the effect of the bankruptcy proceeding. First, Poley argues that the circuit court lacked jurisdiction to interpret the bankruptcy court orders to determine whether the automatic stay applied. Second, Poley argues that the bankruptcy court orders did not provide relief from the automatic stay to allow Poley to respond in opposition to the summary judgment motion, and, therefore,

the court violated Poley's due process rights by proceeding to summary judgment. We reject each argument.[5]

A. State Court Jurisdiction

¶16 We first address Poley's argument that the circuit court lacked jurisdiction to interpret the bankruptcy court orders providing relief from the automatic stay in the context of this foreclosure action. Poley contends that the bankruptcy court had exclusive jurisdiction to determine whether the bankruptcy proceedings stayed this foreclosure action, and without such a bankruptcy court determination, the automatic stay precluded Poley from responding in opposition to GMAC's summary judgment motion.

¶17 Poley points to two sources to support the proposition that the circuit court lacked jurisdiction to interpret the bankruptcy court orders: an unexplained citation to 28 U.S.C. § 1334 (2012), and language in each order stating that the bankruptcy court "shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order." Poley does not sufficiently develop this argument. He fails to cite to any specific language in § 1334 that supports his assertion, and he does not explain the import of the language from the orders. Regarding the orders, he gives us no reason to conclude that the statement

[5] Poley makes a third, thinly developed argument of a different kind, namely, that the circuit court erred by failing to exercise its discretion because it did not issue a written decision on the effect of the bankruptcy court orders. Poley fails to explain how the circuit court's failure to issue a written decision regarding the bankruptcy court orders constitutes a failure to exercise its discretion. To the extent that the circuit court was obligated to interpret the bankruptcy court orders in order to proceed with the summary judgment motion, it implicitly did so by deciding the motion for summary judgment in favor of GMAC and entering a judgment of foreclosure. For the reasons explained in the text, upon de novo review, we conclude that this implicit decision was correct.

in the orders was not a simple assertion of jurisdiction by the federal court, as opposed to an assertion of exclusive jurisdiction regarding all issues, including stay issues. We need not entertain insufficiently developed arguments, and we resolve this issue against Poley on this basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶18 Moreover, even if we were to consider Poley's lack-of-jurisdiction argument, we would conclude that the circuit court had jurisdiction to determine whether the automatic stay applied to the foreclosure action. Pursuant to the statute regarding jurisdiction over bankruptcy proceedings, federal "district courts shall have *original but not exclusive jurisdiction* of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b) (emphasis added). Federal courts have interpreted this language to mean that state courts have concurrent jurisdiction to interpret the bankruptcy code to determine whether an automatic stay, triggered by the terms of the code, applies to an action in state court. *See, e.g.*, ***Diaz v. Texas***, 327 B.R. 796, 800-01 (Bankr. S.D. Tex. 2005) (state courts possess jurisdiction to determine whether a stay applies); ***Wisconsin v. Weller***, 189 B.R. 467, 471 (Bankr. E.D. Wis. 1995) ("The [Wisconsin] circuit court had jurisdiction to determine whether trial of the action pending before it was subject to the stay of § 362 of the Bankruptcy Code ...."). Moreover, courts in Wisconsin have concluded that state courts have jurisdiction to determine whether an automatic stay applies to a state court action and have exercised that jurisdiction. *See, e.g.*, ***GMAC Mortg. Corp. v. Grisvold***, 215 Wis. 2d 459, 471, 572 N.W.2d 466 (1998) ("[A] state court has jurisdiction to determine whether the action pending before it is subject to a stay under the Bankruptcy Code."); *see also* ***Kenosha Hosp. & Med. Ctr. v. Garcia***, 2004 WI

105, ¶¶45-47, 58, 274 Wis. 2d 338, 683 N.W.2d 425 (exercising jurisdiction to determine the applicability of an automatic stay).[6]

¶19 We conclude that Poley failed to develop an argument that the circuit court lacked jurisdiction to determine applicability of the stay, and that, in any case, the court had jurisdiction.

B. Application of the Automatic Stay and Supplemental Order

¶20 Poley's second argument regarding the bankruptcy court orders calls for an initial clarification. This opinion relies on the language from the bankruptcy court's supplemental order. While the wording varied between the supplemental and interim orders, Poley does not argue that the difference in language matters for purposes of this appeal. In fact, as Poley notes, the supplemental order by its terms superseded the interim order, and, according to the final order, governed the applicability of the automatic stay to borrowers or mortgagors in foreclosure proceedings. Therefore, we rely on the language of the supplemental order.

¶21 With this clarification, we address Poley's argument that the supplemental order did not provide relief from the automatic stay that would allow Poley to respond in opposition to GMAC's motion for summary judgment. According to Poley, by allowing the foreclosure action to proceed despite the fact

[6] The cases cited in the text stand for the proposition that state courts have the authority to determine whether an action is subject to a stay, which, in this case, entailed the interpretation of the supplemental order modifying the automatic stay. We discern no reason why a state court would have jurisdiction to interpret the language of 11 U.S.C. § 362, but not to interpret orders modifying the stay created by this statute, when determining whether a state court action is stayed by a bankruptcy proceeding. And, Poley provides no reason.

that the supplemental order did not relieve Poley from the stay, the circuit court violated Poley's due process rights by forcing him to choose between federal liability for violating the stay if he proceeded and foreclosure if he did not. Because we construe the supplemental order to have allowed Poley to oppose summary judgment, we conclude that the circuit court did not violate Poley's due process rights by allowing the foreclosure action to proceed.

¶22 We use the de novo standard to review the question of whether the automatic stay applies to this foreclosure action. *See* ***Grisvold***, 215 Wis. 2d 459, 471 ("The interpretation of a federal statute is an issue of law, which this court reviews de novo."). In addition, whether the automatic stay applies to this particular foreclosure action requires us to interpret an order of the bankruptcy court. Because the circuit court was in no better position to interpret the order than is this court, and because Poley does not argue for a different standard of review, we review the order independently of the circuit court.

¶23 We conclude that Poley was free to oppose GMAC's motion for summary judgment. As GMAC points out, it may be true that, even without any supplemental or clarifying order, an automatic stay pursuant to 11 U.S.C. § 362(a) does not prevent a mortgagor from defending against a foreclosure action that the debtor has initiated. In ***Martin-Trigona v. Champion Federal Savings & Loan Ass'n***, 892 F.2d 575 (7th Cir. 1989), the court held that:

> [T]he automatic stay is inapplicable to suits by the bankrupt ("debtor," as he is now called). This appears from the statutory language, which refers to actions "against the debtor," 11 U.S.C. § 362(a)(1), and to acts to obtain possession of or exercise control over "property of the estate," § 362(a)(3), and from the policy behind the statute, which is to protect the bankrupt's estate from being eaten away by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal the estate's assets and distribute them equitably among the creditors. The

> fundamental purpose of bankruptcy, from the creditors' standpoint, is to prevent creditors from trying to steal a march on each other, and the automatic stay is essential to accomplishing this purpose. There is, in contrast, no policy of preventing persons whom the bankrupt has sued from protecting their legal rights. True, the bankrupt's cause of action is an asset of the estate; but as the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is.

Id. at 577 (citations omitted). Thus, if we were to follow the interpretation stated in ***Martin-Trigona***, even absent the supplemental order, Poley was free to oppose GMAC's motion for summary judgment. Poley did not file a reply brief, and, thus, he does not respond to GMAC's characterization of ***Martin-Trigona***. Given Poley's lack of response, we may consider Poley to have conceded the proposition that the automatic stay did not prevent Poley from defending against the foreclosure action by responding in opposition to the summary judgment motion. *See* ***Apple Hill Farms Dev., LLP v. Price***, 2012 WI App 69, ¶19, 342 Wis. 2d 162, 816 N.W.2d 914 (appellant's argument may be deemed conceded where respondent fails to file a reply brief).

¶24 Regardless whether under ***Martin-Trigona*** the automatic stay, even without the supplemental order, allowed Poley to respond to GMAC's summary judgment motion, we construe the supplemental order to have explicitly allowed Poley to do so. The supplemental order provided limited relief from the stay to enable a "borrower" or a "mortgagor" to "assert … direct claims and counter-claims relating exclusively to the property that is the subject of the loan owned or serviced by a Debtor, in defense of any foreclosure ...."

¶25 The plain meaning of this language allows a "borrower" or a "mortgagor" in a foreclosure action to defend against that action. In the context of summary judgment, defending against a foreclosure action includes responding in

opposition to a motion for summary judgment. We therefore conclude that the supplemental order, by its terms, allowed Poley to respond in opposition to GMAC's motion for summary judgment.

¶26 We do not understand Poley to be arguing for an alternate interpretation of this language from the supplemental order. Rather, we understand Poley to be making two arguments as to why the supplemental order did not provide him relief from the stay. First, Poley appears to argue that the supplemental order did not permit him to oppose the summary judgment motion because he is not a "borrower" within the meaning of the order. Second, Poley appears to argue that the supplemental order did not provide relief from the stay in order to allow him to make the particular factual assertions or arguments that Poley sought to make in opposition to summary judgment. We reject each of Poley's arguments.

¶27 To the extent that Poley suggests that he is not a "borrower" within the meaning of the supplemental order, he does not fully develop an argument to this effect. Poley asserts that he does not concede that he is a "borrower," but fails to explain why he is not a "borrower." Poley's flat assertion that he is not a "borrower" is belied by the common sense meaning of the term. And, as we have noted, there is no ambiguity in the supplemental order to suggest that this court should search for an alternative or specialized meaning for the word "borrower." Moreover, Poley does not appear to argue that he is not a "mortgagor" within the meaning of the supplemental order, even though he would plainly appear to fit that term. Therefore, because Poley is both a "borrower" and a "mortgagor" of GMAC under a plain meaning reading of those terms, and because Poley does not provide

a developed argument as to why he is not a "borrower" or a "mortgagor," we conclude that the supplemental order provided him relief from the automatic stay.[7]

¶28 Turning to Poley's second argument regarding the supplemental order, he contends that, while it generally granted relief to borrowers to defend against a foreclosure action, it provided exceptions from that relief for particular types of claims against the debtor. This argument focuses on the following language in the supplemental order:

> [A]bsent further order of the Court, the automatic stay shall remain in full force and effect with respect to all pending and future Interested Party direct claims and counter-claims: (i) for *monetary relief of any kind* and of any nature against the Debtors; (ii) for *relief that if granted, would not terminate or preclude the prosecution and completion of a foreclosure* ….

(Emphasis added.) Poley appears to be arguing that, because this section of the supplemental order did not allow him to pursue monetary relief or relief that would not terminate the foreclosure action or preclude it from being prosecuted, the order did not provide him relief from the stay to oppose summary judgment.

¶29 This argument misses the mark. As we have explained above, the issue before this court is whether the automatic stay prevented Poley from

[7] It is unclear from the briefing, but Poley may mean to argue that he is not a "borrower" within the meaning of the supplemental order for the reason that GMAC is not the holder of the note that Poley's mortgage secures. If this is what Poley means to argue, it fails for a number of reasons. First, Poley fails to develop this argument. Second, in responding in this appeal to Poley's argument that he is not a "borrower," GMAC characterizes this argument in the same manner as we have characterized it in the text, and Poley did not file a reply brief. Thus, Poley does not contest this characterization. Finally, to the extent that Poley may be arguing that GMAC is not the holder of his note (and that Poley is, therefore, not a "borrower") because the note is not a "negotiable instrument," we explain elsewhere, in a different context, that we reject this argument.

opposing the summary judgment motion. Nothing in this section of the supplemental order precludes Poley from opposing summary judgment. First, in opposing summary judgment, Poley would not have been seeking monetary relief from GMAC. Second, in opposing summary judgment, Poley would not have been seeking relief that would have precluded prosecution and completion of the foreclosure. Indeed, such an opposition would have explicitly sought continued prosecution and completion of the foreclosure. Thus, this section of the supplemental order did not operate to prevent Poley from opposing summary judgment.

¶30 Accordingly, Poley was free to present to the court the materials that he argues the automatic stay prevented him from presenting, which he asserts would have avoided summary judgment. Because the supplemental order provided relief from the stay that allowed Poley to oppose summary judgment, his argument that the circuit court violated his due process rights fails.

II. The Note as a Negotiable Instrument

¶31 We understand Poley to be arguing that a note secured by a mortgage is not a "negotiable instrument," but instead is a "security instrument," and, therefore, GMAC did not make out a prima facie case for summary judgment by claiming possession of the note entitling GMAC to enforce it as a "holder." To clarify, Poley did not argue before the circuit court and does not argue on appeal that GMAC failed to provide sufficient proof that GMAC was the holder of the note at issue here. Instead, Poley appears to argue a purely legal point about the nature of notes secured by mortgages. The legal argument is that GMAC could not make a prima facie showing of its entitlement to enforce the note merely by showing that it possessed this "security instrument," and, therefore, Poley did not

need to respond with opposing materials. For this reason, Poley contends, the circuit court should have found that GMAC had failed to make out a prima facie case for summary judgment and should have denied GMAC's motion for summary judgment.

¶32 Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[8] We review a grant of summary judgment de novo, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). "Where, as here, the complaint states a claim for relief and the answer joins issue, we examine the moving party's affidavits to determine whether that party has made a prima facie case for summary judgment." ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718. If the moving party does make a prima facie case, "we then look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial." ***Id.***

¶33 Poley's argument turns on the definition of a negotiable instrument. Pursuant to WIS. STAT. § 403.104(1), as relevant to this appeal:

> "[N]egotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if all of the following apply:
>
> (a) It is payable to bearer or to order at the time that it is issued or first comes into possession of a holder.

[8] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> (b) It is payable on demand or at a definite time.
>
> (c) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain any of the following:
>
> 1. An undertaking or power to give, maintain or protect collateral to secure payment.

A negotiable instrument can be enforced by the holder of that instrument. WIS. STAT. § 403.301. A "holder" is, generally speaking, the person "in possession of" the negotiable interest, in this case, the note. *See* WIS. STAT. § 401.201(2)(km)1. If a note is endorsed in blank, it is payable to the bearer of the note. WIS. STAT. § 403.205(2). A security interest, on the other hand, must follow different requirements for assignment. *See* WIS. STAT. § 409.203(2).

¶34 We understand Poley's argument to run as follows. The note here is not a negotiable instrument under WIS. STAT. § 403.104(1)(c)1., because it "requires the borrower to take action beyond paying money [by requiring the borrower to inform the note holder if the borrower makes a prepayment] and requires reference to extrinsic writings," including the mortgage securing the note. Instead, because of these features, the note here is a security instrument within the meaning of WIS. STAT. ch. 409. Because the note is a security instrument and not a negotiable instrument, "GMAC could not rely on the Chapter 403 concepts of 'holder' … and endorsement in blank" to make a prima facie case that it is entitled to enforce the note as its holder.

¶35 We disagree. We first observe that the only argument Poley made before the circuit court in opposition to summary judgment was that Poley's mortgage was required to be transferred with the note in order for GMAC to be

able to proceed with foreclosure.[9] "Although this court engages in summary judgment review de novo, we nonetheless may apply waiver to arguments presented for the first time on appeal." ***Gruber v. Village of N. Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692 (citing ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977)). We could reject this argument as forfeited.

¶36 Instead, however, we move directly to the merits, and conclude that Poley fails to support his legal argument. Poley does not cite any legal authority for the general proposition that a note secured by a mortgage is not a negotiable instrument, but is instead a security instrument. This court has treated notes secured by mortgages as negotiable instruments. *See, e.g.*, ***PNC Bank, N.A. v. Bierbrauer***, 2013 WI App 11, ¶10, 346 Wis. 2d 1, 827 N.W.2d 124 (treating a note as a negotiable instrument in a foreclosure action). Further, as to this particular document, Poley does not explain why any of its features should cause us to conclude that it is not a note that should be treated the same as the notes underlying foreclosure actions in which courts have considered notes to be negotiable instruments. That is, beyond a conclusory statement, Poley does not explain how the fact that the note requires a borrower making a "prepayment" to inform the holder that it is doing so constitutes "an act in addition to the payment of money," rather than simply constituting one element of how payment is made

[9] While on appeal Poley does not renew the sole argument he made before the circuit court in opposition to summary judgment, that argument is easily rejected for at least two reasons. First, the transfer of the note carries the mortgage with it, even in regard to a real estate mortgage. *See* ***Dow Family, LLC v. PHH Mortg. Corp.***, No. 2013AP221, slip op. ¶26 (WI App Aug. 6, 2013) (doctrine of equitable assignment means that "the transfer of a note automatically transfers the security for the note, without the need for a written assignment," even in the case of real estate mortgages). Second, GMAC submitted certified copies of the assignments of the mortgage from the original lender, Monona State Bank, to MERS, and from MERS to GMAC.

under the note. And, Poley fails to persuade us that the fact that the note at issue here references a potential mortgage securing it negates its status as a negotiable instrument, given that WIS. STAT. § 403.104(1)(c)1. provides that a negotiable instrument can contain an "undertaking … to … give, maintain or protect collateral to secure payment."

¶37 Other than his new, not-a-negotiable-instrument argument, Poley does not make any other developed arguments on appeal objecting to GMAC's ability to enforce the note.

¶38 In summary, Poley does not convince us that GMAC failed to present a prima facie case for summary judgment, and Poley did not file any response in opposition to summary judgment. Therefore, the circuit court properly granted summary judgment in favor of GMAC.

CONCLUSION

¶39 For these reasons, we conclude that Poley was not precluded from responding to summary judgment due to GMAC's bankruptcy proceeding, and that the court properly granted summary judgment. We therefore affirm the circuit court's summary judgment of foreclosure.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.