COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2236 **Cir. Ct. No. 2011CV1622**

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

WELLS FARGO BANK, N.A.,

PLAINTIFF-RESPONDENT,

V.

MYZELL E. ALEXANDER AND JEAN R. ALEXANDER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Reversed and cause remanded.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Myzell and Jean Alexander appeal a circuit court judgment granting Wells Fargo's motion for summary judgment in Wells Fargo's action to foreclose on the Alexanders' note and mortgage. This case presents two issues: whether Wells Fargo has standing and is the real party in

interest entitled to enforce the note, and whether several documents attached to a Wells Fargo employee's affidavit submitted in support of Wells Fargo's motion for summary judgment are admissible under WIS. STAT. § 908.03(6) (2011-12),[1] the hearsay exception for records of regularly conducted activity. We conclude that Wells Fargo had standing and was the real party in interest to bring the foreclosure action, but its submissions do not make a prima facie case for summary judgment. Accordingly, we reverse and remand the case for further proceedings.

BACKGROUND

¶2 Wells Fargo filed a foreclosure action against the Alexanders, claiming to be "the current holder of a certain note, recorded mortgage and loan modification agreement" and attaching "true" copies of those documents to its complaint. The Alexanders answered, denying all allegations except ownership of the subject real estate, and also filed a counterclaim[2] alleging that Wells Fargo was not the "owner of the note" and was not the "holder of [the] mortgage."

¶3 Wells Fargo moved for summary judgment.[3] In support of its motion, Wells Fargo submitted one affidavit, from Wells Fargo employee Mary Ellen Brust, which had five documents attached. Brust averred as follows:

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

[2] At the summary judgment motion hearing, the circuit court noted that "all the parties acknowledge [the counterclaim] is really a matter of defense."

[3] Wells Fargo also moved for sanctions, arguing that the Alexanders' defenses and counterclaim lacked factual support. The circuit court denied the motion and the parties do not raise this issue on appeal.

1. I am employed by Wells Fargo Bank, NA as Vice President of Loan Documentation.

2. I have been so employed at all times material hereto.

3. I have carefully reviewed all servicing records and the Note and Mortgage relating to the mortgage loan which is the subject of this action, and I make this affidavit from my own personal knowledge.

4. Wells Fargo Bank, N.A. is the current holder of the original Note relating to the mortgage loan which is the subject of this action, and is the servicer of the mortgage loan.

5. Attached hereto and incorporated by reference as Exhibit 1 is a true and complete copy of the original Note at issue in this lawsuit.

6. Attached hereto and incorporated by reference as Exhibit 2 is a true and complete copy of the original Mortgage at issue in this lawsuit.

7. Attached hereto and incorporated by reference as Exhibit 3 is a true and complete copy of the Assignment of the original Mortgage at issue in this lawsuit.

8. Myzell and Jean Alexander ("the Alexanders") are the current record owners of the property at issue in the above-captioned matter, and have defaulted under the terms of the Note and Mortgage by failing to make monthly installment payments due on and after January 1, 2011.

9. Effective with the installment payment due on January 1, 2011, the Alexanders' mortgage loan account was in default.

10. Attached hereto and incorporated by reference as Exhibit 4 is a true and complete copy of the letter sent by Wells Fargo to the Alexanders dated February 6, 2011 notifying them of their default.

....

12. Attached hereto and incorporated by reference as Exhibit 5 is a true and complete copy of the payment history ledger for the mortgage loan account at

> issue in the above-captioned matter. Each entry on this ledger is made contemporaneously with each transaction's occurrence and in the course of regularly conducted activity.

¶4 Exhibit 1 to Brust's affidavit, the "true and complete copy of the original Note," purports to show that on May 17, 2005, the Alexanders executed a promissory note in favor of MIT Lending. The note has two undated endorsement stamps on its last page. One endorsement stamp states: "FOR VALUE RECEIVED, Pay To The Order of Wells Fargo Bank, N.A. Without Recourse: MIT LENDING" and is signed by "Linda Kuoppala, Assistant Secretary." A second endorsement stamp on the same page states: "WITHOUT RECOURSE PAY TO THE ORDER OF Wells Fargo Bank, N.A." and is signed by "Deanna Martin, Vice President."

¶5 Exhibit 2 to Brust's affidavit, the "true and complete copy of the original Mortgage," purports to show that, also on May 17, 2005, the Alexanders entered into a mortgage with Mortgage Electronic Registration Systems, Inc. (MERS), acting as nominee for MIT Lending.

¶6 Exhibit 3 to Brust's affidavit, the "true and complete copy of the Assignment of the original Mortgage," purports to show that MERS, as nominee for "MIT Lending, its successors and assigns," assigned and transferred to Wells Fargo "all beneficial interest" under the mortgage with the Alexanders on May 4, 2011, approximately four weeks after Wells Fargo filed its foreclosure action against the Alexanders. The assignment of mortgage was recorded with the register of deeds office on May 10, 2011.

¶7 Exhibit 5 to Brust's affidavit, the "true and complete copy of the payment history ledger for the mortgage loan account," purports to show the Alexanders' payment history from June 2005 and to September 2011.

¶8 After Wells Fargo filed its motion for summary judgment, the Alexanders, through their counsel, deposed Brust. After Brust's deposition, the Alexanders responded to Wells Fargo's motion for summary judgment,[4] arguing that Wells Fargo failed to make a prima facie case for summary judgment. Specifically, the Alexanders maintained that Wells Fargo did not have standing and was not the real party in interest to bring the foreclosure action, arguing that Wells Fargo was not the owner of the note and mortgage at the time of filing.

¶9 The Alexanders also argued that Brust's affidavit lacked a sufficient foundation as to whether Brust had the requisite personal knowledge for her averments and the attached exhibits to be admitted into evidence, and that her deposition testimony showed that Brust was not a records custodian or other qualified witness to testify about the facts in her affidavit or lay a foundation for the documents attached to her affidavit to be admissible under WIS. STAT. § 908.03(6).

¶10 At the motion hearing, Wells Fargo's counsel presented the original note and mortgage and certified copies of the mortgage and assignment of mortgage to the court. After considering the parties' arguments, the circuit court granted summary judgment in favor of Wells Fargo, concluding that Wells Fargo

[4] The Alexanders moved the court to accept their response to Wells Fargo's motion for summary judgment approximately two weeks later than the deadline set forth in the circuit court's March 26, 2012 scheduling order. The circuit court found excusable neglect and allowed the Alexanders response.

had standing to bring the action, that Wells Fargo made a prima facie case for summary judgment, and that the Alexanders did not present any evidence creating a material factual dispute. The Alexanders now appeal.

DISCUSSION

¶11 It is well established that we review a grant of summary judgment de novo, employing the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. First, we examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. ***Id.*** If they do, we then examine the opposing party's submissions to determine whether material facts are in dispute entitling the opposing party to a trial. ***Id.*** A party is entitled to summary judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 On appeal, the Alexanders maintain that Wells Fargo did not make a prima facie case for summary judgment. First, the Alexanders contend that Wells Fargo did not have standing and was not the real party in interest to file the foreclosure action, because Wells Fargo "was not the holder of the Note, Mortgage, and Loan Mod[ification]" on the date of filing. Second, the Alexanders argue that Brust's affidavit does not set forth evidentiary facts that would be admissible in evidence, and that her deposition testimony demonstrates that Brust lacks the personal knowledge necessary to lay the proper foundation under WIS. STAT. § 908.03(6) to render the attached documents admissible. We address each argument in turn.

A. Standing and Real Party in Interest

¶13 Before we analyze the merits of the Alexanders' challenge to Wells Fargo's legal ability to bring the foreclosure action, we note that the Alexanders appear to conflate the legal concepts of standing and being a real party in interest. 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. A real party in interest is "one who has a right to control and receive the fruits of the litigation." ***Mortgage Assocs., Inc. v. Monona Shores, Inc.***, 47 Wis. 2d 171, 179, 177 N.W.2d 340 (1970). Though standing and the real-party-in-interest requirements are distinct legal concepts, both "'are used to designate a plaintiff who possesses a sufficient interest in the action to entitle him to be heard on the merits.'" ***Weissman v. Weener***, 12 F.3d 84, 86 (7th Cir. 1993) (quoted source omitted). Applying both doctrines, we conclude that Wells Fargo had standing and was the real party in interest.

¶14 We first address the issue of standing. Standing should be construed liberally, not narrowly or restrictively. ***Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.***, 2011 WI 36, ¶38, 333 Wis. 2d 402, 797 N.W.2d 789. Though the supreme court has acknowledged that the terminology used in standing cases often turns on the nature of the case, the "basic thrust" of all the standing cases depends on:

> (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.

Id., ¶40 (internal footnotes omitted).[5] "The essence of the question of standing ... is whether there is an injury and whether the injured interest of the party whose standing is challenged falls within the ambit of the statute or constitutional provision involved." ***Id.***, ¶54. "[A] court determines whether the asserted interest of the party whose standing is challenged is to be recognized by the court on the basis of the facts and relevant legal principles." ***Id.***, ¶56.

¶15 In this case, the relevant legal principles are the statutes governing the transfer and enforcement of negotiable instruments, located in WIS. STAT. § 401.101 *et. seq.,* Wisconsin's adoption of the Uniform Commercial Code. A person entitled to enforce a negotiable instrument includes the "holder" of the instrument. WIS. STAT. § 403.301. Generally speaking, a "holder" is the person in possession of the negotiable instrument, in this case the note. WIS. STAT. § 401.201(2)(km)1.

¶16 Here, Wells Fargo alleged in its complaint that it "is the current holder of a certain note" and "a true copy of the note is attached hereto ... and is incorporated by reference." The two endorsements on the note, while undated, both are paid to the order of Wells Fargo Bank, N.A. In response to the Alexanders' counterclaim (which was later properly characterized as a defense), Wells Fargo produced the original note at the hearing on the motion for summary judgment, thereby providing evidence in support of its assertions set forth in its

[5] The Alexanders argue that "[w]ithout standing a court does not have jurisdiction and does not have authority to act," and that "standing is to be determined as of the commencement of suit," citing ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 570 n.5 (1992). However, unlike federal courts, Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite. ***Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.***, 2011 WI 36, ¶40 n.18, 333 Wis. 2d 402, 797 N.W.2d 789.

complaint and proving its standing. *See* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.15 (3d ed. 2008) ("Adequate pleading is not enough. If the facts are disputed, the plaintiff has the burden of proving standing. The defendant can insist that a factual inquiry into standing be made before trial. Many cases have suggested that summary-judgment procedure is appropriate for this purpose."). We conclude that Wells Fargo proved its standing by demonstrating it was entitled to enforce the note as the holder in possession of the original note.

¶17 We turn now to the real-party-in-interest requirement and conclude that Wells Fargo was the real party in interest at the time of filing. As we previously explained, a real party in interest is "one who has a right to control and receive the fruits of the litigation." ***Mortgage Assocs.***, 47 Wis. 2d at 179. First, Wells Fargo, as the holder of the note, was entitled to its enforcement, and could exercise and control such enforcement by filing a foreclosure action. *See* WIS. STAT. §§ 401.201(2)(km)1., 403.301. Second, Wells Fargo had the right to receive the fruits of the litigation, because the common law principle of equitable assignment provides that the transfer of a note carries the mortgage with it. *See* ***Tidioute Sav. Bank v. Libbey***, 101 Wis. 193, 196, 77 N.W. 182 (1898) ("The rule is that the transfer of a note carries with it all security without any formal assignment or delivery, or even mention of the latter."); ***In re Edwards***, Case No. 11-23195, 2011 WL 6754073, *7 (Bankr. E.D. Wis. Dec. 23, 2011) ("Under this view, long established in Wisconsin law, the Mortgage is equitably assigned when the Note is endorsed and negotiated to its current holder.").

¶18 The Alexanders argue that the assignment of mortgage to Wells Fargo approximately four weeks after the date on which Wells Fargo commenced the foreclosure action demonstrates that Wells Fargo was not the real party in

interest at the time it commenced its lawsuit. However, the mortgage was already *equitably* assigned to Wells Fargo – because it had already passed to Wells Fargo along with the note – at the time of the note's transfer. *See* ***Carpenter v. Longan***, 83 U.S. 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity"); ***Muldowney v. McCoy Hotel Co.***, 223 Wis. 62, 65-66, 269 N.W. 655 (1936) ("the purchase of a note or debt secured by a mortgage carries with it the lien of the mortgage, because of which, in the absence of any formal assignment of the latter to the purchaser, he is considered the equitable owner thereof and of the security afforded thereby"). Therefore, the later assignment of the mortgage is irrelevant for purposes of standing.

B. Brust's Affidavit and Deposition Testimony

¶19 After concluding that Wells Fargo had standing and was the real party in interest to bring the foreclosure action, we must now address whether Wells Fargo made a prima facie case for summary judgment with Brust's supporting affidavit and deposition testimony. 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." WIS. STAT. § 802.08(3). "[T]he party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit [but rather] need only make a prima facie showing that the evidence would be admissible at trial." ***Palisades***, 324 Wis. 2d 180, ¶10. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. WIS. STAT. § 802.08(3).

¶20 As previously stated, Brust's affidavit had five attachments: a note, a mortgage, an assignment of mortgage, a letter notifying the Alexanders that their mortgage was in default, and a payment history ledger. We first address the admissibility of the note, mortgage, and assignment of mortgage, because their admissibility analysis differs from the admissibility analysis for the notice-of-default letter and the payment history ledger.

1. Note, Mortgage, and Assignment of Mortgage

¶21 The Alexanders contend that Brust's affidavit does not provide a proper foundation for admissibility of the note, mortgage, and assignment of mortgage under the hearsay exception for regularly recorded activity, WIS. STAT. § 908.03(6). However, as we explain below, those documents are not hearsay, and therefore the admissibility of those documents does not depend on any hearsay exception.

¶22 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). The "consensus rule" is that "contracts, including promissory notes, are not hearsay when they are offered only for their legal effect, not 'to prove the truth of the matter asserted.'" ***Bank of America v. Neis***, 2013 WI App 89, ¶49, ___ Wis. 2d ___, ___ N.W.2d ___ (quoted source omitted). In ***Neis***, this court concluded that a certified copy of a mortgage, a self-authenticating assignment of mortgage, and an original note produced at the summary judgment hearing were not hearsay, because the proponent of the evidence was not offering the documents for their truth but rather for their legal effect. ***Id.***, ¶¶49, 52.

¶23 Similarly, in this case, Wells Fargo submitted the note, mortgage, and assignment of mortgage not to prove the truth of some fact asserted in the documents, but to show the documents' legal effect, that is, Wells Fargo's rights with respect to foreclose on the note and mortgage. Therefore, the documents are not hearsay and their admissibility does not hinge on the hearsay exception for records of regularly conducted activity.

¶24 Apart from their hearsay argument, the Alexanders make no other developed arguments on appeal directed to the admissibility of the note, mortgage, and assignment of mortgage.[6]

2. Notice-of-Default Letter and Payment History Ledger

¶25 We turn now to the issue of whether Brust's affidavit and deposition testimony made a prima facie case that the remaining attached documents, the notice-of-default letter and the payment history ledger, are admissible. This issue requires examination of the hearsay exception for records of regularly conducted activity. To fall within this exception, the record must be:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a

[6] At the hearing on Wells Fargo's motion for summary judgment, Wells Fargo's counsel submitted to the court the original note, the original mortgage, and a certified copy of the mortgage and assignment of mortgage. We observe that proffering evidence at a hearing on a motion for summary judgment may not comply with the requirements of the summary judgment statute, WIS. STAT. § 802.08, but the parties do not raise this issue on appeal and we decline to address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

> statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

WIS. STAT. § 908.03(6).

¶26 In other words, "a testifying custodian 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." ***Palisades***, 324 Wis. 2d 180, ¶20. To be qualified, the witness must have personal knowledge of how the records were made and how they were prepared in the ordinary course of business. ***Id.***, ¶21.

¶27 This court recently applied the ***Palisades*** standards in ***Neis***, 2013 WI App 89. In ***Neis***, a Bank of America employee submitted an affidavit in support of the Bank's motion for summary judgment, to which a payment history, notice of intent to accelerate, and account information statement were attached.[7] ***Id.***, ¶7. The employee in ***Neis*** averred:

> I am employed by [Bank of America] as a[n] AVP [assistant vice president], Operations Team Lead. I am familiar with the record keeping practices of [Bank of America]. I have received training on the computer systems used by [Bank of America] to service borrowers' loans, understand the codes used in those systems, and have personal knowledge of [Bank of America]'s computer system, including how information is made and kept in that system.

[7] Copies of the note and mortgage were also attached to the affidavit in ***Neis***, but the court there, as here, ruled separately on the admissibility of those documents, concluding that they were not hearsay and their admissibility did not depend on WIS. STAT. § 908.03(6). ***Neis***, 2013 WI App 89, ¶49.

Id., ¶25. In addition, and specifically with regard to the payment history, the notice of intent to accelerate, and the account information statement, the employee averred that she had "personal knowledge of [Bank of America]'s procedures for creating these records" and, for each document, recited the requirements of WIS. STAT. § 908.03(6). ***Neis***, 2013 WI App 89, ¶25.

¶28 The ***Neis*** court held that the employee's averments made a prima facie showing under WIS. STAT. § 908.03(6) that she had personal knowledge of how the three documents were prepared or created, and that they were prepared in the ordinary course of Bank of America's business activities. 2013 WI App 89, ¶32. Specifically, the requisite personal knowledge was shown by the employee's averments that "[the three documents] were each 'taken from [Bank of America's] business records,'" that "she has personal knowledge of Bank of America's '*procedures for creating*' those records," and that "'it is the regular practice of [Bank of America] to make such records." ***Id.***, ¶31 (alteration in original). Notably, the court found that these averments, "*in combination with [the employee's] more general averments in the preceding paragraphs of her affidavit*," were sufficient to make the prima facie showing. ***Id.*** (emphasis added). In sum, the affidavit did "more than merely parrot the statute's requirements or make legal conclusions" and contained "sufficient factual assertions to make a prima facie showing that those three documents are admissible under § 908.03(6)." ***Id.***, ¶33.

¶29 The ***Neis*** case is distinguishable from this case, because, unlike the bank employee's affidavit in ***Neis***, Brust's affidavit here offers no averments asserting either general personal knowledge that is sufficient or specific facts showing that she has sufficient personal knowledge.

¶30 In paragraph three of her affidavit, Brust avers that she "carefully reviewed all servicing records" and was making the affidavit "from [her] own personal knowledge." But this assertion does not describe whether she has personal knowledge regarding how servicing records are created or maintained. To the extent Brust is asserting personal knowledge, she does not say what she has personal knowledge of.

¶31 Paragraph twelve contains Brust's only averment concerning record creation or maintenance. In this paragraph she avers that "[e]ach entry on this ledger is made contemporaneously with each transaction's occurrence and in the course of regularly conducted activity." But this is just a bald assertion that the entries were contemporaneous. What is lacking is an assertion that Brust has personal knowledge of the relevant procedures or that she personally knows about these particular transactions. In contrast, the employee in ***Neis*** specifically averred that she "ha[d] personal knowledge of [Bank of America]'s computer system, including how information is made and kept in that system."

¶32 In sum, all that Brust's affidavit does is assert personal knowledge in the limited sense that she has personal knowledge of the *records* she has personally reviewed, not the procedures that produced those records. Brust does not assert or demonstrate that she has personal knowledge of how the records were made and how they were prepared in the ordinary course of business – two key requirements under ***Palisades.***

¶33 Turning from Brust's affidavit to her deposition testimony, nothing in that testimony demonstrates the personal knowledge that is lacking in her affidavit. Contrary to Wells Fargo's statement in its appellate brief, Brust never testified during her deposition that she personally knows that the Alexanders'

payment history was created by Wells Fargo and each entry was made contemporaneously to each transaction.[8] Rather, Brust simply testified that she reviewed the template affidavit and attachments provided to her by Wells Fargo's counsel, compared the information set forth in the affidavit and the attachments to the business records in Wells Fargo's systems, and confirmed that the information was accurate. Brust defined the phrase "personal knowledge" that she used in paragraph three of her affidavit as meaning "[her] personal knowledge of the system, what [she] was able to confirm and verify and determine was accurate and true."

¶34 Brust's testimony fails to show that she has personal knowledge of how information is routinely entered into Wells Fargo's computer systems or how that information is used to generate the notice-of-default letter or the payment history ledger. Brust testified that her averment in paragraph eight that the Alexanders "have defaulted" was based on her review of Wells Fargo's computer system. Regarding the payment history ledger, Brust testified that she did not prepare the document, and that it "was prepared by a department within Wells Fargo" but she did not name that department or testify that she had personal knowledge as to how the department created or maintained those records. Brust further testified that the payment history ledger was a "capitulation of the – or snapshot of our business system records" that "was pulled from Wells Fargo's system, and then [she] verified the numbers," but this testimony similarly fails to demonstrate that she had personal knowledge of how those records were created or maintained.

[8] The Alexanders' counsel posed a question on this issue, was interrupted, and did not again ask the question upon resuming his examination of Brust.

¶35 It may be that Brust in fact has sufficient personal knowledge. That is not the issue. The question here is whether her averments or deposition testimony assert sufficient personal knowledge. They do not.

¶36 As for the notice-of-default letter, Brust testified that she was "not sure who sends [it] out, other than it went through the California P.O. Box ... [she] just know[s] the stream is sent, they're printed, and they're mailed." Brust testified that she did not know if Wells Fargo or a third-party vendor sends out the notice-of-default letters.

¶37 As we explained in ***Palisades***:

> It is true ... that a custodian or other qualified witness *does not need to be the author of the records or have personal knowledge of the events recorded* in order to be qualified to testify to the requirements of WIS. STAT. § 908.03(6). However, the witness *must have personal knowledge of how the records were made* so that the witness is *qualified to testify that they were made "at or near the time [of the event] by, or from information transmitted by, a person with knowledge"* and "in the course of a regularly conducted activity."

Palisades, 324 Wis. 2d 180, ¶22 (emphasis added). Here, Brust's affidavit and the supplemental deposition testimony do not present facts that show Brust has personal knowledge of how the notice-of-default letter and payment history ledger were created or maintained, and thus the Brust allegations do not provide a sufficient foundation for prima facie admissibility of those documents under WIS. STAT. § 908.03(6). And, without those documents, Wells Fargo fails to make a prima facie case for summary judgment.

¶38 The Alexanders argue that the "report" – presumably referring to the payment history ledger – was prepared in anticipation of litigation, and that "it is well-established law that records prepared in anticipation of litigation are not

admissible under the business records exception," citing ***State v. Williams***, 2002 WI 58, ¶38, 253 Wis. 2d 99, 644 N.W.2d 919. Because the Alexanders do not provide factual support for its assertion that the payment history ledger was prepared in anticipation of litigation and do not provide a legal analysis applying the proffered case law to any facts, we conclude that this argument is undeveloped and decline to address it. *See* ***Madely v. RadioShack Corp***., 2007 WI App 244, ¶22 n.8, 306 Wis. 2d 312, 742 N.W.2d 559 (noting that this court need not consider undeveloped arguments).

¶39 Finally, in the last sentence of their brief-in-chief, the Alexanders request that, if we reverse and remand this case to the circuit court, we also "remand to the trial court with directions to address appropriate sanctions." Due to the Alexanders' failure to file a motion for sanctions in the circuit court pursuant to WIS. STAT. § 802.05(3), their failure to file a motion with this court under WIS. STAT. § 809.25(3), and their failure to identify supporting legal authority for their request, we decline to address it.

CONCLUSION

¶40 For the foregoing reasons, we reverse the circuit court's judgment granting summary judgment in favor of Wells Fargo and remand the case for further proceedings.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.