COURT OF APPEALS
DECISION
DATED AND FILED

September 10, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2441 **Cir. Ct. No. 2010CV1081**

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

BANK OF AMERICA, N.A.,

PLAINTIFF-RESPONDENT,

V.

RENEE M. RAUSCHER,

DEFENDANT-APPELLANT,

V.

GASCO HOLDING, INC., COTTONWOOD FINANCIAL WISCONSIN LLC AND BELLIN MEDICAL GROUP,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Renee Rauscher, pro se, appeals a judgment of foreclosure. We affirm.

¶2 Bank of America, N.A., sought enforcement of a note by foreclosure of a related mortgage, due to Rauscher's alleged default on the subject loan. Rauscher denied most of the complaint's allegations and alleged that Bank of America failed to adhere to a loan modification agreement. Rauscher testified at trial. A Bank of America employee, Monica Aguilar, also testified and authenticated business records. The court subsequently granted foreclosure. Rauscher now appeals.

¶3 This case involves the admissibility and sufficiency of evidence. Evidentiary rulings are committed to the circuit court's discretion. *See* ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶32, 259 Wis. 2d 181, 655 N.W.2d 718. We may not substitute our judgment for that of the trier of fact unless the evidence is so insufficient that no trier of fact could have drawn the appropriate inferences from the evidence adduced at trial. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶4 Rauscher argues Aguilar was an undisclosed witness. This suggestion of trial by ambush is misplaced. Trial courts have the authority to order parties to exchange the names of both expert and lay witnesses they intend to call at trial, but in this case the court did not require the disclosure of lay witnesses. Here, the circuit court appropriately overruled Rauscher's objection to Aguilar's non-disclosure as a witness, noting:

> I think it's clear from my review of the file that all along [counsel] has represented that there would be a witness from Bank of America called to testify to authenticate documents and to give information about the payment history.

¶5 Rauscher also claims Aguilar's testimony did not properly authenticate the business records under WIS. STAT. § 908.03(6),[1] sometimes referred to as the "business records exception," which provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (6) RECORDS OF REGULARLY CONDUCTED ACTIVITY. 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 [WIS. STAT.] s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶6 Testimony at trial established that Aguilar had the requisite personal knowledge and was 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. *See* ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶¶20-21, 324 Wis. 2d 180, 193, 781 N.W.2d 503. Among other things, Aguilar testified concerning the training she received as an employee of Bank of America, and its predecessor in interest, BAC Home Loans Servicing, L.P.[2] She also testified in detail about the various methods used for entering information and documents into the computer system, and stated she witnessed this process take place. She testified the records

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

[2] We refer to the banks collectively as Bank of America unless otherwise noted.

were kept in the course of regularly conducted business by the payment processing department and the tax department.

¶7 Aguilar's trial testimony, which comprises over seventy pages of transcripts, does not merely parrot the requirements of WIS. STAT. § 908.03(6), or make legal conclusions. The circuit court properly concluded Aguilar had the personal knowledge necessary to support the admissibility of the business records.

¶8 Rauscher also argues the records were inadmissible because they were prepared in anticipation of litigation. However, Aguilar testified the information that appears on the records was recorded by Bank of America employees at or near the time the events took place. That information includes payments that were received and advances that Bank of America made on the loan. Bank of America's computer system outputs that information into a readable format. The actual information that was entered into that system was done well before any default and was obviously not prepared in anticipation of litigation. The records were prepared throughout the life of the loan and simply printed from computers after litigation commenced.

¶9 Rauscher also contends a forbearance agreement, which provided a reduced mortgage payment for up to six months to determine whether additional default resolution assistance could be offered, was a novation of the original mortgage and note. A novation by substitution of an obligation occurs where a creditor accepts from the debtor any form of a new agreement in place of a prior contract or obligation between them, with intent to cancel the former and substitute the new one. *See* ***Navine v. Peltier***, 48 Wis. 2d 588, 593, 180 N.W.2d 613 (1970).

¶10 At the outset, we observe the loan forbearance agreement was never admitted into evidence.[3] In any event, the forbearance agreement by its own words did not modify the note and mortgage:

> **D. No Modification. I understand that the [Forbearance] Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents.** I further understand and agree that the Servicer is not obligated or bound to make any modification of the Loan Documents or provide any alternative resolution of my default under the Loan Documents.

(Emphasis in original.)

¶11 Rauscher asserts the circuit court erred by finding a loan modification agreement was "not 'properly accepted'" and thus "invalid." However, the court properly found that the loan modification agreement did not become a binding contract because Rauscher failed to substantiate that she satisfied the conditions for acceptance. The conditions for acceptance of the modification agreement were clearly stated in underlined and bolded format:

> This letter does not stop, waive or postpone the collection actions, or credit reporting actions we have taken or contemplate taking against you and the property. **In the event that you do not or cannot fulfill ALL of the terms and conditions of this letter no later than December 23, 2009, we will continue our collection actions without giving you additional notices or response periods.**

(Emphasis in original.)

[3] Rauscher also claims the circuit court erred by "failing to deem [Bank of America's] insufficient answers to the Request for Admissions as admitted." Among other things, Rauscher insists, "It is conclusively proven, pursuant to [Bank of America's] admission, that the [Bank] offered Rauscher a forbearance agreement in June of 2009." Because of the procedural posture of this case, which proceeded to trial, we conclude the discovery requests are moot. In addition, we agree with the circuit court's conclusion that the forbearance agreement in this case, made for purposes of negotiating a loan modification agreement that never went into effect, constituted an offer of compromise.

¶12 Rauscher insists Bank of America violated the implied duty of good faith and fair dealing when it refused to move forward with the modification agreement and foreclosed on the loan. However, Rauscher failed to present evidence of bad faith in the trial court. Exercising specific contractual rights does not constitute bad faith. This court has stated that it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a bad faith breach of that agreement. *See* ***M&I Marshall & Ilsley Bank v. Schlueter***, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521.

¶13 The note and mortgage show there was no duty to modify the loan in this case. Paragraph One of the mortgage states that the "Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder …." The mortgage also provides that Bank of America was under no duty to provide a modification or return any partial payments made pursuant to the forbearance agreement or offer to modify. This is bolstered by Paragraph Six of the note, which states that "[e]ven if, at a time I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time." The note secures the lender's right to accelerate the loan even if a modification fails or a forbearance agreement ceases to be in force. Accordingly, Rauscher's contentions of bad faith are unsubstantiated.

¶14 Rauscher also argues she was entitled to specific performance of the loan modification agreement under a theory of equitable estoppel. However, Rauscher failed to provide the circuit court with clear, satisfactory and convincing proof that she was entitled to specific performance. *See* ***Gonzalez v. Teskey***, 160 Wis. 2d 1, 13, 465 N.W.2d 525 (Ct. App. 1990).

¶15 Rauscher contends the circuit court erred by allowing evidence outside of the timeframe contained in the pleadings. However, under WIS. STAT. § 802.02(1)(a), a complaint must simply contain "[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief."

¶16 Bank of America alleged Rauscher was delinquent on her June 2009 and subsequent payments. In order to become current on the loan, she needed to make a payment large enough to pay her June 2009 payment, together with other payments up to the date she was submitting the payment. As the circuit court appropriately found, Bank of America's evidence at trial proved the basic elements of its pleadings:

> I have had an opportunity to consider the evidence, both the testimony and the exhibits.
>
> And Ms. Rauscher, while I understand that you are claiming that you always made all your payments and you were never in default, I can't ignore the fact that the Bank has presented evidence to the contrary, documentation indicating that there were payments made certain months and not other months. And that you did not have any evidence to corroborate or substantiate what it was you were saying.
>
> So, I find that Ms. Rauscher is in default under the terms of the Note and the Mortgage. It has not been cured. She was provided with proper notice.

¶17 Finally, in her Statement of Issues, Rauscher claims that the circuit court erred by denying her request for a jury trial. However, she failed to brief the issue and it is therefore deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). In any

event, the court properly denied her request on the grounds that the right to a jury did not extend to this equitable action.

By the Court.—Judgment affirmed.

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