COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP210 **Cir. Ct. No. 2010CV5976**

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

BAC HOME LOANS SERVICING LP F/K/A COUNTRYWIDE HOME LOANS SERVICING LP,

PLAINTIFF-APPELLANT,

V.

CORY THOMPSON,

DEFENDANT-RESPONDENT,

CITIBANK FEDERAL SAVINGS BANK AND MADISON GAS AND ELECTRIC COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. This case arises out of a foreclosure action initiated by BAC Home Loans Servicing against Cory Thompson. The circuit court denied BAC's motion for summary judgment and subsequently entered an order dismissing with prejudice BAC's foreclosure action against Thompson. On appeal, BAC challenges the court's: denial of its motion for summary judgment; evidentiary rulings at trial; denial of its motion for a continuance at trial; decision to dismiss BAC's foreclosure action with prejudice; and denial of BAC's motion for reconsideration. We affirm.

BACKGROUND

¶2 In November 2004, Thompson executed a promissory note in favor of America's Wholesale Lender. The note was secured by a mortgage on certain residential property in Dane County, which identified Mortgage Electronic Registration Systems, Inc. [MERS] as the mortgagee. In October 2010, the mortgage was assigned from MERS to BAC.

¶3 On November 10, 2010, BAC filed this action seeking to foreclose on the secured property pursuant to WIS. STAT. § 845.101 (2011-12).[1] BAC alleged in its complaint that it was the current holder of the note and mortgage, and that Thompson had failed to make contractually required payments. Attached to the complaint were copies of the note and mortgage.

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

¶4 In September 2011, BAC moved for summary judgment. In support of its motion, BAC submitted the affidavit of Eric Oyler, an officer of Bank of America. Oyler averred as follows:

> 1. I am authorized to sign this affidavit on behalf of plaintiff, Bank of America, N.A. ("BANA"), as an officer of BANA.
>
> 2. BANA maintains servicing records for the Loan. As part of my job responsibilities for BANA, I am familiar with the type of records maintained by BANA in connection with the Loan.
>
> 3. The information in this affidavit is taken from BANA's business records. I have personal knowledge of BANA's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of BANA's regularly conducted business activities; and (c) it is the regular practice of BANA to make such records.
>
> 4. The business record attached hereto as Exhibit A [the account information statement], which I have reviewed, is a true and correct copy that is part of the business records described above. It shows that Cory Thompson defaulted, the default has been accelerated, and the amount stated on the attached business record is owed on the Loan.
>
> 5. That on June 16, 2009 the defendant(s) mortgage loan account was in default and therefore a 30-day right to cure letter was sent by the plaintiff. A copy of said letter is attached hereto and its contents are incorporated herein and by reference as Exhibit B.
>
> 6. That attached hereto and its contents are incorporated herein by reference as Exhibit C is the payment history ledger for [Thompson's] mortgage loan account. Each entry on this ledger is made contemporaneously with each transaction's occurrence.

> 7. … BANA has been in possession of the original NOTE since prior to the filing of this action. A copy of the Note from BANA's collateral file is attached hereto and incorporated herein and by reference as Exhibit D….

¶5 Attached to the Oyler affidavit were: (1) a copy of the account information statement; (2) a copy of the notice of intent to accelerate, purporting to be a notice dated June 16, 2009, from BAC, a subsidiary of Bank of America, informing Thompson that he was in default; (3) a copy of the loan history statement, purporting to show Thompson's payment history with entries dating from January 2005 to February 2011; and (4) a copy of the note.

¶6 The circuit court denied BAC's motion for summary judgment and later denied a renewed motion for summary judgment filed by BAC. The foreclosure action then proceeded to trial. At trial, the circuit court declined to admit into evidence a document purporting to be a copy of the note, a copy of a document purporting to be the notice of intent to accelerate and a copy of a document purporting to be the notice of servicing transfer. The court also denied at trial BAC's motion for a continuance to permit its witness time to produce additional evidence to support its foreclosure action. The court went on to find that BAC failed to present sufficient evidence to proceed with the foreclosure and dismissed the foreclosure with prejudice. BAC appeals.

DISCUSSION

¶7 BAC contends the circuit court erred in denying its motions for summary judgment. BAC also contends that the circuit court erred in excluding certain evidence during the trial, denying its request for a continuance of that trial, dismissing the action with prejudice, and denying its motion for reconsideration. We address these arguments in turn below.

A. Summary Judgment

¶8 We review summary judgment de novo, applying the same standards 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 next 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 the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that 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).

¶9 BAC contends the circuit court erred in denying its motion for summary judgment because the summary judgment materials—Oyler's affidavit and the exhibits attached to it—show that there exists no genuine issue of material fact as to whether BAC is entitled to foreclose upon the secured property. We disagree. For the reasons discussed below, we conclude that Oyler's affidavit fails to lay the proper foundation for admitting the account information statement, the notice of intent to accelerate and the payment history statement, and thus fails to make a prima facie showing of Thompson's default. We also conclude that Oyler's affidavit, which refers only to Bank of America, fails to show that BAC is the current holder of the note.[2]

[2] In ***Bank of America N.A. v. Minkov***, No. 2012AP2643, unpublished slip op. (WI App Aug. 8, 2013), we addressed substantially the same issue as presented in this case. Although we are not bound by ***Minkov***, we adopt and repeat its reasoning.

¶10 Pursuant to 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." "[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.

¶11 We stated in ***Palisades*** that when the evidence comprises business records, "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." ***Id.***, ¶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.

¶12 In ***Palisades***, we analyzed whether an affidavit made a prima facie showing that attached documents fell within the WIS. STAT. § 908.03(6) hearsay exception. *See* ***id.***, ¶¶16–23. Palisades Collections, LLC, the alleged buyer of a credit card account, had moved for summary judgment in an action against a cardholder for a balance owed on a credit card originally opened with Chase Manhattan Bank. ***Id.***, ¶¶1, 3. In support of its motion for summary judgment, Palisades submitted an affidavit from a "duly authorized representative of [Palisades]," with account statements attached labeled "Chase ... Mastercard Account Summary." ***Id.***, ¶4.

¶13 The ***Palisades*** court explained that "WIS. STAT. § 908.03(6) does not require that the 'custodian or other qualified witness' be the original owner of the

records." ***Id.***, ¶20. "However, under the plain language of this [hearsay] exception, being a present custodian of the records is not sufficient." ***Id.*** Rather, "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." ***Id.*** Applying these standards, the court concluded in ***Palisades*** that the affidavit did not present any facts showing that the affiant, a Palisades employee, had personal knowledge of how the account statements were prepared and whether they were prepared in the ordinary course of Chase's business. ***Id.***, ¶23. Therefore, the affidavit failed to establish a prima facie case because it did not show that the affiant was a witness who was qualified, based on personal knowledge, to testify to the elements required for admissibility of the account statements under the hearsay exception for records of regularly conducted activity. ***Id.***, ¶1.

¶14 A similar situation exists here. The note in the present case was executed on November 10, 2004, in favor of America's Wholesale Lender. The mortgage securing the Note was assigned to BAC in October 2010. Nothing in BAC's summary judgment materials shows what happened between 2004 and 2010, including what entities serviced the loan and when. Oyler's affidavit does not establish how his position as an officer of Bank of America, with personal knowledge as to Bank of America's procedures for the creation and maintenance of records, qualifies him as having personal knowledge of the records created by entities other than Bank of America, including BAC and America's Wholesale Lender. *See* ***id.***, ¶23.

¶15 The documents attached to Oyler's affidavit appear to include just such records, created by entities other than Bank of America. The account information statement contains entries for dates predating the 2010 assignment of

the mortgage from MERS to BAC, and the unpaid principal balance amount relies on the loan history of payments dating back to 2009. The loan history statement has entries dating back to 2005 with the majority of the entries occurring prior to the 2010 assignment. The notice of intent to accelerate is dated June 16, 2009, which also predated the 2010 mortgage assignment. Furthermore, the notice of intent to accelerate is from BAC; however, Oyler does not aver that he has personal knowledge as to the creation or maintenance of the records of BAC, that Bank of America and BAC share records, or that based on his position, he has some basis for personal knowledge as to how the notice was made and how it was prepared in the ordinary course of BAC's business. *See* ***id.***, ¶21.

¶16 Accordingly, we conclude that Oyler's affidavit fails to make a prima facie showing of Thompson's default.

¶17 We now turn to the question of whether Oyler's affidavit makes a prima facie showing that BAC, the plaintiff in this case, is the holder of the original note. In his affidavit, Oyler avers that he is familiar with servicing records maintained by Bank of America in connection with "the Loan" and "[t]hat [Bank of America] has been in possession of the original Note since prior to the filing of this action." However, BAC, not Bank of America, is the named plaintiff in this case seeking to enforce the note. Oyler's affidavit does not establish that BAC is in possession of the original note, nor does Oyler's affidavit show that Bank of America's possession of the note is imputed to BAC. Accordingly, we conclude that Oyler's affidavit fails to make a prima facie showing that BAC is the holder of the note.

B. Evidentiary Rulings at Trial

¶18 BAC contends that the circuit court erred in failing to admit into evidence at trial Bank of America's "business records and testimony regarding [those] business records," and a document purporting to be a copy of the note.

¶19 Ordinarily, the admissibility of evidence is a discretionary decision for the circuit court. *See* ***State v. Peters***, 166 Wis. 2d 168, 175, 479 N.W.2d 198 (Ct. App. 1991). However, to the extent that the admissibility of evidence involves the construction and application of standards in an evidence statute, the issue is one of law, which we review de novo. ***Id.***

1. Business Records

¶20 BAC argues that the circuit court erred in failing to admit those "business records" belonging to Bank of America that were offered at trial because those records were admissible under the hearsay exception for records of regularly conducted activity. BAC does not specify what "business records" it refers to. At trial, the following three exhibits were offered into evidence by BAC but not admitted: (1) a document purporting to be a copy of a letter to Thompson advising Thompson that servicing of his mortgage would be transferred to a different company; (2) a document purporting to be a copy of the note; and (3) a copy of the notice of intent to accelerate. After objections were made to the admission of these documents, their admission was held in abeyance by BAC's trial counsel until BAC's witness, George Spiel, an assistant vice-president mortgage resolution associate for Bank of America, had a chance to testify. As to the first item, the letter, BAC's trial counsel did not again seek to admit the letter. As to the second item, the note, BAC does not claim that the note was admissible as a business record and in fact raises a separate argument pertaining to the note's admission at

trial. Accordingly, we limit our review in this part of our opinion to the third item, the notice.

¶21 BAC attempted to admit into evidence a copy of a document purporting to be a notice of intent to accelerate relating to Thompson's mortgage. BAC asserts that Spiel's testimony was sufficient to authenticate the notice of intent to accelerate and that the document was thus admissible under WIS. STAT. § 908.03(6). However, BAC does not address the circuit court's finding that Spiel could not credibly testify that the exhibit was identical to the electronic image of the notice of intent to accelerate which Spiel viewed when reviewing documents relating to Thompson's mortgage. The issue here is not admissibility. The circuit court effectively bypassed the admissibility issue and went straight to considering what weight it should give evidence. The circuit court's finding was that it should give the evidence no weight because of Spiel's credibility problem.

¶22 The fact finder is the ultimate arbiter of a witness's credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). BAC has not presented this court with any reason to overturn the court's credibility finding. We must therefore accept the court's finding that Spiel could not credibly testify that the exhibit was a printed copy of the same document he previously viewed an electronic image of. Accordingly, we affirm the court's determination that the exhibit was not admissible.

2. Note

¶23 BAC argues the circuit court erred in failing to admit at trial a copy of a document purporting to be the note. The circuit court denied admission of the document at trial on the basis that the document was not admissible under an exception to the hearsay rule. BAC argues that the copy of the note was not

hearsay because it was offered for its legal effect rather than to prove the truth of the matter asserted. *See* ***OneWest Bank, FSB v. Sowl***, No. 2011AP688, unpublished slip op., ¶14 (WI App Apr. 11, 2013) ("A note, however, is offered for its legal effect and is not hearsay.") BAC also argues that the document was self-authenticating under WIS. STAT. § 909.02(9),[3] and thus could not be found to be inadmissible on the basis that it was not properly authenticated.

¶24 We will assume, without deciding, that BAC is correct that the circuit court erred in determining that the copy of the note was inadmissible hearsay and that BAC is correct that the copy of the note is self-authenticating. However, BAC's evidentiary arguments do not address what BAC sought to prove—possession of the original note. Nothing in the document or the evidence presented at trial demonstrates that BAC was in possession of the original note. Accordingly, we conclude that even if the evidentiary ruling with regard to the note was an erroneous exercise of the court's discretion, it was harmless error.

C. Motion for a Continuance

¶25 BAC argues the circuit court erroneously exercised its discretion in failing to grant its motion for a continuance at trial to afford it the opportunity to gather additional evidence.

¶26 In Wisconsin, a continuance is not a matter of right. ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496. The decision to

[3] WISCONSIN STAT. § 909.01 provides that documents must be authenticated to be admissible, a requirement that is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." WISCONSIN STAT. § 909.02(9) provides that the following are self-authenticating: "[c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by chs. 401 to 411."

grant or deny a continuance lies within the discretion of the circuit court and the court's ruling "'will be set aside only if there is evidence of an [erroneous exercise] of discretion.'" ***Id.*** (quoted source omitted). We affirm the court's exercise of discretion "unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances." ***Hudson Diesel, Inc. v. Kenall***, 194 Wis. 2d 531, 542, 535 N.W.2d 65 (Ct. App. 1995).

¶27 At trial, counsel for BAC asked the circuit court for a continuance "until [that] afternoon or perhaps a half-hour" to provide it time to produce additional, admissible evidence at trial. The court asked BAC if it could "do it in 20," to which BAC replied in the affirmative. The court ultimately gave BAC approximately forty-five minutes to produce additional evidence. After receiving approximately twice the amount of time requested, BAC was still not prepared to proceed and asked the court to further continue the matter to another day. The court denied BAC's motion, noting that the case had been pending for approximately two years and that BAC had a sufficient heads up regarding the evidentiary requirements.

¶28 We read BAC's brief as arguing that the court failed to properly apply the law because it "imposed an unprecedented 'chain of custody' requirement on the admission of [Bank of America's] business records," which necessitated a continuance to comply with the court's requirements. We disagree. The law is well established regarding the evidentiary burdens for the admission of business records. *See generally* ***Palisades***, 324 Wis. 2d 180.

¶29 The court found that BAC had two years, more than sufficient time, to prepare for trial. This is not disputed by BAC. The court also granted BAC a continuance during trial to provide BAC further time to gather additional

evidence. The court found that there comes a point where there "needs to be finality" in cases. In this case, with the law well established, a period of approximately two years to prepare for trial, and a continuance granted at trial to gather additional evidence, we cannot say that there was no reasonable basis for the court's decision to deny BAC's motion for a further continuance. We therefore reject BAC's claim that the court erroneously exercised its discretion in denying its motion for a continuance.

D. Dismissal with Prejudice

¶30 BAC claims the circuit court erroneously exercised its discretion when it dismissed its foreclosure action with prejudice. Our review of a circuit court's decision to dismiss a case with prejudice is limited to whether the court erroneously exercised its discretion. ***Haslow v. Gauthier***, 212 Wis. 2d 580, 590-91, 569 N.W.2d 97 (Ct. App. 1997). As stated above, we will affirm the court's exercise of discretion "unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances." ***Hudson Diesel, Inc.***, 194 Wis. 2d at 542.

¶31 At trial, after the circuit court indicated that it was dismissing the action, Thompson's counsel asked the court "to specifically determine that [] dismissal is with prejudice." The circuit court granted the request, explaining that a witness was put on the stand and that prejudice attaches. BAC argues for the first time on appeal that the court erroneously applied a criminal law doctrine to this civil case. BAC has forfeited the argument. BAC had an opportunity to make the argument before the circuit court and failed to do so. While BAC did complain about dismissal with prejudice in its reconsideration motion, BAC did not develop the meritorious argument it now makes on appeal. BAC's failure to

object deprived the court of an opportunity to correct any alleged error. *See* ***State v. Doss***, 2008 WI 93, ¶83, 312 Wis. 2d 570, 754 N.W.2d 150. We conclude that BAC has therefore forfeited review of whether dismissal with prejudice was appropriate.

¶32 Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in dismissing the case with prejudice.

¶33 Before moving on, we question the parties' approach to this case. The parties seemingly assume that it was appropriate for the circuit court to decide whether dismissal was or was not with prejudice. However, it appears to us that whether BAC should be prevented from a future attempt to bring a foreclosure action is more likely a question governed by issue or claim preclusion doctrines. However, because the parties do not discuss the matter in these terms, we do not decide whether, in the first instance, it made sense for the circuit court to decide whether dismissal should be with or without prejudice.

E. Motion for Reconsideration

¶34 BAC contends that the circuit court erroneously exercised its discretion in denying its motion for reconsideration. We review a circuit court's decision to deny or grant a motion for reconsideration for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853.

¶35 To prevail on a motion for reconsideration, a movant must present either newly discovered evidence or establish a manifest error of law or fact. ***Id.,*** ¶44. BAC's motion for reconsideration asserted that the court erred as a matter of law in failing to admit at trial the copy of the document purporting to be the note,

in failing to continue the matter upon its motion, and in dismissing the action with prejudice. We have explained above that the circuit court did not err as to the first and second rulings and BAC's challenge to the dismissal with prejudice was undeveloped in its reconsideration motion. Accordingly, we conclude that the court properly denied BAC's motion for reconsideration.

CONCLUSION

¶36 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.