

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2014

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. 2012AP2371

Cir. Ct. No. 2012CV132

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ASSOCIATED BANK, N.A.,

PLAINTIFF-RESPONDENT,

V.

RUSSELL L. SCHIDER AND TERESA M. BOHR SCHIDER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Columbia County:
ALAN J. WHITE, Judge. *Affirmed.*

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

¶1 HIGGINBOTHAM, J. Russell and Teresa Schider appeal a summary judgment granting foreclosure to Associated Bank, N.A. on the Schiders' homestead property. The Schiders make three arguments on appeal: (1) the Bank failed to make a prima facie showing that it has standing to enforce

the note at issue in this case, because an endorsement in blank on the note is insufficient on its face and because the Bank allegedly admitted in discovery that a different entity is the current assignee; (2) the Bank failed to make a prima facie showing of entitlement to summary judgment because the averments of a Bank employee are insufficient to admit a copy of the note into evidence; and (3) the Bank failed to make a prima facie showing that it possesses an original note that is authentic.¹ WIS. STAT. § 802.08(3) (2011-12).²

¶2 We conclude that the Schiders have forfeited the first two arguments because they failed to make these arguments in the circuit court. As for the Schiders' authentication argument, we conclude that the Bank has made a prima facie showing that the original note is authentic, and is therefore enforceable. Because we reject all of the Schiders' arguments on appeal, we affirm.

BACKGROUND

¶3 In 2004, Russell and Teresa Schider executed and delivered a mortgage and promissory note to Associated Bank. The note was secured by a mortgage on the Schiders' homestead property in Pardeeville. The Schiders stopped making the required payments on the note and the Bank filed this action to foreclose on the property.

¹ The Schiders also argue that an alternative basis offered by the Bank to establish that it is the holder of the note and therefore entitled to enforce it, based on the affidavit of Bank attorney John Cravens, is insufficient. We do not address this argument because it does not affect our conclusion that the Bank, as the holder of a note that is endorsed in blank, is entitled to enforce the note.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 The Bank alleged in its complaint that it was the “mortgagee of record and the holder or bearer of the Note.” The Bank attached uncertified copies of the note and mortgage to the complaint. This copy of the note identifies the Bank as the lender. It bears two undated endorsements: one specially endorsed to Associated *Mortgage*, Inc., (as opposed to Associated *Bank*) and the second endorsed in blank.

¶5 The Bank moved for summary judgment on the foreclosure action. The Bank submitted two affidavits, one by Bank employee Nathan Schnell, and one by Bank attorney John Cravens, in support of the motion for summary judgment. Schnell averred in part that the photocopy of the note attached to the complaint was a “true and correct copy” of the original note, and that the Bank is the “holder or bearer” of that original note.

¶6 The Schiders opposed the Bank’s motion for summary judgment. The Schiders argued that the Bank lacked standing to enforce the note because Fannie Mae, rather than the Bank, was the current holder of the note, and as the holder of the note, Fannie Mae was the only entity with standing to enforce it. The Schiders also argued that the uncertified copy of the note attached to the complaint was inadmissible because the Bank employee’s affidavit at issue “fails to establish that he was qualified to authenticate the Note.”

¶7 At the conclusion of a hearing on the summary judgment motion, and in a written decision, the circuit court concluded that the Bank had standing and that it had established a prima facie case for summary judgment. The court also concluded that the Schiders did not present any evidence that raised a genuine issue of material fact that the Schiders owed a debt to the Bank, and that they were

in default on that debt. Based on these undisputed facts, the court granted the Bank a summary judgment of foreclosure. The Schiders appeal.

DISCUSSION

¶8 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and whether the answer joins an issue of fact or law. *Id.* If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether the opposing party's affidavits establish a disputed material fact that would entitle the opposing party to trial. *Id.*; see also WIS. STAT. § 802.08(2).

I. Forfeitures

¶9 On appeal, the Schiders argue that the Bank has failed to establish that it has standing to enforce its claim under the note. “[T]o have standing to sue, a party must have a personal stake in the outcome, ... and must be directly affected by the issues in controversy.” *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81 (citation omitted).

¶10 In support of their standing argument, the Schiders point to two undated endorsements on the copy of the note: a special endorsement from Associated Bank to Associated Mortgage, and an endorsement in blank. As for the special endorsement, the Schiders contend that, because the note was specially endorsed to Associated Mortgage, Associated Mortgage, and not the Bank, has standing to enforce the note, and that the Bank has presented no evidence that the

note was reassigned to the Bank. As for the note being endorsed in blank, the Schiders contend that the Bank has the burden of establishing that an agent of the Bank as a corporate entity had the requisite authority to endorse negotiable instruments on behalf of the corporation, citing *Smith v. Thomson*, 203 Wis. 56, 233 N.W. 576, (1930), and here, the Bank has not submitted proof of this fact. Consequently, the Schiders argue, a material question of fact remains regarding the validity of the endorsement in blank, precluding summary judgment. In addition, as part of this standing challenge, the Schiders now argue on appeal that the Bank effectively admitted in discovery that a different entity is the current assignee.

¶11 The problem with these contentions is that the Schiders did not first make these arguments in the circuit court, and therefore they have forfeited them. See *Hopper v. City of Madison*, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977) (in general, courts will not address “issues raised for the first time on appeal since the [circuit] court has had no opportunity to pass upon them.”).

¶12 As summarized above, it is true that the Schiders made a lack of standing argument in the circuit court. However, that argument was based on theories not argued by the Schiders on appeal. In the circuit court, the Schiders argued that they had conducted an online search that established that Fannie Mae owns the note and therefore it is only Fannie Mae that has standing to enforce the note, not the Bank. The Schiders do not pursue this theory on appeal in support of their argument that the Bank lacks standing, and the theories they do advance, as indicated above, were not first made in the circuit court. Consequently, the Schiders have forfeited their standing arguments and we consider them no further.

¶13 The Schiders also forfeit their second argument by failure to raise it in the circuit court. The Schiders argue on appeal that the affidavit of Bank employee Nathan Schnell is insufficient to establish that the Bank is the holder of the note, because none of the averments establish that Schnell had personal knowledge of the business practices and recordkeeping policies of Associated Mortgage, and therefore Schnell is not qualified to testify regarding the subsequent endorsement of the note by Associated Mortgage. Our review of the Schiders' briefs in the circuit court submitted in opposition to the Bank's motion for summary judgment reveals that the Schiders did not advance this theory in that court. We therefore move on without considering this argument further.

II. Authentication

¶14 In order to prevail on a foreclosure claim, a mortgagee must first prove it has the right to enforce the note. *See PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶10, 346 Wis. 2d 1, 827 N.W.2d 124.

¶15 Affidavits in support or in opposition to 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). In order to be admissible, a document must be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01.³ One method of authenticating an endorsed note is by the

³ WISCONSIN STAT. § 909.01 provides, "[t]he requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

testimony of a witness “with knowledge that a matter is what it is claimed to be.” WIS. STAT. § 909.015(1).

¶16 The Schiders argue that Schnell’s affidavit is insufficient to establish a prima facie case that the Bank was the holder of the Schiders’ note, and, thus entitled to enforce it against the Schiders, because Schnell did not make statements in his affidavit sufficient to establish a prima facie case that the copy of the note was authentic. Specifically, the Schiders contend that the affidavit fails to provide any facts demonstrating that “Schnell has any personal knowledge regarding the authenticity of the Note, the date of the alleged assignments, or the identity or authority of the persons signing the endorsements.”

¶17 The Schiders assert that the facts in this case are like those in *PHH Mortgage Corp. v. Kolodziej*, No. 2010AP60, unpublished slip op. (WI App Mar. 10, 2011). In that case, we found that the following averments did not suffice to establish a prima facie case that a copy of a note was authentic: averments in an affidavit of a PHH attorney that the attached note was a copy of the original note without any averments showing a basis for his personal knowledge of the original note, such as statements showing that the attorney knew the contents of the note or had compared the copy to the original or witnessed the creation of the note. *Id.* at ¶24. However, here, the averments in Schnell’s affidavit are different from those in *PHH*, and, as we proceed to explain, we conclude that Schnell’s affidavit suffices to establish a prima facie case that the copy of the note was authentic.

¶18 We first observe that Bank employee Schnell identifies himself in the affidavit as a “foreclosure coordinator.” He also avers that he has “experience and expertise in the servicing of mortgage loans, loan document review, and

analysis of loan payoff calculations.” Schnell avers that he had “personally examin[ed]” the Bank’s business records “[i]n performance of [his] job functions and in connection with making this affidavit,” including, significantly, the Bank’s records at issue in this foreclosure. Schnell also avers that he is “familiar with business records created and maintained by [the Bank] for the purpose of servicing mortgage loans” and that it is a regular practice of the Bank’s “mortgage servicing business to make these records.” Schnell avers that, “[t]he Schiders executed and delivered to [the Bank] a Note dated November 29, 2004.... A true and correct copy of said Note is attached to the Complaint,” and that the Bank “is the mortgagee of record and the holder or bearer of the Note.”⁴

¶19 These averments provide the facts missing in *PHH* to show the requisite personal knowledge by the affiant, because from these averments it can reasonably be inferred that the copy of the note attached to the Complaint is a true and correct copy of an original note in the Bank’s possession, which it could authenticate at trial. Thus, we conclude that the facts as set forth by the averments are sufficient to establish a prima facie case that the copy of the note is authentic.

¶20 Apart from their authentication argument, the Schiders make no other developed arguments on appeal regarding the admissibility of the note. We therefore affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁴ The “bearer” of a note is a person in possession of a note endorsed in blank. WIS. STAT. § 401.201(2)(cm).

