COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP662 **Cir. Ct. No. 2011CV123**

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

BELCORP FINANCIAL SERVICES, INC.,

PLAINTIFF-APPELLANT,

V.

ESTATE OF RICHARD B. WETZEL AND RUTH I. WETZEL,

DEFENDANTS-RESPONDENTS,

M&I BANK OF EAGLE RIVER, VILAS COUNTY AND WISCONSIN CHILD SUPPORT AGENCY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN III, Judge. *Affirmed*.

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

¶1 PER CURIAM. Belcorp Financial Services, Inc., appeals a summary judgment dismissing its mortgage foreclosure action against Ruth Wetzel and the Estate of Richard Wetzel, and awarding actual attorney fees and costs in favor of the Wetzels. Belcorp argues the circuit court erred by granting the Wetzels summary judgment because there is a genuine issue of material fact. Belcorp also challenges the award of attorney fees and costs. We reject Belcorp's arguments and affirm the judgment.

BACKGROUND

¶2 Belcorp filed suit against the Wetzels seeking to foreclose a mortgage on the Wetzels' home. The complaint alleged that under a business loan agreement, Jake Retail Group, LLC—a business in which the Wetzels' son, James, had an ownership interest—executed a promissory note in favor of Belcorp for $240,000. The complaint further alleged that the Wetzels executed a guaranty agreeing to secure the business's obligations under the note with a mortgage on the Wetzels' homestead. The business defaulted and Belcorp began collections proceedings. The parties then entered into a forbearance agreement. When the business defaulted again, Belcorp filed the underlying mortgage foreclosure action against the Wetzels.

¶3 During discovery, the Wetzels maintained they had not signed the business loan agreement, guaranty or mortgage that Belcorp sought to foreclose. The parties ultimately filed competing motions for summary judgment. Attached to the Wetzels' summary judgment motion was a forensic document examiner's report in which the examiner opined that the Wetzels' purported signatures on the subject documents were not genuine. The circuit court granted summary judgment in favor of the Wetzels, concluding Belcorp had not met its burden of proving that

the Wetzels were bound by documents they did not sign. The court also awarded the Wetzels $5,000 in actual attorney fees and costs. This appeal follows.

DISCUSSION

¶4 This court reviews summary judgment decisions independently, applying the same standards as the trial court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Belcorp contends the circuit court erred by granting the Wetzels' summary judgment because there is a genuine issue of material fact as to whether the Wetzels gave their son authority to sign their names on the subject documents. We are not persuaded.

¶5 A mortgage "shall not be valid unless evidenced by a conveyance that" among other things "[i]s signed by or on behalf of each of the grantors[.]" WIS. STAT. § 706.02(d).[1] The statute on conveyances further provides:

> A conveyance signed by one purporting to act as agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgement. The burden of proving the authority of any such agent shall be upon the person asserting the same.

WIS. STAT. § 706.03(1m). Our supreme court has held that § 706.03, "by its clear wording sets forth two distinct requirements: (1) an express authorization of agency; and (2) the authorizing principal is identified as such in the conveyance or

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

in the form of signature or acknowledgment." ***Glinski v. Sheldon***, 88 Wis. 2d 509, 517, 276 N.W.2d 815 (1979). Here, the documents make no mention of James acting as agent for his parents—he simply forged their signatures on the documents. Ultimately, it is immaterial to the clear application of the statute whether there is extrinsic information to show that James had permission to act as agent.

¶6 Belcorp nevertheless argues the Wetzels waived any defenses to their obligations under the guaranty by signing the subsequent forbearance agreement. That agreement, which the Wetzels admittedly signed, provided, in relevant part:

> The parties agree that each and every payment made pursuant to this Agreement shall be applied as set forth above and shall not be returned in any event to the Guarantors in the event of breach. Acceptance of funds pursuant to this Agreement shall constitute neither a waiver of default nor a waiver of any prior acceleration of the Promissory Note following default. The Guarantors agree that the Promissory Note is in default and has been properly accelerated and that no further acceleration is required. Guarantors further waive any defenses to the payment default of Borrower or any defenses to their payment obligations under their personal guaranty.

The forbearance agreement, by its terms, waives any defenses to "obligations under their personal guaranty." As noted above, however, the underlying guaranty was invalid: Wetzel's defenses remained viable, including the forgery defense. Ultimately, the forbearance agreement cannot legitimize a conveyance that did not meet the WIS. STAT. § 706.02 requirements. The circuit court properly granted the Wetzels' motion for summary judgment on the invalid mortgage.

¶7 Next, Belcorp claims the circuit court erred by awarding the Wetzels actual attorney fees and costs for maintaining a frivolous lawsuit. WISCONSIN STAT. § 802.05(2) provides:

> By presenting to the court, whether by signing, filing, submitting, *or later advocating a pleading*, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (d) The denials of factual contentions stated in the paper are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(Emphasis added.) The statute further provides: "If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation." WIS. STAT. § 802.05(3).

¶8 Our review of the circuit court's decision that an action was continued frivolously is a mixed question of fact and law. ***Keller v. Patterson***, 2012 WI App 78, ¶22, 343 Wis. 2d 569, 819 N.W.2d 841. What an attorney or

party knew or should have known is a question of fact, ***id.***, and whether the facts found by the circuit court support a conclusion that a lawsuit was continued frivolously is a question of law that this court reviews independently. *See* ***Storms v. Action Wis., Inc.***, 2008 WI 56, ¶35, 309 Wis. 2d 704, 750 N.W.2d 739.

¶9 Belcorp contends it was never given the twenty-one-day safe harbor notice required under WIS. STAT. § 802.05(3)(a). We disagree. At an October 25, 2012 hearing on the Wetzels' summary judgment motion, Belcorp requested a continuance to conduct further discovery. The court granted the continuance, but reminded Belcorp it had the burden of proof in the case, stating it was Belcorp's "obligation to prove the signatures once [it] knew that the defense was forgery." The court further cautioned Belcorp: "[I]f this case goes forward without any better proofs [than] you have, [the Wetzels have] got a really good claim for actual fees and costs in this matter."

¶10 Belcorp continued to pursue the foreclosure action and, on December 21, 2012, filed a brief opposing the Wetzels' summary judgment motion. Belcorp acknowledged that the Wetzels had not signed the subject documents, but claimed that the Wetzels gave James consent to sign their names and that the forbearance agreement waived the Wetzels' forgery defense. After the continued hearing, the circuit court granted summary judgment and awarded the Wetzels actual costs and attorney fees, iterating that Belcorp bore the burden of proof once the forgery defense was raised, but "refused to accept the burden." Rather, Belcorp "[c]ontinued to press forward, [requiring the Wetzels] to assume those responsibilities which were not theirs to begin with." Because the court gave Belcorp adequate notice of the risk of actual costs and fees at the October 25 hearing, and further gave Belcorp an adequate opportunity to be heard, we reject this challenge to the award.

¶11 Belcorp alternatively argues that the "James as agent" theory it pursued had a reasonable basis in the law and was completely independent of the forged signatures issue. We are not persuaded. Belcorp's agency theory was ultimately a repackaged attempt to legitimize the signatures. Given the clear application of WIS. STAT. §§ 706.02 and 706.03, as discussed above, the court properly determined the Wetzels were entitled to actual costs and fees associated with defending Belcorp's attempts to legitimize the forged signatures.[2]

¶12 Finally, in their brief, the Wetzels seek "costs, fees and reasonable attorneys fees" incurred in defending what they argue is a frivolous appeal. In order for parties before this court to have the proper notice and opportunity to be heard, however, parties wishing to raise frivolousness must do so "by making a separate motion to the court," thereby allowing the parties and counsel a chance to be heard. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. Here, the Wetzels' motion was made in their respondents' brief. Our supreme court has cautioned, however, that "a statement in a brief that asks that an appeal be held frivolous is insufficient notice to raise this issue." ***Id.*** Because the Wetzels failed to file a separate motion, their request is denied.

By the Court.—Judgment affirmed.

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

[2] The court ultimately limited the award to $5,000, concluding there was "some legitimate argument relative to liability under the forbearance agreement." Whether the court properly determined Belcorp pursued a "legitimate" theory is not before us, as the Wetzels did not appeal that determination or the attendant limitation of costs.