

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 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. 2013AP949
STATE OF WISCONSIN**

Cir. Ct. No. 2010CV183

**IN COURT OF APPEALS
DISTRICT IV**

SUNTRUST MORTGAGE, INC.,

PLAINTIFF-RESPONDENT,

V.

TODD SCHMIDT,

DEFENDANT-APPELLANT,

JANE DOE SCHMIDT,

DEFENDANT.

APPEAL from a judgment of the circuit court for Wood County:
GREGORY J. POTTER, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Todd Schmidt appeals a judgment granting foreclosure to respondent SunTrust Mortgage, Inc., and dismissing his counterclaims. We affirm.

¶2 The circuit court decided the case on summary judgment. Schmidt first argues that the circuit court failed to follow proper summary judgment methodology. Specifically, he argues that the court failed to make a substantive decision on his argument that some of SunTrust’s affidavit material was not admissible under the business records hearsay exception, Wis. STAT. § 908.03(6) (2011-12).¹ SunTrust does not appear to dispute that the court did not expressly address that point.

¶3 Admission of affidavit material at the summary judgment stage may be a discretionary decision. *Bank of America NA v. Neis*, 2013 WI App 89, ¶15, 349 Wis. 2d 461, 835 N.W.2d 527. However, even if Schmidt is correct that the circuit court failed to exercise its discretion, that is not by itself a reversible error. Instead, as we stated in *Neis*, even though the circuit court’s ruling did not “reflect any discernible exercise of discretion,” we will apply a de novo standard of review on admissibility because “the Wis. STAT. § 908.03(6) issue in this case turns not on any discretionary factor but solely on the application of legal standards to a given set of facts.” *Id.*, ¶16. Accordingly, we proceed directly to Schmidt’s second argument, that the SunTrust affidavits failed to satisfy the admissibility requirements of *Neis* and other cases.

¶4 Schmidt argues that, insofar as the SunTrust affidavits relate to his loan payment history, they failed to show that the affiants were qualified witnesses to make

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

the averments that would establish admissibility as business records. Therefore, Schmidt argues, SunTrust failed to establish the amount of default.²

¶15 We conclude that the affidavit of Tomar Hill shows that he is sufficiently qualified. Hill avers that he is an “officer” at SunTrust, and that through his employment he has become familiar with SunTrust’s recordkeeping practices and the types of records, including payment histories, that it maintains in connection with loans that it services. Hill further avers that the attached payment history for the Schmidt loan is taken from SunTrust’s business records; that he has personal knowledge that, under SunTrust’s procedures for creating payment history ledgers, each entry is made at or near the time of the occurrence, by persons with personal knowledge of the information in the record or from persons with personal knowledge; and that these records are kept in the ordinary course of SunTrust’s regularly conducted business activities. This is sufficient to meet the applicable standard under *Neis*.

¶16 Schmidt’s third argument is that the circuit court erred by denying his motion to file a first amended answer, affirmative defenses, and counterclaims. The parties appear to agree that Schmidt’s motion to amend the answer was filed more than six months after the summons and complaint, and therefore the amendment is permitted only by leave of court, which should be “freely given at any stage of the action when justice so requires.” WIS. STAT. § 802.09(1). The parties appear to agree that this is a discretionary determination by the circuit court.

² Schmidt also argues that the SunTrust affidavits failed to “properly authenticat[e] the note [and] mortgage.” However, SunTrust points out, and Schmidt does not dispute in reply, that SunTrust produced the original note and certified copies of the mortgage. Accordingly, we address only the arguments that Schmidt pursues in reply, which pertain to his loan payment history.

¶7 Schmidt’s motion to amend the answer was filed and argued during the briefing on SunTrust’s summary judgment motion. Neither party directs us to any substantive decision by the circuit court on the motion to amend. At the last hearing on the summary judgment motion, the court appears to have concluded that “since the motion for summary judgment has been granted, the other motions are moot.”

¶8 It is not apparent to us, and SunTrust does not explain, how the granting of summary judgment on SunTrust’s foreclosure claim would moot a motion to interpose additional defenses to that claim, or would moot counterclaims. Therefore, the denial of the motion cannot be affirmed on this basis.

¶9 However, SunTrust argues that the denial of the amendment was nonetheless reasonable, in light of the apparent legal weakness of the proposed amendments and the amount of time that had passed since the case began. In contrast, Schmidt does not clearly develop an argument explaining why justice required the circuit court to allow this amendment. He appears to argue that the amendment should be allowed unless SunTrust is prejudiced, but he cites no law for that proposition, and does not dispute that passage of time is a proper basis on which to deny the motion. Therefore, Schmidt has not persuaded us that the decision was unreasonable and must be reversed.

¶10 Finally, Schmidt’s fourth argument is that, even without the proposed amendments to his answer, the circuit court did not properly consider the affirmative defenses and counterclaims he had already pled in his original answer. SunTrust does not appear to dispute, and the hearing transcript confirms, that the court did not reach a substantive decision on those affirmative defenses or counterclaims. However, the written judgment does dismiss the counterclaims.

¶11 Although the circuit court may not have expressly applied summary judgment methodology to the affirmative defenses and counterclaims, that is not by itself a reversible error. Our review of summary judgment is de novo, *Neis*, 349 Wis. 2d 461, ¶15, and therefore it makes no difference to our review whether the circuit court correctly applied the methodology. Instead, to establish reversible error on appeal, Schmidt must argue that SunTrust was not entitled to summary judgment on those defenses and counterclaims.

¶12 Here, Schmidt's argument seems mainly to be aimed at recasting his affirmative defenses and counterclaims as points that the circuit court should have considered in deciding whether foreclosure should have been denied for equitable reasons. However, as SunTrust points out, and Schmidt does not appear to dispute, this equitable framing of the issues was not previously presented to the circuit court, and therefore should not be considered first on appeal.

By the Court.—Judgment affirmed.

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

