COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP970 **Cir. Ct. No. 2009CV010050**

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

ONEWEST BANK FSB,

PLAINTIFF-RESPONDENT,

V.

ALEXANDER GROYSMAN,

DEFENDANT-APPELLANT,

JP MORGAN CHASE BANK AND EAG INVESTMENTS,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM W. BRASH, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Alexander Groysman, *pro se*, appeals from a circuit court judgment granting summary judgment of foreclosure to OneWest Bank, FSB ("OneWest").[1] Groysman argues that the circuit court erred in granting summary judgment because "[t]here are numerous deficiencies with OneWest's evidence, which are all issues of material fact." We affirm.

BACKGROUND

¶2 This foreclosure action concerns a two-unit residential building owned by Groysman. On February 1, 2006, Groysman executed a note payable to BankUnited, FBS ("BankUnited"). On the same day, Groysman also executed a mortgage to BankUnited to secure the note.

¶3 On June 30, 2009, OneWest filed this foreclosure action against Groysman, his unknown spouse, unknown tenants of the property, and EAG Investments, which OneWest believed may have an interest in the property. OneWest alleged that it was the current holder of the note and mortgage and that Groysman had failed to make payments since February 2008.

¶4 Groysman, acting *pro se*, filed an answer to the complaint in which he stated that he was not the current owner of the property, but was the mortgage holder.[2] He also alleged that IndyMac Federal Bank, FSB ("IndyMac Federal")

[1] Groysman was represented at the circuit court for hearings on his motion to dismiss and OneWest's second motion for summary judgment, but on appeal he is once again proceeding *pro se*.

[2] According to Groysman's representations to the circuit court, he transferred the title to EAG Investments, in which Groysman has an interest.

currently owned the mortgage.[3] Groysman further asserted that OneWest had not sent required correspondence regarding debt collection to Groysman and had not been responsive to Groysman's attempts "to resolve this issue." Groysman also indicated, however, that subsequent to the filing of the complaint, OneWest had agreed to set up "a restructured mortgage and[/]or repayment deal" with him. Therefore, Groysman asserted, the proceeding should be dismissed.

¶5 Over the next year, efforts were made to resolve the matter, but they were unsuccessful. OneWest moved for summary judgment. Groysman opposed the motion, arguing that OneWest "is not the recorded owner of the mortgage in question" and "is not in possession of any Assignment of Mortgage between [OneWest] and [BankUnited, the] original mortgagor." The circuit court denied OneWest's motion, concluding that there were genuine issues of material fact that precluded summary judgment.[4]

¶6 The case was subsequently transferred to a different branch of the circuit court. In April 2011, counsel for OneWest brought to court "the original note and mortgage," explaining that he thought that might "resolve any standing

---

[3] OneWest's response brief provides the following background concerning IndyMac Federal:

> On or about July 11, 2008, IndyMac Bank, F.S.B. failed and went into receivership under the Federal Deposit Insurance Corporation … and was rebranded IndyMac Federal Bank, F.S.B. On March 19, 2009, IndyMac Federal Bank, F.S.B. was acquired by OneWest Bank, F.S.B., a bank created for the purpose of acquiring IndyMac Federal Bank.

[4] The Honorable John DiMotto denied the motion for summary judgment. Shortly after doing so, the case was transferred to the Honorable William W. Brash, III, who ultimately granted the second motion for summary judgment that was filed about two years after the first motion for summary judgment and is the subject of this appeal.

issue." Groysman's son Eugene Groysman, whom the circuit court permitted to argue, said: "[Y]es, they presented the original note, but there is no time frame when they received this." In light of Groysman's continued concerns about OneWest's standing, the circuit court granted OneWest's request to file an amended complaint.

¶7 OneWest filed an amended complaint that provided additional allegations concerning various banks' acquisitions of the note and mortgage. The amended complaint also reiterated that although BankUnited had executed an assignment of mortgage to OneWest, "the assignment was lost," so OneWest had executed an "Affidavit of Lost Assignment" that was recorded in the Milwaukee County Register's Office on October 23, 2009.

¶8 The amended complaint also included an allonge to the note that identifies Groysman as the borrower and BankUnited as the originating lendor. The allonge includes a blank endorsement that states: "Pay to the order of [blank] without recourse." (Some capitalization omitted.) That allonge, which is not dated, includes the signature of Lee Hernandez, who is identified as Vice President of BankUnited.

¶9 The amended complaint also contained a second allonge to the note. It is not dated and it does not identify the property or borrower. It simply states: "Pay To The Order Of [blank] Without Recourse" and is signed by Cynthia Prees, Assistant Vice President of IndyMac Bank, F.S.B. ("IndyMac").

¶10 Groysman filed an answer to the amended complaint in which he made additional allegations concerning various banks' acquisitions of the mortgage and note. He also asserted that the allonge from BankUnited could "not be verified," was not previously presented, and, therefore, "should be excluded."

Groysman argued that the allonge was also deficient because it lacked a stamp of receivership by IndyMac or OneWest, which Groysman said "is required."

¶11 Groysman attacked the IndyMac allonge on grounds that it lacked "a borrower name, loan number, note date, property address," and other information. Groysman argued that without that information, the document could not be authenticated and, therefore, the document "should also be excluded from this case."

¶12 Groysman asked the circuit court to dismiss the case with prejudice. He subsequently retained counsel, who represented him at the hearing on Groysman's motion to dismiss.

¶13 Prior to the hearing, OneWest filed an affidavit in opposition to the motion to dismiss that included correspondence to Groysman indicating that IndyMac took over the loan effective August 2006. Correspondence dated March 2, 2009, states that payments on the overdue account can be sent to IndyMac Federal. Finally, correspondence dated April 2, 2009, concerning Groysman's attempts to set up a repayment plan, cautions Groysman that if he does not follow the payment plan, then "Indymac Mortgage Services, a division of OneWest Bank, FSB will assume normal collection proceedings." At that hearing, OneWest's counsel once again brought the original note and mortgage, and he filed with the circuit court "an exact copy of the original note."

¶14 The circuit court denied the motion to dismiss and OneWest moved for summary judgment. Groysman moved for an enlargement of time to file an amended answer to the complaint, but the circuit court denied his motion. After additional briefing and oral argument, the circuit court granted the motion for

summary judgment. In doing so, it noted that it was undisputed that Groysman had not made any payments since February 2008.

¶15 The circuit court said that OneWest had provided a true and correct copy of the original note and also had brought the original note to court for the hearing. That note was endorsed in blank on the two allonges. As for the mortgage, the circuit court said that the affidavit of lost assignment of mortgage was acceptable, noting that there was "no indication that there was any fraudulent conduct on the part of the lenders involved in [the] selling of this note and mortgage." The circuit court continued:

> Moreover, there is evidence that the defendants recognized [OneWest] as the lender when they attempted to enter into a loan modification…. I would cite the parties to the hearing transcript of March 26th of 2010 … which [is when] that very discussion occurred. This demonstrates that the defendants recognize [OneWest] as the party that has the right to demand payment from the defendants or obtain a judgment from them.
>
> As such, the Court finds that the requirements for establishing [OneWest] as the real party in interest have been met.

¶16 Next, the circuit court considered whether OneWest had "submitted sufficient evidence to support its request for judgment." The circuit court concluded that the affidavit by Zachary Rusk, an Assistant Secretary for OneWest, "complies with the requirements of ***Palisades*** [***Collection LLC v. Kalal***, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503] and, as such, is sufficient to present a prima facie case for summary judgment in favor of [OneWest]." (Italics and bolding added; underlining omitted.)

¶17 Finally, the circuit court concluded that because OneWest was "the real party in interest" and had presented a prima facie case, and because Groysman

had "presented no evidence of disputed material facts," OneWest was entitled to summary judgment. This appeal follows.

STANDARD OF REVIEW

¶18 Wisconsin's appellate courts have explained many times the methodology for reviewing a grant of summary judgment:

> We review *de novo* the grant of summary judgment, employing the same methodology as the circuit court. A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. We examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial.
>
> Affidavits in support of and 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). On summary judgment, the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit. That party need only make a prima facie showing that the evidence would be admissible at trial. If admissibility is challenged, the court must then determine whether the evidence would be admissible at trial.

Palisades, 324 Wis. 2d 180, ¶¶9-10 (citations omitted; italics added).

¶19 While our review of the grant of summary judgment is *de novo*, we have also noted that where the circuit court has made a determination as to the admissibility of evidence at the summary judgment stage, we may review that decision for misuse of discretion. ***Id.***, ¶13. "However, not all evidentiary rulings are discretionary. For example, if an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented and our

review is *de novo*." ***Id.***, ¶14 (italics added). In this appeal, neither party argues that we should review any portion of the circuit court's ruling for a misuse of discretion. We need not decide whether their assumption that *de novo* review of each aspect of the circuit court's ruling is proper, because under either standard of review, we conclude that the circuit court's ruling is correct.

¶20 Finally, "[a]lthough this court engages in summary judgment review *de novo*, we nonetheless may apply waiver to arguments presented for the first time on appeal." ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692 (italics added).

DISCUSSION

¶21 Groysman argues that genuine issues of material fact preclude summary judgment. He identifies ten issues, which we will group into four issues: (1) concerns about the affidavits submitted by OneWest; (2) concerns regarding the mortgage, note, and allonges; (3) the circuit court's application of summary judgment standards; and (4) allegations concerning which bank bought BankUnited. At the outset, we note that Groysman has chosen not to pursue some of the arguments he made in his brief in opposition to summary judgment, and he appears to raise some new assertions that were not in his motion. Issues that are not briefed on appeal are deemed abandoned, ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981), and we will not address arguments raised for the first time on appeal, *see* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997); *see also* ***Gruber***, 267 Wis. 2d 368, ¶27.

I. Concerns about the affidavits.

¶22 Groysman repeats many of the same challenges to the affidavits of OneWest's attorney and OneWest's assistant secretary that he made in his brief opposing the motion for summary judgment. In short, he asserts that the affidavits do not satisfy the requirements for affidavits outlined in ***Palisades***, a case that interpreted WIS. STAT. § 802.08(3), which states that 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." *See* ***id.*** ***Palisades*** explained that "the 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." ***Id.***, 324 Wis. 2d 180, ¶10.

¶23 ***Palisades*** also concluded that when a party seeks to admit business records under the hearsay exception found in WIS. STAT. § 908.03(6), the testifying custodian need not be "the original owner of the records," but "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." ***Palisades***, 324 Wis. 2d 180, ¶20 (italics omitted). To be qualified to offer that testimony, "the witness must have personal knowledge of how the records were made." ***Id.***, ¶22.

¶24 Groysman argues that the affidavit from Rusk—who is identified as an Assistant Secretary for OneWest in another document submitted as part of OneWest's motion for summary judgment—is insufficient under ***Palisades***. He complains that the affidavit does not explain Rusk's job duties and fails to lay a foundation for Rusk's statement that he has personal knowledge of the bank's

procedures and for other attached documents. We are not convinced. The affidavit tracks the language of ***Palisades***, stating that Rusk has "personal knowledge of how business records are created and maintained by OneWest" and also states that the records are "made at or near the time by a person with knowledge of the occurrences reflected therein, or from information provided by a person with knowledge, and are kept in the course of [OneWest's] regularly conducted business activity." OneWest was required to make only "a prima facie showing that the evidence would be admissible at trial," *see* ***id.***, ¶10, and the affidavit did so.

¶25 Groysman also argues that some portions of the affidavit filed by OneWest's trial counsel were insufficient because they lacked foundation. The statements in the affidavit outlined the proceedings in the case and the fees associated with trial counsel's work on the case. We agree with OneWest that trial counsel's affidavit contained assertions that were related to the case and his representation, and that the affidavit was sufficient under ***Palisades***.

II. Concerns regarding the mortgage, note, and allonges.

¶26 Groysman challenges the mortgage, note, and allonges on grounds that they are not properly endorsed. He asserts that OneWest lacks standing to pursue the foreclosure. Several of his arguments were not raised in the circuit court and were therefore forfeited and will not be considered on appeal. *See* ***Gruber***, 267 Wis. 2d 368, ¶27; ***Van Camp***, 213 Wis. 2d at 144. Groysman's remaining arguments are that the note and mortgage are not endorsed in blank and that the affidavit of lost assignment of the mortgage is insufficient.

¶27 In response to the first argument, OneWest argues that the note is a negotiable instrument, *see* WIS. STAT. § 403.104, that can be endorsed in blank,

see WIS. STAT. § 403.205(2), and that was endorsed in blank in this case. We agree. The two allonges contain the signatures of vice presidents of BankUnited and IndyMac. Those signatures are endorsements under WIS. STAT. § 403.204(1) (defining an endorsement as "a signature, other than that of a signer as maker, drawer or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument" and noting that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."). Further, the signatures are endorsements in blank because they do not contain a special endorsement. *See* § 403.205(1) & (2). As an instrument that is endorsed in blank, the note in this case is "payable to bearer and may be negotiated by transfer of possession alone until specially endorsed." *See* § 403.205(2).

¶28 Groysman also argues that OneWest has not shown that "the document allegedly in their possession is, in fact, an original." He further argues that "he never agreed that the mortgage and note in question were his signatures." The record refutes Groysman's assertions. Groysman's answers to the complaint and amended complaint never alleged that the copies of the note and mortgage provided by OneWest were the wrong documents or that the signatures on those documents were not Groysman's.

¶29 Furthermore, OneWest's trial counsel brought the original note to court on three occasions. On the first occasion, Groysman's son acknowledged that the note was the original when he argued that the date of receipt was the issue. He stated: "[Y]es, they presented the original note, but there is no time frame when they received this."

¶30 On the second occasion, when Groysman was represented by counsel, OneWest's trial counsel again brought the note to court and during the hearing filed with the court "an exact copy of the original note." Groysman's trial counsel did not object, indicating that the copy could be filed "if it's the same copy as in their amended pleading." At the end of the hearing, Groysman's trial counsel said that Groysman wanted the court to know "that he never said that that was his signature." However, Groysman did not raise that claim again in his brief opposing the motion for summary judgment, and he never produced any evidence that he signed a different note or mortgage.

¶31 Finally, OneWest's trial counsel brought the note to court again for the summary judgment motion. Groysman did not ask to examine the note or allege that the note did not contain his signature.

¶32 Next, Groysman argues that the Affidavit of Lost Assignment of the mortgage is hearsay and fails to satisfy the statutory requirements concerning the enforcement of instruments that have been lost, stolen, or destroyed. *See* WIS. STAT. § 403.309. In response, OneWest argues:

> [T]he assignment of mortgage is irrelevant. The purpose of recording an assignment of mortgage is to put third parties on notice that a mortgage still exists on the property and to protect the current holder of the mortgage from the previous owner filing a satisfaction of mortgage. ***Thauer v. Smith***, 213 Wis. 91, 250 N.W. 842, 844 (1933). In ***Thauer***, the Wisconsin Supreme Court stated that a subsequent purchaser should not assume that the person liste[d] as the apparent owner of the mortgage is the actual owner thereof because the manner assigning a mortgage is quite informal and could be for temporary purposes. ***Id.*** There is no statute or law requiring an assignment of mortgage. Additionally, [WIS. STAT.] § 706.08(1)(a) states that the effect of not recording an instrument "shall be void as against any subsequent purchaser, in good faith and for valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is

> recorded first." Thus, the purpose of the recording statutes is to protect bona fide purchasers. Alexander Groysman in this case has no standing to challenge the validity of the Affidavit of Lost Assignment of Mortgage, as the statute indicates that the recording system is to protect third party bona fide purchasers.
>
> ….
>
> OneWest is the Current holder of the note and under the principle of equitable assignment; OneWest was adequately assigned the Mortgage. It has long been settled in Wisconsin that the transfer of the Note carries with it the mortgage security. *See* ***Woodruff v. King***, 47 Wis. 261, 2 N.W. 452, 453 (1879). According to the doctrine of equitable assignment, "[t]he note and the mortgage are inseparable; the former as the essential, and the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is nullity." ***Carpenter v. Longan***, 83 U.S. 271, [274 (1872)]. Under this principle, the mortgage is equitably assigned when the Note is endorsed and negotiated to its current holder. Since OneWest holds the original Note endorsed in blank, OneWest has demonstrated that it is the holder of the Note, which carries with it the mortgage security. Consequently, OneWest has the authority to enforce the Note and foreclose on the related mortgage; therefore summary judgment was properly granted in favor of OneWest.

(Underlining omitted; bolding and italics added.)

¶33 Groysman's reply brief provides no response to OneWest's argument. Unrefuted arguments are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Therefore, Groysman's argument that OneWest lacked standing to foreclose based on the filing of the Affidavit of Lost Assignment of the mortgage fails.

III. Challenges to the circuit court's application of summary judgment standards.

¶34 Groysman offers a brief argument concerning the circuit court's application of summary judgment standards. He contends that when the circuit

court accepted the affidavits as prima facie evidence, it was deciding issues of witness credibility. We disagree. The circuit court had to determine whether OneWest had submitted prima facie evidence and, if so, whether Groysman had provided evidence that created a genuine issue of material fact. Groysman did not present contradictory evidence such as a different note or mortgage, documentation indicating that another bank owns the note or mortgage, or proof that Groysman had been making payments since 2008. We do not agree that the circuit court erred. Indeed, applying our own *de novo* analysis, we affirm the grant of summary judgment.

IV. Allegations concerning which bank bought BankUnited.

¶35 Groysman presents one final standing argument. He contends that OneWest lacked standing and cannot prove its case because BankUnited was transferred to a private equity group that did not involve OneWest. Groysman also notes that OneWest's amended complaint contained references to JP Morgan Chase Bank which, Groysman maintains, was not in any way involved in the transactions at issue in this case.

¶36 We are not convinced that Groysman's assertions defeat the motion for summary judgment. To the extent OneWest's amended complaint included information on banks that may not have played a role in this case, Groysman contested that information in his amended answer, and his original answer identified the bank that he claimed held the note and mortgage. Specifically, he alleged that "Indy Mac Federal Bank, FSB is the holder of the subject mortgage, however was not the originator of the mortgage." In response to the motion to dismiss, OneWest provided a copy of a loan statement to Groysman that stated that IndyMac Federal held the loan as of March 2009. The April 2009 loan

statement continued to identify IndyMac Federal, but also referred to Indymac Mortgage Services as a division of OneWest. The original note and mortgage, the loan statements, and Groysman's answer all indicate that the note was owned at various times by BankUnited, IndyMac, IndyMac Federal, and OneWest. This is consistent with the blank endorsements by BankUnited and IndyMac.

¶37 In his motion to dismiss, Groysman raised the issue of OneWest's identification of banks not involved with his loan. However, he did not raise the issue in his response to the motion for summary judgment, and the circuit court did not address it on its own. Ultimately, what is at issue is whether OneWest had standing to bring the foreclosure action and presented a prima facie case. Like the circuit court, we have answered both questions in the affirmative. Groysman did not produce evidence that refuted OneWest's prima facie case. For example, Groysman did not deny that he failed to make payments since 2008, and he did not allege that any other bank has the right to enforce the note and mortgage. We agree with the circuit court that OneWest was entitled to a summary judgment of foreclosure.

By the Court.—Judgment affirmed.

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