COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 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. 2013AP2121 **Cir. Ct. No. 2012CV198**

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

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

ROSARIA C. MONTESANO A/K/A ROSARIO MONTESANO AND JAMES A. MONTESANO,

DEFENDANTS-APPELLANTS,

LASALLE BANK N.A., RIVERWOOD WHITE PINES CONDO OWNERS ASSOCIATION, RIVERWOOD CONDOMINIUM OWNER'S ASSOCIATION, INC.,

DEFENDANTS,

FEDERAL HOME LOAN MORTGAGE CORPORATION,

CREDITOR.

APPEAL from an order of the circuit court for Columbia County: W. ANDREW VOIGT, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Rosaria and James Montesano appeal an order of the circuit court denying the Montesanos' motion under WIS. STAT. § 806.07 (2011-12)[1] to reopen a judgment of foreclosure. Relying largely on an unpublished opinion of this court, the Montesanos argue that the circuit court erroneously exercised its discretion in denying their motion. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In 2001, the Montesanos took out a mortgage on vacation property located in the Wisconsin Dells. In April 2012, JP Morgan Chase Bank, the holder of the mortgage and the note securing the mortgage, filed a complaint of foreclosure on the Montesanos' vacation property, alleging that the Montesanos had failed to make contractual payments. The Montesanos counterclaimed, alleging "Estoppel and/or Unclean Hands" and "Unclean Hands, Breach of contract and Tort for Property Damage." The Montesanos subsequently stipulated to the dismissal with prejudice of their counterclaims against JP Morgan Chase and the circuit court entered an order dismissing those claims.

¶3 In January 2013, JP Morgan Chase moved the circuit court for summary judgment. The Montesanos did not file a response. A hearing on the

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

motion for summary judgment was scheduled for March 4, 2013. On March 1, the Montesanos moved the court to adjourn the hearing on the basis that they had recently retained new counsel who needed additional time to prepare. The court denied the Montesanos' motion. Following the summary judgment hearing, the circuit court determined that JP Morgan Chase was entitled to summary judgment and entered a judgment of foreclosure in the bank's favor.

¶4 A sheriff's sale of the property was scheduled for June 10, 2013. On that date, the Montesanos filed an "emergency motion to adjourn" the sale for one month. In an affidavit attached to the motion, James averred that he had been "seeking a loan modification with [JP Morgan Chase] since March" and that JP Morgan Chase had "defrauded [him] by failing to timely process [his] loan modification request." The motion was granted and the sheriff's sale was rescheduled for July 22. The sale took place as scheduled and on July 25, a report of sale was filed with the circuit court indicating that the property had been sold to JP Morgan Chase.

¶5 On August 9, 2013, prior to entry of the order confirming the sale, the Montesanos moved the court to reopen the judgment of foreclosure under WIS. STAT. § 806.07(1)(a) and (g).[2] Section 806.07(1)(a) allows relief from a judgment on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect" and (1)(g) allows relief from a judgment when "[i]t is no longer equitable that the

[2] Also on August 9, 2009, the Montesanos filed a "proposed amended answer," wherein the Montesanos asserted a counterclaim for breach of good faith stemming from JP Morgan Chase's actions with respect to the bank's failure to process a loan modification application, which they claim to have submitted on July 9, 2013. The Montesanos have not argued, and we have not found anywhere in the record, that they formally, or otherwise validly, moved the court to amend their answer.

judgment should have prospective application." The court denied the Montesanos' motion and on August 29, 2013, the circuit court entered an order confirming the sale. The Montesanos appeal.

DISCUSSION

¶6 The Montesanos contend that the circuit court erroneously denied their WIS. STAT. § 806.07(1)(g) motion for relief from the judgment of foreclosure.[3]

¶7 The circuit court has wide discretion in determining whether to grant relief from a judgment under WIS. STAT. § 806.07. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶29, 326 Wis. 2d 640, 785 N.W.2d 493. We will not disturb the court's discretionary determination unless the court erroneously exercised its discretion. ***Johnson v. Cintas Corp. No. 2***, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756. "'A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.'" ***Id.*** (quoted source omitted). We will search the record for reasons to sustain the circuit court's exercise of discretion. ***Lofthus v. Lofthus***, 2004 WI App 65, ¶21, 270 Wis. 2d 515, 678 N.W.2d 393.

¶8 WISCONSIN STAT. § 806.07(1)(g) allows for relief from a judgment in an equitable action when "[i]t is no longer equitable that the judgment should

[3] On appeal, the Montesanos have limited their arguments to the question of whether the circuit court erroneously exercised its discretion in denying their motion for relief based on the inequity of enforcing the judgment of foreclosure, under WIS. STAT. § 806.07(1)(g), and have thus forfeited any claim that the circuit court erroneously exercised its discretion in denying their motion under § 806.07(1)(a) on the grounds of mistake, inadvertence, surprise, or excusable neglect.

have prospective application." *See* ***Bank One Wis. v. Kahl***, 2002 WI App 312, ¶17, 258 Wis. 2d 937, 655 N.W.2d 525 (section 806.07(1)(g) applies only to equitable actions); and ***McFarland State Bank v. Sherry***, 2012 WI App 4, ¶32, 338 Wis. 2d 462, 809 N.W.2d 58 (Dec. 22, 2011) (foreclosure proceedings are equitable in nature).

¶9 In reviewing cases construing the federal counterpart to § 806.07(1)(g), FED. R. CIV. P. 60(b)(5), the Wisconsin Supreme Court stated in ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 543-44, 363 N.W.2d 419 (1985), that Rule 60(b)(5) "was intended to preserve for the courts the power to alter final judgments having an ongoing impact when the facts as determined in the original action have changed to a degree that the final judgment must also be changed to comport with the new conditions." Our supreme court has also observed that the United States Supreme Court has stated that a court may consider granting a motion under Rule 60(b)(5) "'when changed factual circumstances make compliance [with the underlying order or judgment] substantially more onerous,'" when the underlying order or judgment "'proves to be unworkable due to unforeseen obstacles,'" or when enforcement of the underlying order or judgment "'would be detrimental to the public interest.'" ***Wisconsin Dept. of Corrections v. Kliesmet***, 211 Wis. 2d 254, 261, 564 N.W.2d 742 (1997) (quoting ***Rufo v. Inmates of Suffolk County Jail***, 502 U.S. 367, 384 (1992)).

¶10 The Montesanos argued before the circuit court that it was not equitable for the judgment of foreclosure to continue to have prospective application because JP Morgan Chase acted in bad faith with respect to attempts by the Montesanos to modify their mortgage following the entry of the judgment of foreclosure. The circuit court found, however, that the Montesanos failed to make a sufficient showing of changed circumstances justifying relief from the

judgment of foreclosure. The court found that the only difference between the circumstances prior to and after the entry of the judgment of foreclosure was an acknowledgment "that efforts to resolve this case short of the entry of [j]udgment … [had] failed," which the court reasoned was not a difference significant enough to warrant reopening the judgment.

¶11 The Montesanos argue on appeal that the circuit court's decision to deny their WIS. STAT. § 806.07(1)(g) motion was an erroneous exercise of the court's discretion in light of this court's unpublished decision in ***Moser v. Anchor Bank FSB***, No. 2012AP2700, unpublished slip op. (WI App June 20, 2013). *See* WIS. STAT. RULE 809.23(3)(b) (an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under WIS. STAT. § 752.31(2) may be cited for its persuasive value). Relying exclusively on our opinion in ***Moser***, the Montesanos argue that ***Moser*** establishes that issues concerning mortgage modifications arising between the entry of the judgment of foreclosure and the confirmation of sale "are actionable claims that can *only* be brought as counterclaims after a reopen[ing] of the original judgment of foreclosure." Thus, according to the Montesanos, they could not bring any counterclaims arising after the entry of the judgment of foreclosure unless the judgment of foreclosure was reopened. The Montesanos misread ***Moser***.

¶12 In ***Moser***, the issue before us was claim preclusion and whether a mortgagee could, following the entry of an order confirming the sale of the property subject to the mortgage at issue, bring a separate action against a mortgagor alleging the improper denial of a mortgage modification under the Home Affordable Modification Program (HAMP), the loan modification process at issue in that case. *See* ***id.***, ¶1. We concluded that the mortgagee could not bring his action because the action was barred by claim preclusion. ***Id.*** We explained

that foreclosure actions are unique in that they often result in two separate and final appealable orders—a judgment of foreclosure and a subsequent order for confirmation of sale. ***Id.***, ¶15. We explained that as far as we could tell on the record before us in ***Moser***, the foreclosure proceedings at issue and the HAMP loan modification process could proceed simultaneously, and a loan modification under HAMP could be granted, even after the judgment of foreclosure was entered, which would revive the mortgagee/mortgagor relationship between the parties. ***Id.***, ¶17. We went on to explain further that pursuant to WIS. STAT. § 802.07(2), the mortgagee in ***Moser*** had the option to litigate his modification claims against the mortgagor as counterclaims in the foreclosure action, even after the judgment of foreclosure had been entered. ***Id.***, ¶22.

¶13 Notably, we did not specify in ***Moser*** the procedural manner in which the mortgagee in that case could raise his counterclaims. We stated that we were not persuaded by any purported argument by the mortgagee that his only recourse would have been to move the court to reopen the judgment of foreclosure and seek permission from the court to amend his answer. *See* ***id.***, ¶30. We left open the possibility that there were other manners in which the mortgagee could bring his counterclaims. For example, our opinion in ***Moser*** indicates that the mortgagee in that case could have moved the circuit court to amend his answer to assert his counterclaim after the judgment of foreclosure was entered notwithstanding the entry of that judgment. *See* ***id.***, ¶22. Thus, contrary to the Montesanos' suggestion, ***Moser*** does not provide persuasive authority for the proposition that the Montesanos could not bring any counterclaims arising after

the entry of the judgment of foreclosure unless the judgment of foreclosure was reopened.[4]

¶14 We read the Montesanos' brief on appeal as also arguing that regardless of whether reopening of the judgment of foreclosure was necessary in order to assert their counterclaims against JP Morgan Chase, the circuit court erroneously exercised its discretion in failing to do so because enforcement of the judgment was inequitable in light of the facts after entry of the judgment.

¶15 The Montesanos argue that following the judgment of foreclosure they timely submitted an application for modification of their mortgage, but that an agent of JP Morgan Chase failed to properly process their application, which prevented their application from being evaluated. The Montesanos appear to be arguing that the bank's agent's failure to process their application and the bank's failure to review that application were changed circumstances sufficient to require a reopening of the judgment of foreclosure. We are not persuaded.

¶16 In an affidavit submitted by the Montesanos in support of their WIS. STAT. § 806.07 motion, James averred that during the pendency of this case, the Montesanos had attempted to work with JP Morgan Chase to secure a modification of their loan. James averred that the Montesanos had given their mortgage modification application to a representative of JP Morgan Chase sometime the day the application was due, but the application was not formally submitted to the bank until the following day, which rendered the application

[4] As indicated above in footnote 2, the Montesanos have not argued that they moved the court to amend their answer. We therefore do not address in this case what effect, if any, a motion to amend the answer would have had on the Montesanos' right to assert a counterclaim against JP Morgan Chase for breach of good faith.

untimely. At the hearing on the Montesanos' motion, the Montesanos' attorney indicated that obtaining a mortgage modification had been an ongoing process throughout the foreclosure proceedings, stating that the Montesanos had not contested JP Morgan Chase Bank's motion for summary judgment on the issue of foreclosure in an effort to work with JP Morgan Chase to obtain a modification.

¶17 The record before this court indicates that throughout the foreclosure proceedings, the Montesanos attempted to obtain a modification of their mortgage, but that their attempts to do so had been unsuccessful. The record indicates that sometime prior to June 2013, the Montesanos claimed to have submitted a loan modification request which they claimed was not timely processed. The record also indicates that the Montesanos claimed that a mortgage modification application was due to JP Morgan Chase on July 9, 2013, that the Montesanos submitted their application at some point on that date, but that JP Morgan Chase deemed the application untimely. The record is silent, however, as to when on July 9 the Montesanos' application was submitted, thus it is unclear to this court whether the application was submitted in time for it to be processed by the bank on July 9. In addition, the record in this case indicates that throughout the foreclosure proceedings, the Montesanos repeatedly moved in last minute fashion for relief that would delay the foreclosure proceedings. For example, three days before the summary judgment hearing was scheduled, the Montesanos moved to adjourn the hearing because they had retained new counsel. Also, on the date of the originally scheduled sheriff's sale, the Montesanos moved to adjourn the sale on the basis that they were in the process of trying to obtain a loan modification.

¶18 The circumstances surrounding JP Morgan Chase Bank's alleged refusal to consider the Montesanos' July 2013 mortgage modification application may arguably have constituted new facts upon which to support a WIS. STAT.

§ 806.07(1)(g) motion. However, we cannot say that it was an erroneous exercise of the circuit court's discretion for the court to determine that such new facts, standing alone, are not sufficient to justify setting aside the judgment. New facts must convince the court that it was "no longer equitable" for the judgment of foreclosure to have prospective application. The record that we have summarized in the preceding paragraphs provides a sufficient factual basis upon which a circuit court could reasonably conclude that it remained equitable for the judgment to stand. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion in refusing to grant the Montesanos relief under WIS. STAT. § 806.07(1)(g).

CONCLUSION

¶19 For the reasons discussed above, we are unable to conclude that the circuit court erred in denying the Montesanos' WIS. STAT. § 806.07 motion. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.