COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2014AP449 **Cir. Ct. No. 2013CV348**

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

ANCHORBANK, FSB,

PLAINTIFF-RESPONDENT,

V.

BRET N. BOGENSCHNEIDER,

DEFENDANT-APPELLANT,

UNKNOWN SPOUSE OF BRET N. BOGENSCHNEIDER AND HERITAGE CREDIT UNION,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Bret Bogenschneider appeals a judgment of foreclosure in favor of AnchorBank and an order granting summary judgment in favor of AnchorBank on counterclaims filed by Bogenschneider. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In 2011, Bogenschneider took out a mortgage on a residential property located in Maple Bluff, Wisconsin. In 2013, AnchorBank filed a complaint seeking foreclosure of Bogenschneider's property, alleging that it is the holder of the note and of the mortgage securing the note, and that Bogenschneider had failed to make the contractual payments. AnchorBank sought foreclosure under WIS. STAT. § 846.101 (2011-12),[1] which permits shortened redemption periods in exchange for waivers of certain deficiency judgments. *See* ***Bank Mut. v. S.J. Boyer Const., Inc.***, 2010 WI 74, ¶31, 326 Wis. 2d 521, 785 N.W.2d 462. Bogenschneider counterclaimed for damages under WIS. STAT. §§224.77, 224.80 and 844.01, alleging that AnchorBank caused him harm by failing to follow regulations of the Federal National Mortgage Association, commonly known as Fannie Mae, by not properly considering "a deed in lieu of foreclosure offer" on the property.

¶3 In July 2013, Anchor Bank moved the circuit court for summary judgment. In support of its motion, Anchor Bank submitted the affidavit of Steven Wood. Wood averred in relevant part as follows:

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

> 1. [] I am an authorized agent of AnchorBank, FSB, and [] I am familiar with and have access to the financial records concerning the mortgage which is the subject of this action ….
>
> 2. That in the regular performance of my job functions, I have personal knowledge of how the business records are prepared and maintained by AnchorBank, FSB for the purpose of servicing mortgage loans. These records … are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by AnchorBank, FSB…. In connection with making this affidavit, I have personally examined these business records reflecting data and information as of June 11[], 2013.
>
> 3. That on July 1, 2011, [Bogenschneider] signed a note and promised to pay the original principal balance of $239,000.00 plus interest in accordance with the provisions of said note ….
>
> 4. That to secure the indebtedness referred to in the preceding paragraph, on July 1, 2011, [] Bogenschneider executed a mortgage to AnchorBank, FSB, which was recorded July 7, 2011 ….
>
> 5. That AnchorBank, FSB has possession, and is the holder, of the promissory note[.]
>
> ….
>
> 7. That [] Bogenschneider is currently in default on this note by failing to make timely and scheduled payments on the account. The customer is due for the October 1, 2012 and subsequent payments and owes a principal balance of $225,280.14 accruing interest at the current rate of 3.75 percent per annum.
>
> 8. The unpaid balance of the Note and Mortgage was declared immediately due and payable. A copy of the Notice of Default letter is attached hereto ….

Attached to Wood's affidavit were: (1) a copy of the note; (2) a copy of the mortgage; (3) a copy of the notice of default and right to cure; and (4) a copy of

the loan history statement, purporting to show Bogenschneider's payment history with entries dating from December 2011 to December 2012.

¶4 After Anchor Bank moved the circuit court for summary judgment, Bogenschneider filed an amended counterclaim, alleging: (1) a claim for damages under WIS. STAT. §§ 224.77, 224.80, and 844.01 because AnchorBank failed to follow Fannie Mae regulations; (2) breach of the duty of good faith and fair dealing; (3) tortious interference with real estate and professional business, under WIS. STAT. § 134.01; and (4) breach of contract for failing to provide him with a notice of acceleration and right to cure, and a notice of transfer of ownership of the mortgage. Bogenschneider also moved the court for summary judgment on his counterclaims.

¶5 Following a hearing, the circuit court granted AnchorBank's motion for summary judgment on its complaint for foreclosure. The court found that AnchorBank was the holder of the original note, which was presented to the court, and was entitled to a judgment of foreclosure. The Court stated that it "is a fairly clear-cut case that there was a note secured with a mortgage and a default and a notice of default and an acceleration and [Anchor Bank] is entitled to judgment of foreclosure." The court denied Bogenschneider's motion for summary judgment and AnchorBank's motion to dismiss. An order of foreclosure memorializing the court's rulings was entered in October 2013.

¶6 Thereafter, Bogenschneider moved the circuit court for relief from the judgment of foreclosure. Bogenschneider asserted the following reasons for relief: (1) the original note appeared to be a forgery; (2) notice was not provided from a third-party holder, such as Fannie Mae, that the note was reassigned to AnchorBank; and (3) the note "raises several 'materials issues of fact,'" including the forgery of the note and the proper recording of the mortgage with the register of deeds. Bogenschneider subsequently filed an amended motion for relief

wherein he asserted that he was entitled to relief from the judgment of foreclosure for the following reasons: (1) AnchorBank failed to disclose that it had changed the locks on the subject property; (2) AnchorBank denied the existence of a servicing agreement between AnchorBank and Fannie Mae; and (3) the note held by AnchorBank does not appear to be the original note. Bogenschneider also moved the court again for summary judgment on his counterclaims, as did AnchorBank.

¶7 A hearing was held on the parties' motions, after which the circuit court granted AnchorBank's motion for summary judgment on Bogenschneider's counterclaims. The court determined that AnchorBank was within its contractual rights to place locks on the subject property, that AnchorBank was in possession of the original note containing Bogenschneider's original signature (which had been presented to the court), that AnchorBank had the right to enforce the note, and that AnchorBank had not improperly denied Bogenschneider access to the property. The court also determined that Bogenschneider did not have a cause of action for any of his remaining counterclaims. With regard to the judgment of foreclosure, which was entered in October 2013, and Bogenschneider's motion for relief from that order, the court determined that judgment in favor of AnchorBank was appropriate. However, the court further determined that a new order of foreclosure should be entered because Bogenschneider did not have sufficient access to the property during the redemption period following the entry of the October 2013 order, and that upon entry of the new order, the six-month redemption period would run anew. A new judgment of foreclosure was subsequently entered in February 2014. Bogenschneider appeals.

DISCUSSION

¶8 Bogenschneider contends that the circuit court erred in granting AnchorBank's motion for summary judgment on the issue of foreclosure and that the court also erred in granting summary judgment in favor of AnchorBank on Bogenschneider's counterclaims. Before we proceed with our analysis, we observe that Bogenschneider's arguments in support of these challenges are generally disorganized and difficult to follow, and are not framed in terms of the applicable standards of review. Bogenschneider also makes assertions that are not pertinent to the present proceeding and/or are without factual support in the record before us. Bogenschneider's lack of organization and inattention to our standard of review made it difficult to determine what issues Bogenschneider intends to present and whether, if those issues had been argued in terms of the proper standards of review, they would have merit. We have made considerable efforts to specify and address what we perceive to be Bogenschneider's intended arguments. However, to the extent that we have not addressed arguments raised in this appeal, those arguments are deemed rejected. *See* ***Roberts v. Manitowoc Cnty. Bd. Of Adjustment***, 2006 WI App 169, ¶35, 295 Wis. 2d 522, 721 N.W.2d 499.

A. Standard of Review

¶9 Our review on summary judgment is de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

A. Judgment of Foreclosure

¶10 Bogenschneider contends that the circuit court erred in granting AnchorBank's summary judgment motion for a judgment of foreclosure because the summary judgment submissions failed to establish that AnchorBank has a legal basis to bring the foreclosure action and to enforce the note and mortgage.

¶11 Bogenschneider first argues that AnchorBank failed to establish that it has standing to bring the foreclosure action because AnchorBank "was not the legal owner of the [mortgage], and did not allege it was the lawful holder of the [mortgage] at the time of the filing of the foreclosure action." Bogenschneider appears to be arguing that the owner of the mortgage is Fannie Mae and that AnchorBank is only the servicer of the mortgage. Bogenschneider argues that because AnchorBank failed to submit to the circuit court a servicer agreement between it and Fannie Mae, AnchorBank failed to establish that it has a "legal right to hold the [mortgage] as the servicer."

¶12 Bogenschneider also argues that material issues of fact exist with regard to AnchorBank's possession of the original note. Bogenschneider asserts that the original note filed with the court bore a general endorsement that was not present on the photocopy of the note, and he asserts that AnchorBank must have "retroactively" stamped a general endorsement on the note after the foreclosure proceeding was commenced. Citing generally to ***In re Rinaldi***, 487 B.R. 516 (Bkrtcy E.D. Wis. 2013), he asserts that "[t]he improper practice of retroactively stamping a promissory note … is grounds to dismiss the foreclosure action."

¶13 Having reviewed the summary judgment submissions, we conclude that undisputed facts show that AnchorBank is the holder of the original note and is entitled to enforce the note and mortgage.

¶14 The original note, which was endorsed in blank and signed by an assistant vice president of AnchorBank, was submitted to the court.[2] Bogenschneider points out that the original note contains a blank endorsement that is not present on the copy of the note attached to AnchorBank's complaint, but this circumstance does not show that the note was endorsed after the foreclosure proceeding was initiated because the endorsement is not dated. It is pure conjecture on Bogenschneider's part to argue that the note was endorsed following the initiation of the foreclosure proceeding. Furthermore, Bogenschneider has not cited this court to any legal authority that the endorsement of a note after a foreclosure proceeding is initiated affects the holder of the note's right to enforce the note. Bogenschneider cites this court to ***In re Rinaldi***; however, he does not explain how or why that case supports his argument. In ***In re Rinaldi***, a bankruptcy case, the bankruptcy court stated that the debtor's insinuation that the creditor endorsed the note after the foreclosure proceeding began was irrelevant to that proceeding because there was no requirement that an endorsement be dated. ***Id.*** at 528. The bankruptcy court also stated that any complaint about an apparent lack of endorsement in a state court foreclosure proceeding must be raised before the state court. ***Id.*** So far as we can tell, ***In re Rinaldi*** does not provide support for Bogenschneider's assertion that a holder of a note may not enforce that note if the note is endorsed in blank during the pendency of a foreclosure proceeding.

¶15 A note endorsed in blank is payable to the bearer, which in this case is AnchorBank, because it produced the original note in court. *See* WIS. STAT. § 403.205(2). As the note's holder, AnchorBank also holds the mortgage. *See*

[2] *See* WIS. STAT. § 909.02(9) (commercial paper, and the signatures thereon, is self-authenticating).

Dow Family, LLC v. PHH Mortg. Corp., 2014 WI 56, ¶¶5-7, 30, 33, 47, 354 Wis. 2d. 796, 848 N.W.2d 728 (pursuant to WIS. STAT. § 409.203(7), when a note is transferred or assigned, the equitable interests in the mortgage follow). We conclude that AnchorBank established its right to enforce the note and, under the doctrine of equitable assignment, the mortgage as well. Accordingly, we conclude that summary judgment in favor of AnchorBank was appropriate.

B. Counterclaims

¶16 Bogenschneider argues that the circuit court erred in dismissing his counterclaims for damages under WIS. STAT. §§ 224.77 and 224.80. WISCONSIN STAT. § 224.77 provides in relevant part:

> (1) Prohibited acts and practices. No mortgage banker, mortgage loan originator, mortgage broker … may do any of the following:
>
> (k) Violate any provision of this subchapter, ch. 138, or any federal or state statute, rule, or regulation that relates to practice as a mortgage banker, mortgage loan originator, or mortgage broker.

WISCONSIN STAT. § 224.80 provides in relevant part:

> (2) Private cause of action. A person who is aggrieved by an act which is committed by a mortgage banker, mortgage loan originator, or mortgage broker in violation of any provision of this subchapter or of any rule promulgated under this subchapter may recover all of the following in a private action ….

¶17 Bogenschneider tells us that the circuit court determined that although "[he] was aggrieved by the actions of Anchor Bank [sic] in clandestinely changing the locks on the subject property and preventing access by [him] to the property," WIS. STAT. ch. 244 does "not provide a legal cause of action for the

harm and resulting damages" from AnchorBank's actions. Bogenschneider misrepresents or fails to understand the circuit court's ruling.

¶18 The circuit court did not, as Bogenschneider asserts, make a finding that Bogenschneider was "aggrieved" by actions taken by AnchorBank contrary to WIS. STAT. § 224.80. Rather, the circuit court determined that AnchorBank had a contractual right to change the locks on the property to secure it after AnchorBank was made aware that Bogenschneider had vacated the property in late 2012, and that the heat and electricity to the property had been disconnected. The court stated:

> [T]he fact of the matter is that for property located in the Village of Maple Bluff in the State of Wisconsin in the months of … November, December and through the winter, the failure to provide heat and electricity does trigger the right of the bank … to take the actions that it did under the expressed terms and conditions … of the written agreement.

The court concluded that because AnchorBank acted within its contractual rights in changing the locks to the property, Bogenschneider did not have a viable claim against AnchorBank under WIS. STAT. ch. 224.

¶19 After ruling in favor of AnchorBank on all of Bogenschneider's counterclaims, the court remarked that it did not want AnchorBank to think that the court believed AnchorBank's actions in providing Bogenschneider access to the property after the locks to the property had been changed to be "the kind that [the court] would expect" under the circumstances. The court further stated that it "would like … to think that … the bank [would] still work[] aggressively with [] former customer[s] to cooperate and to assist [them] in working through [] issues" related to mortgage deficiencies and foreclosure. However, as stated above, no where does the court make a finding that Bogenschneider was "aggrieved" by

AnchorBank's actions. And, although Bogenschneider suggests otherwise, nowhere does the court conclude that a cause of action does not lie in any circumstances under WIS. STAT. §§ 224.77 and 224.80 when a mortgagor denies a defaulting mortgagee access to property.

¶20 Bogenschneider next argues that the circuit court erred in concluding that "the Real Estate Settlement Procedures Act of 1974 [] ('RESPA') does not apply in Wisconsin Circuit Court because it is a [f]ederal statute." Bogenschneider cites the following statement made by the circuit court:

> I understand there might be a lot of rules and regulations under Fannie Mae, federal law, but I don't conclude …, even if you are asserting that, that you have a cause of action to come into state court, because having concluded that [AnchorBank] had the contractual right to do what it did and the factual basis that if it didn't comply with some notice requirement under federal regulations that that means you have a cause of action and are entitled to judgment in state court.

¶21 The circuit court did not conclude, as Bogenschneider contends, that RESPA may not be asserted or relied upon in any Wisconsin state court because it is a federal law. Rather, the court's statement was made in the context of explaining to Bogenschneider that assuming without deciding that under some unspecified Fannie Mae regulation that Bogenschneider was entitled notice that AnchorBank was going to change the locks on the property in order to protect its asset, Bogenschneider did not establish that a cause of action for damages resulting from a failure to provide notice lies in WIS. STAT. ch. 244. The court did not make a determination regarding RESPA and its applicability in the present proceeding. Furthermore, Bogenschneider's arguments related to RESPA are made for the first time on appeal and we additionally reject the arguments on that

basis. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983) (arguments raised for the first time on appeal need not be considered).

¶22 Finally, Bogenschneider asserts that the circuit court erred in determining that the economic loss doctrine bars his counterclaims, in particular his counterclaim for the breach of the duty of good faith and fair dealing.[3] Bogenschneider argues that the economic loss doctrine "cannot bar an action for bad faith." Again, however, Bogenschneider has misinterpreted the court's ruling. The court did not rule that the economic loss doctrine barred any of Bogenschneider's counterclaims. While the court made the general observation that the economic loss doctrine applies to any contractual claims made by Bogenschneider, the court actually dismissed Bogenschneider's counterclaims because the court determined that AnchorBank had authority to enforce the note and mortgage and was justified in its action with regard to changing the locks on the property. We conclude that Bogenschneider's argument is therefore without merit.

CONCLUSION

¶23 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

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

[3] The economic loss doctrine requires contracting parties to pursue only contractual remedies for economic losses caused by an alleged breach of contract. *See* ***Linden v. Cascade Stone Co.***, 2004 WI App 184, ¶¶7-8, 276 Wis. 2d 267, 687 N.W.2d 823.