

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2015

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. 2014AP2971-FT

Cir. Ct. No. 2013CV266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KNA FAMILY LLC,

PLAINTIFF,

U.S. BANK NATIONAL ASSOCIATION,

PLAINTIFF-RESPONDENT,

v.

PETER FAZIO AND SHARI FAZIO,

DEFENDANTS-APPELLANTS,

MICHELLE C. PANOVICH,

RECEIVER.

APPEAL from an order of the circuit court for Barron County:
J. MICHAEL BITNEY, Judge. *Reversed.*

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

¶1 PER CURIAM. In this mortgage foreclosure action, Peter and Shari Fazio appeal an order dismissing their counterclaim against U.S. Bank National Association.¹ The Fazios’ counterclaim alleged that U.S. Bank violated CAL. CIV. CODE § 2943 by failing to deliver a beneficiary statement and payoff demand statement to the Fazios within twenty-one days of their written requests.² The circuit court concluded the Fazios’ counterclaim failed to state a claim on which relief could be granted because the loan documents contemplated that any cause of action “arising under the [Fazios’] claimed default” would be governed by Wisconsin, not California, law. We conclude the circuit court incorrectly interpreted the governing law provision in the Fazios’ mortgage. We therefore reverse.³

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2013-14 version.

² All references to CAL. CIV. CODE § 2943 are to the version that was in effect from January 1, 2010 until January 1, 2014.

³ In addition to arguing the circuit court incorrectly interpreted the mortgage’s governing law provision, the Fazios also argue, albeit with virtually no analysis, that the dismissal of their counterclaim violated their right to due process. Because we agree with the Fazios that the court incorrectly interpreted the governing law provision, we need not address their due process argument. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

Moreover, U.S. Bank asserts the Fazios forfeited their due process argument by failing to raise it in the circuit court. See *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on appeal are generally deemed forfeited). The Fazios fail to respond to this contention in their reply brief, and we therefore deem it conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed conceded).

BACKGROUND

¶2 On October 25, 2000, the Fazios acquired a commercial property located at 2500 Pioneer Avenue in Rice Lake.⁴ As part of the transaction to acquire the property, the Fazios executed a promissory note in favor of Wells Fargo Bank, National Association, in the amount of \$1,100,000. The note was secured by a mortgage on the Pioneer Avenue property. The note and mortgage were subsequently assigned to U.S. Bank.

¶3 The note was scheduled to mature on November 1, 2010. However, the parties negotiated extensions and a forbearance agreement, which extended the term of the note until July 1, 2012.

¶4 On June 17, 2013, U.S. Bank commenced the instant foreclosure action against the Fazios, alleging they were in default due to their “failure to pay all interest and principal due on the loan on its extended maturity date of July 1, 2012.” The Fazios answered the complaint, denying they were in default. They also filed a counterclaim against U.S. Bank, alleging the following:

- The mortgage expressly states that it, and the note, shall be governed by and construed in accordance with the laws of the State of California;
- CALIFORNIA CIV. CODE § 2943 required U.S. Bank to prepare and deliver a beneficiary statement and a payoff demand statement to the Fazios within twenty-one days of their requests;
- The Fazios made written requests to U.S. Bank for a beneficiary statement and a payoff demand statement;

⁴ The Fazios’ brief-in-chief consistently uses party designations, rather than names, to refer to the parties. We remind counsel that WIS. STAT. RULE 809.19(1)(i) requires “[r]eference to the parties by name, rather than by party designation, throughout the argument section.”

- U.S. Bank failed to timely deliver a beneficiary statement or a payoff demand statement in accordance with § 2943;
- Because of U.S. Bank’s failure to comply with § 2943, the Fazios “have and continue to suffer damages in an amount to be determined at trial.”

¶5 On February 6, 2014, U.S. Bank assigned its rights and interests under the note and mortgage to KNA Family, LLC. KNA Family was substituted as plaintiff in the foreclosure action, but U.S. Bank remained a party for purposes of the Fazios’ counterclaim.

¶6 Thereafter, U.S. Bank moved to dismiss the counterclaim, asserting it failed to state a claim on which relief could be granted. *See* WIS. STAT. § 802.06(2)(a)6. U.S. Bank argued that, under the mortgage’s governing law provision, Wisconsin, not California, law applied. U.S. Bank therefore argued CAL. CIV. CODE § 2943 was inapplicable.

¶7 The circuit court agreed with U.S. Bank, reasoning the language of the loan documents demonstrated that the parties “contemplated and agreed that any cause of action arising under the [Fazios’] claimed default on their note and mortgage would be filed, litigated, and governed under the laws of the State where the mortgaged premises [are] located (e.g., Wisconsin).” The court therefore granted U.S. Bank’s motion to dismiss the Fazios’ counterclaim, and the Fazios now appeal.

DISCUSSION

¶8 We independently review a circuit court’s dismissal of a complaint—or here, a counterclaim—for failure to state a claim on which relief can be granted. *See Larson v. Burmaster*, 2006 WI App 142, ¶17, 295 Wis. 2d

333, 720 N.W.2d 134. “A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint.” *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). We accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of stating a claim. *Meyer v. Laser Vision Inst., LLC*, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223. “A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations.” *Watts*, 137 Wis. 2d at 512.

¶9 The Fazios’ counterclaim alleged that U.S. Bank violated CAL. CIV. CODE § 2943 by failing to timely provide the Fazios with a beneficiary statement and a payoff demand statement upon request. Section 2943(b)(1) provides, “A beneficiary, or his or her authorized agent, shall, within 21 days of the receipt of a written demand by an entitled person or his or her authorized agent, prepare and deliver to the person demanding it ... a beneficiary statement.” Similarly, § 2943(c)(1) provides, in relevant part, “A beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand.”⁵ The statute further provides that an entitled person may recover damages if a beneficiary “willfully fails” to prepare and deliver a beneficiary statement or payoff demand statement within twenty-one days of a written demand. Sec. 2943(e)(4).

⁵ CALIFORNIA CIV. CODE § 2943(a)(1) defines the term “beneficiary” as “a mortgagee or beneficiary of a mortgage or deed of trust, or his or her assignees.” The term “entitled person,” is defined, in relevant part, as “the trustor or mortgagor of, or his or her successor in interest in, the mortgaged or trust property or any part thereof[.]” Sec. 2943(a)(4). For purposes of this appeal, it appears undisputed that U.S. Bank is a “beneficiary,” as the statute defines that term, and the Fazios are “entitled person[s].”

¶10 The term “beneficiary statement” means a written statement showing:

(A) The amount of the unpaid balance of the obligation secured by the mortgage or deed of trust and the interest rate, together with the total amounts, if any, of all overdue installments of either principal or interest, or both.

(B) The amounts of periodic payments, if any.

(C) The date on which the obligation is due in whole or in part.

(D) The date to which real estate taxes and special assessments have been paid to the extent the information is known to the beneficiary.

(E) The amount of hazard insurance in effect and the term and premium of that insurance to the extent the information is known to the beneficiary.

(F) The amount in an account, if any, maintained for the accumulation of funds with which to pay taxes and insurance premiums.

(G) The nature and, if known, the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary which have become a lien on the real property involved.

(H) Whether the obligation secured by the mortgage or deed of trust can or may be transferred to a new borrower.

CAL. CIV. CODE § 2943(a)(2). A “payoff demand statement,” in turn, is

a written statement, prepared in response to a written demand made by an entitled person or authorized agent, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement. The written statement shall include information reasonably necessary to calculate the payoff amount on a per diem basis for the period of time, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note.

Sec. 2943(a)(5).

¶11 The circuit court determined the Fazios could not state a claim for relief under CAL. CIV. CODE § 2943 because, pursuant to the mortgage's governing law provision, Wisconsin, not California, law applied. The interpretation of a written agreement, such as a mortgage contract, is a question of law that we review independently. See *Schmitz v. Grudzinski*, 141 Wis. 2d 867, 871, 416 N.W.2d 639 (Ct. App. 1987). The goal of contract interpretation is to determine and give effect to the intentions of the parties. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶21, 342 Wis. 2d 29, 816 N.W.2d 853. Where contract language is unambiguous, we presume the parties' intent is evidenced by the words they chose, and we apply the contract language as written. *Kernz v. J.L. French Corp.*, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751.

¶12 The governing law provision in the Fazios' mortgage, paragraph 8.9, states:

GOVERNING LAW. This Mortgage was accepted by Mortgagee in the State of California and the proceeds of the Note were disbursed from the State of California, which state the parties agree has a substantial relationship to the parties and the Loan. Accordingly, in all respects, including, without limitation, matters of construction, validity, enforceability, and performance, all Loan Documents shall be governed by, and construed in accordance with, the laws of the State of California applicable to contracts made and performed in such state and any applicable law of the United States of America, except that at all times the provisions for enforcement of Mortgagee's STATUTORY POWER OF SALE and all other remedies granted hereunder and the creation, perfection and enforcement of all mortgage liens and security interests created pursuant to the Loan Documents shall be governed by and construed in accordance with, the laws of the state where the property is located.

We agree with the Fazios that, pursuant to this unambiguous language, California law applies to their counterclaim.

¶13 Paragraph 8.9 begins by stating, as a general matter, that the loan documents shall be governed by and construed under California law “in all respects, including ... matters of construction, validity, enforceability, and performance[.]” The Fazios’ counterclaim pertains to U.S. Bank’s alleged failure to timely provide beneficiary and payoff demand statements upon request. The alleged failures clearly relate to the Fazios’ performance of their obligations under the loan documents—without knowing the amount due, the Fazios could not satisfy their obligation to pay off the remaining balance of the note.

¶14 U.S. Bank argues the Fazios’ counterclaim instead falls under the subsequent exception in paragraph 8.9, which provides that the “provisions for enforcement of Mortgagee’s STATUTORY POWER OF SALE and all other remedies granted hereunder and the creation, perfection and enforcement of all mortgage liens and security interests created pursuant to the Loan Documents” shall be governed by and construed in accordance with the laws of the state where the property is located—that is, Wisconsin. We disagree. The counterclaim does not relate in any way to U.S. Bank’s statutory power of sale or any other remedy granted by the loan documents, nor does it relate to the creation, perfection, or enforcement of a mortgage lien or security interest. We agree with the Fazios that, even if U.S. Bank had never commenced the instant foreclosure action, the Fazios would still have had a claim against U.S. Bank for its alleged violations of CAL CIV. CODE § 2943. After U.S. Bank filed suit against the Fazios, they properly chose to bring their § 2943 claim as a counterclaim in the Wisconsin foreclosure action, rather than as an independent claim in California court. However, they were not required to do so, and their choice to do so should not bar them from

pursuing a remedy that they would otherwise be entitled to pursue under the mortgage's governing law provision.

¶15 U.S. Bank argues the Fazios' counterclaim necessarily relates to the "creation, perfection and enforcement of all mortgage liens and security interests" under the loan documents because CAL CIV. CODE § 2943 falls within Division 3 ("Obligations"), Part 4 ("Obligations Arising from Particular Transactions"), Title 14 ("Lien"), Chapter 2 ("Mortgage"), Article 1 ("Mortgages in General") of the California Civil Code. We are not convinced. The mere fact that § 2943 is located within a portion of the California Civil Code pertaining to mortgage enforcement does not mean each subsection of § 2943 pertains to mortgage enforcement. As pointed out above, the Fazios could have filed their § 2943 claim against U.S. Bank even if foreclosure proceedings had never been commenced.

¶16 U.S. Bank also cites CAL. CIV. CODE § 2943(b)(2), which provides that a request for a beneficiary statement may be made "at any time before, or within two months after, the recording of a notice of default under a mortgage or deed of trust, or may otherwise be made more than 30 days prior to the entry of the decree of foreclosure." U.S. Bank then asserts, "Clearly this involves the enforcement of mortgage liens and remedies under a mortgage, which [paragraph] 8.9 of the Mortgage provides are governed by Wisconsin law." However, the mere fact that § 2943(b)(2) defines the time period for requesting a beneficiary statement, in part, based on events in the mortgage foreclosure process does not mean that a lender's obligation to provide a beneficiary statement relates to the enforcement of a mortgage lien. Again, the Fazios could have filed their § 2943 claim even if U.S. Bank had never commenced a foreclosure action.

¶17 U.S. Bank next cites various provisions of the California Civil Code relating to the mortgage foreclosure process, which it alleges are incompatible with Wisconsin law. However, the Fazios are not attempting to enforce those provisions of the California Civil Code. Their counterclaim rests solely on the requirements, under § 2943, that U.S. Bank timely provide them with beneficiary and payoff demand statements upon request. U.S. Bank has not shown that these requirements are incompatible with the mortgage foreclosure process set forth in the Wisconsin statutes. That other sections of the California Civil Code may be incompatible with Wisconsin law is irrelevant.

¶18 The circuit court cited additional language from the Fazios' mortgage in support of its decision to grant U.S. Bank's motion to dismiss. First, the court cited paragraph 7.2(c), entitled "Judicial Foreclosure; Injunction," which states the mortgagee "shall have the right to commence and maintain an action or actions in any court of competent jurisdiction to foreclose this instrument as a mortgage or to obtain specific enforcement of the covenants of Mortgagor hereunder." The court also cited paragraph 8.10, entitled "Consent to Jurisdiction," which states that the mortgagor "irrevocably submits to the jurisdiction of ... any state or federal court sitting in the state where the Property is located ... over any suit, action or proceeding, brought by Mortgagee against Mortgagor, arising out of or relating to the Loan or any Loan Document[.]" However, the court did not analyze either of these paragraphs, and we conclude they are irrelevant. The Fazios have never alleged that the circuit court lacked jurisdiction over U.S. Bank's foreclosure action. Nothing in either paragraph indicates that California law does not apply to the Fazios' efforts to obtain beneficiary and payoff demand statements from U.S. Bank, nor prevents them from raising these issues in the present action and forum.

¶19 For the foregoing reasons, we conclude the governing law provision in the Fazios’ mortgage unambiguously allowed them to bring a counterclaim in this action alleging a violation of CAL. CIV. CODE § 2943. Further, even if we concluded both the Fazios and U.S. Bank had advanced reasonable interpretations of the governing law provision, that would render the provision ambiguous. *See Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (Contract language is ambiguous if it is susceptible to more than one reasonable interpretation.). In that case, we would construe the governing law provision against U.S. Bank and adopt the Fazios’ interpretation. *See Maryland Arms Ltd. P’ship v. Connell*, 2010 WI 64, ¶23, 326 Wis. 2d 300, 786 N.W.2d 15 (Ambiguous contract language is construed against the drafter.).

¶20 Finally, U.S. Bank argues that, even if the governing law provision allowed the Fazios to bring a claim under CAL. CIV. CODE § 2943, their counterclaim failed to adequately plead a claim under that section. U.S. Bank first notes that § 2943(e)(4) provides for damages in the event that a beneficiary “willfully fails to prepare and deliver” a beneficiary statement or payoff demand statement. Section 2943(e)(4) further provides that “willfully” means “an intentional failure to comply with the requirements of this section without just cause or excuse.” U.S. Bank asserts the Fazios’ “failure to plead willfulness results in a failure to state a claim” under § 2943.

¶21 However, when deciding whether a complaint should be dismissed for failure to state a claim on which relief can be granted, we liberally construe the complaint in favor of stating a claim. *Jenkins v. Sabourin*, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981). Moreover, under Wisconsin’s notice pleading rules, a pleading need only set forth: (1) “[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences

out of which the claim arises and showing that the pleader is entitled to relief[;]” and (2) “[a] demand for judgment for the relief the pleader seeks.” WIS. STAT. § 802.02(1). “The purpose of a complaint in a notice pleading jurisdiction is to provide ‘sufficient detail’ such ‘that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery.’” *United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶21, 349 Wis. 2d 587, 836 N.W.2d 807 (quoted source omitted).

¶22 Here, although the Fazios’ counterclaim did not specifically allege that U.S. Bank’s actions were “willful,” it expressly alleged that: (1) the Fazios requested a beneficiary statement and payoff demand statement from U.S. Bank “pursuant to [CAL. CIV. CODE] § 2943[;]” (2) U.S. Bank failed to provide these statements within twenty-one days “in accordance with [CAL. CIV. CODE] § 2943[;]” and (3) “[a]s a result of [U.S. Bank’s] failure to comply with [CAL. CIV. CODE] § 2943,” the Fazios suffered damages. The counterclaim then demanded judgment in the amount of the Fazios’ damages. These allegations were sufficient to give both U.S. Bank and the circuit court fair notice of the Fazios’ claim and its basis, and no more was required under WIS. STAT. § 802.02(1).

¶23 U.S. Bank also argues the Fazios failed to adequately plead a claim under CAL. CIV. CODE § 2943 because they “failed to attach to their counterclaim the request for a beneficiary statement or a payoff demand statement that they allege they made.” (Some capitalization omitted.) However, for purposes of a motion to dismiss, we must accept as true all allegations in the plaintiff’s complaint. See *Meyer*, 290 Wis.2d 764, ¶3. The Fazios’ counterclaim specifically alleged that they made written requests for the beneficiary and payoff demand statements. U.S. Bank does not cite any authority for the proposition that the Fazios were required to attach copies of the written requests to their

counterclaim. We need not consider arguments unsupported by references to legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Order reversed.

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

