COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2013AP2388

Cir. Ct. Nos. 2011SC320
2013CV58

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

RIVERSIDE FINANCE, INC.,

PLAINTIFF-RESPONDENT,

V.

LORI ROGERS AND KEVIN ROGERS,

DEFENDANTS-APPELLANTS.

KEVIN ROGERS AND LORI ROGERS,

PLAINTIFFS-APPELLANTS,

V.

RIVERSIDE FINANCE, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Affirmed*.

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

¶1 PER CURIAM. Lori and Kevin Rogers (collectively, Rogers) appeal a judgment for money and replevin entered in favor of Riverside Finance, Inc. Rogers argues the circuit court erroneously determined the Wisconsin Consumer Act (WCA) did not apply to the parties' loans, Riverside did not opt in to the WCA, and Rogers had no contractual right to a hearing prior to repossession of personal property. Rogers additionally contends the court awarded excessive attorney's fees to Riverside. We reject Rogers's arguments and affirm.

BACKGROUND

¶2 Rogers received twelve loans from Riverside[1] from July 24, 2001 through September 24, 2009, all secured by various personal property such as automobiles. In addition to paying money directly to Rogers or a third party, nine of the twelve loans paid the balance of a prior loan. The third-party payments were for various charges such as a Continental Car Club membership, life insurance premiums, disability insurance premiums, or GAP insurance. The annual percentage rate of the loans varied between 19.44% and 33.94%.[2]

[1] One or more of the loans was issued by Riverside's predecessor, Wisconsin Financial Corporation.

[2] We reviewed ten of the twelve loan documents. Rogers does not bother to cite the loan documents in the record, and Riverside cites only generally to exhibits comprising over 150 pages.

¶3 In its brief, Riverside identifies the twelve loans in a table, setting forth the loan date and total amount financed. It further breaks down the total amount financed into the amount allocated to pay off a prior balance and the amount of new money disbursed. The first, fifth, and ninth loans were comprised of only new money; in other words, those loans did not pay off any prior loan.

¶4 The amount financed in the September 2009 final loan was $14,158.16, consisting of a $13,421.18 loan payoff and a $736.98 new money disbursement.[3] The loan was secured by a 1988 Jayco fifth wheel camper, a 1998 Mercedes Benz, and a 1990 GMC pickup truck. Rogers failed to pay the amount due each month from July 2 through December 2, 2010.

¶5 Thereafter, Riverside delivered a December 16 "NOTICE OF RIGHT TO CURE DEFAULT And NOTICE REGARDING REPOSSESSION OF COLLATERAL (Pursuant to Wisconsin Consumer Act)[.]"[4] The form indicated, "Our records show you are in default under § 425.105 of the Wisconsin Consumer Act on the consumer credit transaction …." It then identified the camper and vehicles serving as collateral on the loan and indicated Rogers could cure the default on or before December 31 by paying the amount in arrears plus delinquency charges. At the bottom of the document was a bolded and underlined

[3] The principal balance of the loan was higher still than the total amount financed because Rogers was charged approximately $425 in points (prepaid finance charge), which was added to the loan balance. Of the new money, Rogers received $140.57 and the rest was allocated to life insurance and a car club membership.

[4] In addition to the title of the document, the document header identified Riverside Finance as an Associated Banc Corp Affiliate, and also identified Associated Bank. Below, the document identified Riverside Finance as the creditor, but Associated Bank as the contact point. Beneath Associated Bank's contact information, the document stated, "Call to setup payment arrangements[.]"

notice referring the reader to the reverse side. Among other things, the reverse provided:

> IMPORTANT NOTICE REGARDING REPOSSESSION: As a result of your default, we may have the right to take possession of the collateral without further notice or court proceeding. If you are not in default or object to our right to take possession of the collateral, you may, no later than 15 days after the date of this notice, demand that we proceed in court by notifying us in writing at the address below. If we proceed in court, you may be required to pay court costs and attorney fees.

¶6 Rogers responded by letter dated December 27, as follows:

> I (Lori Rogers) spoke with Sherry today at … the number provided, regarding the Right to Cure letter we received.
>
> We will be filing our taxes the first week of January 2011, and will be E-filing so expect our return within a week after that. If we do not receive it by the 14th, I agreed to call back. At any rate, we will be using our tax return to pay in full and also get payments back on track.
>
> If you do not find these arrangements acceptable, we do request a court date, which would halt the RTC action yet result in the same however, with us paying before ever getting to court.
>
> We have had unfortunate circumstances in our family …. We do not wish to be behind and are looking forward to starting 2011, back on track with our monthly payments to Riverside Finance.

¶7 The parties do not inform us what transpired following the letter. However, Riverside apparently repossessed the two automobiles securing the loan some time in April 2011, without first proceeding in court.[5] Riverside subsequently filed a replevin action seeking possession of the camper that also

[5] Riverside does not cite the record for these facts. Rogers does not identify when the vehicles were repossessed and provides an incomprehensible record citation.

secured the loan. The following day, Rogers filed a complaint alleging repossession of a car with no right to do so, in violation of WIS. STAT. § 427.104(1)(j); theft, in violation of WIS. STAT. §§ 895.446 and 943.20; and prohibited nonjudicial repossession, in violation of WIS. STAT. §§ 425.206 and 425.305.[6] The two actions were later consolidated.

¶8 Riverside and Rogers each moved for summary judgment. Both parties contended the twelve loans constituted a single transaction, and the circuit court accepted their position in its written decision. Further, as the court aptly observed, the issue of whether the Wisconsin Consumer Act (WCA) applies "is the heart of the case." The court explained:

> If the WCA does not apply, then [Riverside] is entitled to summary judgment on all issues and specifically is entitled to a judgment for replevin …. Similarly, … if the act applies, the failure of [Riverside] to resort to legal proceedings prior to exercising self-help remedies makes available to [Rogers] all the remedies available under the WCA[,] which include retention of all collateral and previous payments made. …
>
> Under WIS. STAT. § 421.202(6), the provisions of the WCA do not apply to transactions in which the amount financed exceeds $25,000.

¶9 Riverside argued that the amount financed for purposes of WCA application consisted of the total new money disbursed in all twelve loans comprising the single transaction. Rogers, on the other hand, argued that only the amount financed in the twelfth note should be considered.

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[6] The parties stipulated to return of the two automobiles pending the outcome of the litigation.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶10 The court accepted Riverside's argument and determined that the amount financed exceeded $25,000 and that, therefore, the WCA did not apply. Additionally, the court rejected Rogers's argument that the notice to cure constituted an opt-in to the WCA. Finally, the court concluded the claim for civil theft failed since there was no requirement for a hearing prior to Riverside's repossession of the vehicles.

¶11 Rogers moved for reconsideration, arguing that the court inadequately considered the civil theft claim and that contract law and promissory estoppel applied to that claim. The court agreed with Riverside that Rogers never presented any contract claims or promissory estoppel argument "in either the pleadings or in the previous extensive briefs filed by the parties." Nonetheless, the court considered Rogers's arguments in the interest of justice. The court determined that no contract was created by Riverside's notice of right to cure and Rogers's letter in response, and that the notice did not constitute a "promise." Accordingly, the court denied Rogers's reconsideration motion. The court also awarded Riverside attorney's fees pursuant to the loan contract, although it disallowed a portion of the requested fees as excessive. Rogers appeals.

DISCUSSION

¶12 Rogers argues the circuit court erroneously determined: (1) the amount financed for WCA purposes was over $25,000; (2) Riverside did not opt in to the WCA; (3) Riverside did not have a contractual or promissory-estoppel-based duty to proceed in court prior to repossessing collateral; and (4) Riverside was entitled to attorney's fees for both pursuing its claim and defending against Rogers's claims.

Whether the amount financed exceeded $25,000

¶13 The WCA prohibits nonjudicial repossession where a proper demand for a hearing has been made.[7] *See* WIS. STAT. §§ 425.206(1)(d); 425.205(1g)(a)3.[8] Because it is undisputed that Riverside repossessed two of Rogers's vehicles without proceeding in court and after Rogers had requested court proceedings, we must determine whether the WCA applies to the transaction between Rogers and Riverside.

¶14 Rogers reiterates his circuit court argument that all twelve loans issued by Riverside constitute a single transaction. Riverside agrees. We therefore assume, arguendo, there was a single transaction.[9]

¶15 Accordingly, we must determine whether the twelve-loan transaction financed an amount exceeding $25,000. The WCA does not apply to "[c]onsumer credit transactions in which the *amount financed* exceeds $25,000." *See* WIS. STAT. § 421.202(6). (Emphasis added.)

¶16 Rogers never cites or discusses the actual content of the first eleven loan contracts. Instead, Rogers argues in general terms, asserts undeveloped legal

[7] "[Wisconsin stat. c]hapters 421 to 427 shall be known and may be cited as the Wisconsin consumer act." WIS. STAT. § 421.101

[8] WISCONSIN STAT. § 425.205(1g)(a), (b) require the precise notice given on the reverse side of the notice Riverside delivered to Rogers, and also require that the notice be combined with any notice of right to cure.

[9] Our acceptance of the parties' agreement that all twelve loans constituted a single transaction should not be considered an endorsement of that position. However, because no argument was made to the contrary in the circuit court or this court, we will not interfere with Rogers's chosen strategy. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (We will not abandon our neutrality to develop arguments for the parties.).

conclusions, and labels Riverside's argument as absurd. For example, Rogers contends:

> There is no reason to treat each new note as financing more than it says on its face is being financed. At each juncture, the parties issued a new note that *continued* their earlier relationship, modifying it only slightly as to any additional advances or additional security, but that new note became the *sole* operative document for the single transaction, and the amount financed under that note was the 'amount financed' to determine if the WCA applies.
>
> ….
>
> Because the *final* note replaced all earlier ones and resulted in a single transaction in which the amount financed was under $25,000, the WCA applied[.]
>
> ….
>
> Under the WCA, the amount financed in any consumer loan is the total amount paid to the customer. WIS. STAT. § 421.206(6). This ought not be determined over time or through a historical analysis of the parties' relationship, but instead by simply looking at the amount of money a customer receives in exchange for a promise to repay that amount.

Rogers's cited authority does not exist; there is no WIS. STAT. § "421.206(6)."[10] Rogers also creates and attacks a straw-man argument with bad math, claiming Riverside is somehow double-counting disbursements.[11]

[10] If Rogers intended to cite WIS. STAT. § 421.202(6), that statute does not support Rogers's assertion.

[11] We further observe Rogers misrepresents the record, informing us, "The 'amount financed' on that [final] note was $13,561.75." The note, however, has a line explicitly titled, "Amount Financed[.]" As Riverside correctly observes, the amount financed by the final note was $14,158.16. This misrepresentation is consistent with a gross lack of attention to detail throughout Rogers's briefs.

¶17 Rogers argues Riverside's argument is absurd because no individual loan comprising the single transaction exceeded $25,000 in one lump sum. Frankly, it is Rogers's position that is absurd. It is illogical to assert, when reviewing twelve loans comprising a single transaction, that the amount financed is not the total amount of money disbursed throughout the transaction. Rogers's argument is the equivalent of asserting that one did not get twelve dollars in change at a convenience store because, rather than handing the customer twelve dollars at once, the clerk handed the customer one dollar at a time.

¶18 In any event, Riverside does not attempt to double-count previously disbursed money that was then paid off by a subsequent loan. Rather, it sets forth the new money provided to Rogers under each of the twelve loans, and then adds *only* those twelve amounts together. Riverside asserts that sum, $34,332.06, is the total "amount financed" in the single twelve-loan transaction.[12] We cannot disagree with that straightforward logic. Rogers's argument is irreconcilable with twelve loans being a single transaction. The amount financed exceeded $25,000. Therefore, the WCA does not apply to the parties' twelve-loan transaction. *See* WIS. STAT. § 421.202(6).

Whether Riverside opted in to the WCA

¶19 Rogers argues Riverside opted in to the WCA because the notice of right to cure that it delivered to Rogers "expressly incorporated and adopted WCA rights and procedures." (Capitalization omitted.) The face of that document did

[12] As the table in Riverside's brief demonstrates, had it truly double-counted payoffs of prior loans, it would have arrived at $95,167.28, which is the sum of the individual amounts financed on each of the twelve loans.

explicitly reference the WCA twice and a certain statute found within it. The reverse of the document also provided the specific repossession information required by WIS. STAT. § 425.205(1g)(a), and complied with the para. (1g)(b) & (1g)(c) requirements that the information be combined with any notice of right to cure and that the document be delivered by certified or registered mail.

¶20 Rogers's argument relies on ***Bank of Barron v. Gieseke***, 169 Wis. 2d 437, 455-56, 485 N.W.2d 426 (Ct. App. 1992), where we held a lender could contractually opt in to the WCA, in which case the lender would be bound by the act's provisions. We explained, "Because the WCA protects borrowers, we see no reason to prevent lenders from affording borrowers the WCA protections *when*, although not required to do so by the WCA, *they agree to do so*." ***Id.*** at 456 (emphasis added).

¶21 The fatal flaws in Rogers's argument, however, are: (1) the WCA-related information here was provided in a notice only after Rogers had defaulted—not in the loan contract; and (2) the notice document does not explicitly state that Riverside was opting in to the WCA or any portion of it. In ***Bank of Barron***, the notes themselves explicitly stated they were governed by the WCA. ***Id.*** at 447-49. That case, therefore, does not support Rogers's argument.

¶22 Rogers provides no other authority for its argument that Riverside should be deemed to have opted in to the WCA. In ***Dallman v. Felt & Lukes, LLC***, 2013 WL 6628996, No. 12-cv-765-wmc, slip op. (W.D. Wis. Dec. 17, 2013), Felt & Lukes delivered Dallman a notice of default similar to the one at issue here. At the top of the document, it stated the notice was "[r]equired before legal action for collection is commenced. Wisconsin Statutes 425.105." ***Id.*** at *8. The notice was sent by regular and certified mail, and contained the same

repossession notices—required by WIS. STAT. § 425.205(1g)(a)—that were presented in the notice at issue here. *See* ***id.*** at *2. Dallman, like Rogers, argued that the notice constituted an opt-in under ***Bank of Barron***, and that the WCA therefore applied despite the transaction exceeding $25,000. ***Dallman***, at *7-*8.

¶23 The ***Dallman*** court rejected the argument that the notice constituted an opt-in to the WCA. It explained:

> While Felt & Lukes may have muddied the waters by sending the notices when it was not required to do so, Felt & Lukes did not agree to take on the legal responsibility of complying with the WCA in its entirety simply by providing notice above and beyond what was required. … Such a boilerplate notice, with no language expressing an intent to opt into the WCA (and indeed, with no language even clearly demonstrating that opting in was an option the parties contemplated), cannot serve to bind defendants to all the responsibilities and potential liabilities such a decision would entail.

Id. at *8. We agree with the ***Dallman*** court; the postdefault notice sent to Rogers was insufficient to constitute an opt-in to the WCA.

Whether Riverside contractually agreed to proceed in court before repossession

¶24 We have already concluded that the WCA does not apply to the parties' transaction because the amount financed exceeded $25,000, and that Riverside did not opt in to the WCA. Rogers alternatively argues Riverside was contractually bound to proceed in court prior to repossessing any collateral.

¶25 A valid contract requires an offer, acceptance, and consideration. ***Piaskoski & Associates v. Ricciardi***, 2004 WI App 152, ¶7, 275 Wis. 2d 650, 686 N.W.2d 675. Rogers contends Riverside's notice of right to cure constituted a contract offer and Rogers's response constituted acceptance of that offer. Riverside responds that the circuit court correctly determined there was no binding

acceptance because Rogers replied with a conditional acceptance of the right to a hearing.

¶26 We agree with Riverside. It is well-established that a conditional acceptance is no acceptance at all. "'If the acceptance is not the exact thing offered, or if it is accompanied by any conditions, qualifications, or reservations, however slight in time, or otherwise, no contract is made.'" ***Clark v. Burr***, 85 Wis. 649, 655, 55 N.W. 401 (1893) (sources omitted). "The acceptance of an offer upon terms varying from those of the offer, however slight, is a rejection of the offer." ***Hess v. Holt Lumber Co.***, 175 Wis. 451, 455, 185 N.W.2d 522 (1921). Here, Rogers stated, "If you do not find these arrangements acceptable, we do request a court date[.]" Thus, Rogers's purported acceptance of the right to a hearing was conditioned upon Riverside's rejection of Rogers's counterproposal as to curing the default. We therefore reject Rogers's argument.

¶27 Furthermore, Rogers first raised its contract argument in a motion for reconsideration, failed to support that motion with affidavits, and failed to provide an adequate record on appeal. Thus, we have no idea whether—in the first instance—Riverside accepted or rejected Rogers's counterproposal to cure the default upon receiving a tax return in mid-January. Rogers's letter appears to—at least in part—serve as a memorialization of a phone conversation between the parties. This suggests Riverside may have accepted Rogers's cure counterproposal. Additionally, Riverside informs us the vehicles were repossessed in April, and Rogers does not dispute that assertion. This too would suggest Riverside accepted Rogers's cure counterproposal, because Riverside did not then repossess for over three months. If Riverside accepted the counterproposal, then the conditional request for a hearing was never activated, and Riverside could not have been in breach. Moreover, if the counterproposal

was accepted, then Rogers must have failed to cure in January as proposed, which means they would have been in breach of the purported contract. We therefore deem Rogers's contract argument inadequately developed. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we may decline to address issues that are inadequately briefed).

¶28 In a related argument, Rogers argues promissory estoppel applies to the right to a hearing set forth in Riverside's notice of right to cure. That argument also fails as undeveloped because Rogers first raised it in a motion for reconsideration, failed to support that motion with affidavits, and failed to provide an adequate record on appeal. Rogers contends there are material issues of fact concerning whether a promise was made and whether Rogers relied on it. If that is true, then Rogers should have presented its argument in response to Riverside's motion for summary judgment or, at the very least, presented supporting affidavits or other evidence with the motion for reconsideration. Rogers cites no record facts in support of the argument that material issues of fact are in dispute. We therefore reject the argument as undeveloped. *See* ***id.***

Whether Riverside is entitled to fees for defending Rogers's claim

¶29 Rogers argues Riverside cannot recover those attorney fees related to defending Rogers's claim, because the loan contract language is ambiguous. Rogers inaccurately quotes the contract language, fails to direct us to the specific page or location within the note containing the language, and directs us to a three-page photocopy in Rogers's appendix that is largely illegible. We therefore reject the argument as inadequately developed. *See* ***id.***; ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (we may reject arguments not supported by citation to the record).

¶30 We nonetheless affirm the circuit court's attorney fee award on the merits. One or more of the notes documenting the loans to Rogers states: "Borrower agrees to pay all costs of collection, including reasonable attorney's fees, other expenses of litigation, and the costs of repossessing, preparing for disposition, and disposition of collateral, to the extent permitted by law." Rogers contends Riverside cannot recover its fees for defending Rogers's claims because the contract language here was similar to language found ambiguous in ***Borchardt v. Wilk***, 156 Wis. 2d 420, 456 N.W.2d 653 (Ct. App. 1990).

¶31 We reject Rogers's argument for two independent reasons. First, according to Rogers's own argument, the ***Borchardt*** court did not conclude fees related to a counterclaim were entirely unrecoverable; rather, it held "the amount recoverable for attorney's fees is reduced in proportion to the amount recovered on the note less the amount recovered on the counterclaim." ***Id.*** at 428. Here, there was no recovery on Rogers's opposing claim, and, therefore, there is no basis for proportionally diminishing Riverside's fees.

¶32 Second, the contract language here differs from ***Borchardt*** and is not ambiguous. Riverside could not recover the vehicles as collateral or receive any other remedy unless it first successfully defended Rogers's claim that the WCA applied to the parties' transaction. Thus, all of the attorney's fees were related to collection and/or repossessing collateral. Furthermore, as the circuit court reasoned, the issues were so "interwoven" that it "would be impossible" to apportion the attorney's fees. Rogers has not disputed that conclusion on appeal or offered any procedure for apportionment. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (failure to address court's rationale constitutes a concession).

By the Court.—Judgment affirmed.

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