

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2017

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. 2015AP2316

Cir. Ct. No. 2015CV252

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

UNIVERSAL INVESTMENT CORPORATION,

PLAINTIFF-RESPONDENT,

V.

STEPHENS PARTNERSHIP AND SANDRA STEPHEN BAILLE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Stephens Partnership and Sandra Stephen Baille (collectively “Stephens”) appeal a summary judgment for money damages entered against them and in favor of Universal Investment Corporation (Universal). We

conclude Universal failed to establish a prima facie case for summary judgment and, therefore, we reverse and remand for further proceedings.

BACKGROUND

¶2 Four individuals formed the Stephens Partnership in the late 1970s. In 1995, two of its members, Donna and Nathan Pedersen, entered into a written agreement with Stephens Partnership to sell their respective interests back to the partnership. In connection with the sale agreement, promissory notes were also prepared. The notes were allegedly signed by Sandra Baille and Jennifer Mode on behalf of the partnership.

¶3 In 2014, Thomas¹ and Nathan Pedersen entered into written agreements with Universal, in which they agreed to assign to Universal their interests and rights under the sale agreement and promissory notes. Afterward, Stephens sent Universal two checks, but informed Universal the checks were not being submitted “as full and final payment” on the two notes because the parties were still in the process of working “out the amount that is due under the notes.”

¶4 The parties were unable to resolve their dispute. Therefore, Universal commenced a breach of contract suit against Stephens, seeking a money judgment for the amounts due on the two promissory notes. Universal did not attach either the signed original notes or copies of the signed originals to its complaint.

¹ In 1996, Donna Pedersen’s estate assigned her interests and rights under the sale agreement to her husband, Thomas Pedersen.

¶5 Universal moved for summary judgment, supporting its motion with an affidavit from one of its directors, referencing attached documents, and a supplemental affidavit. Significantly, these evidentiary materials did not include either the two signed original promissory notes or copies of the signed originals. Given this omission, Stephens argued Universal could not prevail on its motion for summary judgment.

¶6 The circuit court held a summary judgment hearing. Stephens again argued Universal could not prevail because it failed to produce either: (1) the two signed original notes; or (2) authenticated copies of the two signed original notes. Counsel for Universal then informed the court that he possessed copies of both notes, but he admitted that the copies were unsigned and were “not attached to the affidavit.” Nonetheless, the court reviewed a copy of one of those unsigned notes. Copies of the unsigned notes were neither formally received by the court, nor included in the record before us.

¶7 The circuit court granted Universal’s motion for summary judgment and entered a money judgment against Stephens for the amount due on the two promissory notes. Stephens now appeals.

DISCUSSION

¶8 Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).² First, “[w]e examine the moving party’s submissions to

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

determine whether they constitute a prima facie case for summary judgment.” *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citing *Gross v. Woodman’s Food Market, Inc.*, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718). “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.” *Id.* (citation omitted). “We review the grant or denial of summary judgment de novo, and we apply the same standard as does the trial court.” *Mach v. Allison*, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766.

¶9 A negotiable instrument—here, the two promissory notes—may be enforced by the “holder” of the instrument. WIS. STAT. § 403.301. A holder generally is the person in possession of the negotiable instrument. *See* WIS. STAT. § 401.201(2)(km)1. However, a person is not liable on a negotiable instrument unless that person’s signature is affixed to it. *See* WIS. STAT. § 403.401; *see also Jennaro v. Jennaro*, 52 Wis. 2d 405, 411, 190 N.W.2d 164 (1971) (“Liability on a negotiable instrument is statutorily limited to persons whose signatures appear thereon.”).

¶10 We conclude Universal failed to establish a prima facie case for summary judgment because its evidentiary materials did not contain the two signed original notes, or authenticated copies of the two signed original notes.³ Universal brought this action against Stephens to obtain a money judgment for the amounts due on the two promissory notes. Yet, it failed to attach either signed

³ Because we find this issue dispositive, we decline to address the other arguments raised by Stephens. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate courts need not address every issue raised by the parties when one is dispositive).

originals or copies of the signed originals to its complaint, or to its summary judgment affidavits. Without the signed originals or authenticated copies of those documents as part of the record, Universal failed to establish a prima facie case to enforce the two promissory notes prior to the summary judgment hearing. *See Dow Family, LLC v. PHH Mortg. Corp.*, 2013 WI App 114, ¶24, 350 Wis. 2d 411, 838 N.W.2d 119 (noting that “[w]ithout the original note, or a properly authenticated copy, there is no factual showing that [the party] is entitled to enforce the note”), *aff’d*, 2014 WI 56, 354 Wis. 2d 796, 848 N.W.2d 728.

¶11 At the summary judgment hearing, the circuit court reviewed what Universal’s counsel represented to be a copy of one of the two unsigned promissory notes. Presumably, the court considered that document in granting Universal’s motion for summary judgment. In doing so, the court erred. A document must be authenticated to be admissible. *See* WIS. STAT. § 909.01. Such authentication is done by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* The testimony of a witness “with knowledge that a matter is what it is claimed to be” is one means of authenticating a document. WIS. STAT. § 909.015(1).

¶12 Here, the copy of the note was not sufficiently authenticated to be considered by the court on summary judgment. At the summary judgment hearing, Universal’s counsel informed the circuit court that he possessed copies of the two unsigned notes. However, his statements to the court were not made under oath or affirmation. Therefore, his statements were not “testimony,” and thus were insufficient under WIS. STAT. § 909.015(1) to authenticate the copy of the note the court considered. Furthermore, counsel did not specifically state the copies he possessed were “true and accurate” copies of the *original* promissory notes. *Cf. Dow Family, LLC*, 350 Wis. 2d 411, ¶21 (determining defendant failed

to establish prima facie case for summary judgment in part because the defendant's attorney "did not aver that the copy of the note ... submitted on summary judgment was a true and correct copy of the original").

¶13 Universal nonetheless insists the copy of the note was sufficiently authenticated by: (1) the 1995 sale agreement; (2) a 1995 letter from Stephens Partnership's then-attorney informing Sandra Baille that promissory notes were being sent to her for endorsement; and (3) a 2015 letter from Stephens' current counsel. We are unpersuaded.⁴ These documents establish the terms of the sale agreement—not the promissory notes—and that promissory notes were sent to Baille in 1995 for her endorsement. Universal fails to satisfactorily explain how these documents sufficiently establish that the purported copy of the note *presented to the circuit court* was, in fact, a "true and accurate" copy of one of the original notes.

¶14 Even if we were to assume the purported copy of the note the circuit court reviewed was sufficiently authenticated, the copy of the note was *unsigned*. Therefore, the circuit court improperly considered it as a matter of law in determining Stephens was liable under the two notes. *See* WIS. STAT. § 403.401 (person's signature must appear on instrument before the person is liable on that instrument).

⁴ Alternatively, Universal asserts it is entitled to summary judgment on the amount due under the sale agreement, arguing the sale agreement is a negotiable instrument. Even if we were to accept Universal's argument that the sale agreement is a negotiable instrument, Universal is not entitled to summary judgment on the amount due under the sale agreement because its complaint seeks—and the circuit court awarded—a money judgment on the amount due on the *promissory notes*, not the sale agreement.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

