COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2016AP149
2016AP150

Cir. Ct. Nos. 2010CV433
2012CV184

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

CENTRAL BANK,

PLAINTIFF-APPELLANT,

V.

ARLAN HANSON AND A. HANSON ELECTRIC,

DEFENDANTS,

J. H. LARSON ELECTRICAL COMPANY AND VIKING ELECTRIC SUPPLY,

DEFENDANTS-RESPONDENTS.

APPEALS from judgments of the circuit court for Polk County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

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

¶1 SEIDL, J. Central Bank appeals judgments awarding Viking Electric Supply, Inc. (Viking) and J.H. Larson Electrical Company (Larson) the reasonable costs and attorney fees they incurred as a result of Central Bank proffering false affidavits during this litigation.[1] Central Bank contends the circuit court lacked authority to award Viking and Larson those costs and attorney fees. We conclude the circuit court possessed inherent authority to impose sanctions on Central Bank for proffering patently false affidavits. We also conclude the court did not erroneously exercise its discretion by imposing sanctions on Central Bank for its misconduct. Therefore, we affirm the judgments.

BACKGROUND

¶2 From 1976 to 2008, The RiverBank provided financing to Arlan Hanson, his wife, Aziza Hanson, and A.A. Hanson Electric, Inc. (Hanson Electric). During that time period, RiverBank obtained from the Hansons various documents evidencing financial obligations secured by mortgages upon the Hansons' real estate. The Hansons executed mortgages to RiverBank in 1999, 2000, and 2004.

¶3 In June 2010, RiverBank commenced this action against the Hansons and Hanson Electric, seeking a money judgment for the amount due on a 2008 promissory note and foreclosure of the 2004 mortgage on their real property securing the note. RiverBank joined Viking and Larson as defendants because each had an outstanding judgment lien against Hanson Electric and one or both of the Hansons.

[1] Upon this court's motion and order dated April 27, 2017, these appeals are consolidated.

¶4 RiverBank moved for summary judgment against the Hansons and Hanson Electric and for default judgments against Viking and Larson. RiverBank supported its motions with an affidavit from one of its commercial loan officers, Mark Erickson. Erickson averred that Arlan had informed him that the mortgage did not accurately describe the property intended to be covered by the mortgage. He also averred that, with Arlan's permission, RiverBank then amended the mortgage by executing an "Affidavit of Correction" in late 2008. However, Viking and Larson contended the Affidavit of Correction was invalid under Wisconsin law.[2] While RiverBank's motion was pending, RiverBank also submitted what it claimed was a November 2008 written authorization from the Hansons permitting RiverBank to amend the mortgage.

¶5 The circuit court denied RiverBank's motion for default judgment. However, the court entered a new scheduling order permitting Viking and Larson to file amended answers and RiverBank to file a new motion for summary judgment. As a result, RiverBank again moved for summary judgment and supported its motion with a supplemental affidavit from Erickson. In that affidavit, Erickson averred that he prepared the November 2008 written authorization and that Arlan had informed him that Arlan was authorized by Aziza to sign the 2008 written authorization on her behalf.

[2] Because neither Arlan nor Aziza signed the Affidavit of Correction, Viking and Larson argued the Affidavit of Correction was invalid under both ***Smiljanic v. Niedermeyer***, 2007 WI App 182, ¶2, 304 Wis. 2d 197, 737 N.W.2d 436, and WIS. STAT. § 706.085 (2015-16), which became effective in May 2010.

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

¶6 The circuit court denied RiverBank's motion for summary judgment in a written decision. Among other things, the court concluded there was an issue of a material fact concerning RiverBank and the Hansons' intent with regard to the November 2008 written authorization. The court later allowed RiverBank to have until the end of December 2011 for discovery and to file a renewed motion for summary judgment.

¶7 However, on October 7, 2011, the Minnesota Department of Commerce closed RiverBank and appointed the Federal Deposit Insurance Corporation (FDIC) as RiverBank's receiver. On the same day, Central Bank purchased RiverBank's former assets from the FDIC, including the documents evidencing the Hansons' debt and mortgage. The circuit court then substituted Central Bank in place of RiverBank as plaintiff in this action.

¶8 Central Bank then moved for summary judgment and reformation of the mortgage. The circuit court denied Central Bank's motion, again concluding there were material issues of fact regarding both the parties' intent and whether Aziza authorized Arlan to sign the 2008 written authorization on her behalf.

¶9 Central Bank again moved for summary judgment and, shortly thereafter, also commenced a separate action against the Hansons, Hanson Electric, Viking, and Larson, seeking foreclosure of a 2000 mortgage on the Hansons' real property. The two cases were consolidated and, once again, the circuit court denied Central Bank's motion for summary judgment.

¶10 The consolidated cases proceeded to a two-day bench trial. Erickson, who was previously employed by RiverBank but was now employed by Central Bank, testified that in 2008 Arlan informed him that the 2000 and 2004 mortgages did not contain accurate legal descriptions of the property. As a result,

Erickson met with Arlan and prepared the November 2008 authorization permitting RiverBank to amend the mortgage. Although Erickson and Arlan signed the November 2008 authorization, it was not signed by Aziza. According to Erickson, Arlan told him that Aziza was "comfortable" with Arlan signing the authorization on her behalf. Erickson further testified that when he notarized real estate documents that contained Aziza's signature, Aziza always signed the documents in his presence. Aziza testified that she was not present when Erickson notarized the 2004 mortgage containing her signature.

¶11 Erickson also testified regarding the circumstances surrounding the creation of the multiple "Affidavits of Correction." He directed Kim Paetznick, a former RiverBank loan assistant who purportedly drafted the 2004 mortgage, to draft and sign multiple Affidavits of Correction, which Erickson then notarized. According to Erickson, the Affidavits of Correction were intended to correct the legal descriptions contained in three different mortgages, including the 2000 and 2004 mortgages. Erickson testified he did not attempt to have the Hansons execute a new mortgage because this would have affected RiverBank's "lien position." Although Erickson admitted he prepared the November 2008 written authorization and directed Paetznick to execute the Affidavits of Correction, he denied doing so for the purpose of RiverBank establishing that its secured interest in the property had priority over other creditors' secured interests, such as Viking and Larson.

¶12 Jerry Tack, a former RiverBank employee and former Central Bank consultant, testified that starting in the summer of 2010 he attempted to negotiate an agreement between RiverBank and the Hansons to resolve issues regarding the mortgages and loans. Tack could not remember if this effort started prior to, or after, RiverBank commenced its suit against the Hansons. Although Tack

remembered someone from RiverBank accompanying him when he met with Arlan in approximately January 2011 to negotiate the agreement, he could not remember if Erickson was the one who accompanied him. Aziza testified that both Erickson and Tack visited Hanson Electric to negotiate a settlement. Tack further testified that, because Aziza had not signed the 2008 written authorization Erickson prepared, one of his objectives was to get Aziza to sign an affidavit indicating that Aziza had intended for the mortgages to encumber the Hansons' entire property. According to Tack, such an affidavit would have "clean[ed] up the documentation."

¶13 Arlan testified that he informed Erickson about the errors contained in the 2000 and 2004 mortgages when they were negotiating the terms of the 2008 promissory note. According to Arlan, the attorney who drafted some of the legal descriptions in the mortgages on behalf of RiverBank, Priscilla Dorn, was the person who told him about the errors. Arlan also testified that in January 2011, both Erickson and Tack met with him at his business in an attempt to persuade him and Aziza to sign affidavits indicating they had intended for the mortgages to encumber their entire property. Arlan and Aziza did not sign the affidavits. Erickson denied he was involved in such a meeting.

¶14 Paetznick, who was previously employed by RiverBank but now employed by Central Bank, testified she drafted the 2004 mortgage. However, Paetznick also admitted she did not draft the 1999 and 2000 mortgages, even though she signed Affidavits of Correction indicating she drafted each of the three mortgages. Additionally, although Erickson notarized the Affidavits of Correction, Paetznick testified Erickson did not ask her to swear or affirm that the information contained in the Affidavits of Correction was true. Once Paetznick finished testifying, the circuit court stated, "I'm going to make some specific

findings of fact with respect to the affidavits in particular," which the court then described as "perjuries."

¶15 The circuit court issued its preliminary findings of fact and subsequently issued a written decision concluding Central Bank was entitled to foreclosure on most of the Hansons' property. Viking and Larson moved for an award of costs and attorney fees incurred as a result of Central Bank's fraudulent or perjurous conduct. The court ultimately concluded Viking and Larson were entitled to reasonable costs and attorneys' fees incurred as a result of Central Bank proffering "patently false affidavits." Central Bank now appeals.

DISCUSSION

¶16 On an appeal from a bench trial, we will not disturb the circuit court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). However, we review the circuit court's conclusions of law de novo. *See* ***City of Muskego v. Godec***, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

¶17 "We review the [circuit] court's decision to impose sanctions and the appropriateness of the sanctions ordered under an erroneous exercise of discretion standard." ***Lee v. GEICO Indem. Co.***, 2009 WI App 168, ¶16, 321 Wis. 2d 698, 776 N.W.2d 622 (citation omitted). "[W]e will affirm the [circuit] court's decision if it examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion.'" ***Id.*** (quoting ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604)). "The issue is not whether we, as an original matter, would have imposed the same sanction as the circuit court; it is whether the circuit court exceeded its discretion in imposing the sanction it did." ***Id.*** (citation omitted).

¶18 When the circuit court imposed sanctions on Central Bank, it did not adequately explain whether it was doing so pursuant to statutory authority or its inherent authority. However, "[w]e generally look for reasons to sustain a circuit court's discretionary determination," meaning that when the circuit court fails to adequately explain the reasons for its discretionary decision, "we will independently review the record to determine whether the circuit court properly exercised its discretion and whether the facts provide support for the court's decision." ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493 (citation omitted).

¶19 "Circuit courts are bestowed with those powers necessary to maintain their dignity, transact their business, and accomplish the purposes of their existence." ***Schultz***, 248 Wis. 2d 746, ¶2. Thus, a circuit court has inherent authority to impose sanctions on a party for misconduct during litigation. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991) (noting that courts have "inherent authority to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders"), *overruled on other grounds by* ***Industrial Roofing Servs. v. Marquardt***, 2007 WI 19, 299 Wis. 2d 81, 726 N.W.2d 898; *see also* ***Lee v. LIRC***, 202 Wis. 2d 558, 562, 550 N.W.2d 449 (Ct. App. 1996) (concluding that the court had inherent authority to dismiss the case because the plaintiff had failed to file a brief).

¶20 Furthermore, because one of the circuit court's most vital functions is to ensure "the truthful disclosure of facts," the court may sanction "a party who has attempted to suborn perjury from a witness." ***Schultz***, 248 Wis. 2d 746, ¶12. And, akin to suborning perjury, submitting false affidavits and testimony constitutes misconduct that a court has inherent authority to sanction. *See* ***Nichols***

v. Klein Tools, Inc., 949 F.2d 1047, 1049 (8th Cir. 1991) (concluding trial court did not err by imposing sanctions on a party for offering fabricated testimony); ***United Bus. Commc'n, Inc. v. Racal-Milgo, Inc.***, 591 F. Supp. 1172, 1187 (D. Kans. 1984) (holding that a party "tampered with the administration of justice" by presenting "false and misleading testimony" and submitting "a false statement in answer to interrogatories"); ***Rockdale Mgmt. Co. v. Shawmut Bank, N.A.***, 638 N.E.2d 29, 32 (Mass. 1994) (upholding dismissal for proffering forged document, providing misleading answers to interrogatories, and giving false deposition testimony); *cf.* ***Teubel v. Prime Dev., Inc.***, 2002 WI App 26, ¶¶16-17, 249 Wis. 2d 743, 641 N.W.2d 461 (circuit court has the inherent authority to sanction an attorney for altering marked exhibits).

¶21 As relevant here, the circuit court made the following findings of fact. First, the court found the three mortgages were drafted by or under the direction of attorney Priscilla Dorn, who was then employed by RiverBank. Second, the court found the Affidavits of Correction Central Bank relied on were significantly impeached at trial, and the court found two were "patently false." Third, the court found Aziza did not sign or acknowledge her signature on the 2004 mortgage in Erickson's presence. By implication, the court found Central Bank proffered untruthful testimony from Erickson, one of its employees, at trial—i.e., Erickson's testimony that when he notarized real estate documents containing Aziza's signature, Aziza always signed the documents in his presence. Finally, although the circuit court found the false affidavits were executed by RiverBank—not Central Bank—in 2008, Central Bank nonetheless proffered them

at the 2013 trial. Based on the record,[3] we conclude these factual findings are not clearly erroneous. *See* WIS. STAT. § 805.17(2) (requiring that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses").

¶22 These factual findings demonstrate Central Bank proffered patently false Affidavits of Correction and false testimony from one of its employees at trial. The record further demonstrates that Central Bank relied on the false Affidavits of Correction when it twice moved for summary judgment. Like suborning perjury, submitting false affidavits and testimony to the circuit court "at best interferes with the court's ability to impartially adjudicate the instant case, and at worst can undermine both the opposing party's and the public's faith in the integrity of the judiciary." ***Schultz***, 248 Wis. 2d 746, ¶12. Because submitting false testimony to the court "threaten[s] the dignity of the judicial process," we conclude the circuit court did not erroneously exercise its discretion by using its inherent authority to impose sanctions on Central Bank.[4] *See* ***id.***

[3] WISCONSIN STAT. RULE 809.19(1)(d)-(e) requires a party on appeal to include appropriate references to the record in its brief. The appendix is not the record, and the parties' briefs here include only appendix citations. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Thus, none of the parties have included appropriate references to the record in their briefs. We admonish the parties' respective counsel that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

[4] Because we conclude the circuit court's inherent authority is dispositive of this issue, we decline to address Central Bank's arguments that it was erroneously sanctioned under WIS. STAT. §§ 224.77, 224.80. *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).

¶23 Central Bank argues the circuit court erred by imposing sanctions for three principal reasons.[5] Central Bank first argues WIS. STAT. § 802.05, which governs frivolous conduct, sets forth a clear legislative command curtailing a circuit court's inherent authority to award attorney fees as a sanction for litigation misconduct. Specifically, Central Bank argues the circuit court was required to comply with the requirements contained in § 802.05 before it could award attorney fees as a sanction. We reject that argument for four reasons.

¶24 First, WIS. STAT. § 802.05 addresses only one specific type of litigation misconduct—i.e., frivolity—whereas a court's inherent authority to sanction a party extends to the panoply of litigation misconduct. *Cf.* ***Chambers v. NASCO, Inc.***, 501 U.S. 32, 46 (1991) (noting that a court's "inherent power extends to a full range of litigation abuses"). Second, § 802.05 contains no express language abrogating or curtailing a circuit court's inherent authority to sanction a party for engaging in litigation misconduct. "We will not 'read into the statute language that the legislature did not put in.'" ***State v. Schwarz***, 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703 (quoting ***Brauneis v. State***, 2000 WI 69, ¶27, 236 Wis. 2d 27, 612 N.W.2d 635). Third, even after § 802.05 was most recently amended in 2005, this court has continued to recognize that "the common law in Wisconsin is clear that a trial court has inherent power to sanction a party to maintain the dignity of the circuit court." ***Lee***, 321 Wis. 2d 698, ¶23. Finally, federal courts have consistently concluded RULE 11 of the FEDERAL RULES OF CIVIL PROCEDURE—after which WIS. STAT. § 802.05 was patterned, *see* ***Trinity***

[5] Central Bank does not dispute the factual bases underlying the sanctions—nor does it dispute that the circuit court limited its award of costs and attorneys' fees to those related to the submission of the false Affidavits of Correction. Rather, Central Bank disputes only the circuit court's authority to award costs and attorneys' fees in this case.

Petroleum, Inc. v. Scott Oil Co., 2007 WI 88, ¶49 & n.37, 302 Wis. 2d 299, 735 N.W.2d 1—does not limit a court's inherent authority to impose sanctions on a party for litigation misconduct, *see* ***Chambers***, 501 U.S. at 46-47 (holding FED. R. CIV. P. 11 did not displace a federal court's "inherent power to impose sanctions"); *accord* ***Conner v. Travis Cty.***, 209 F.3d 794, 799 (5th Cir. 2000) (per curiam) ("A court may use its inherent powers to sanction an attorney who acts in bad faith." (citation omitted)); ***Western Sys., Inc. v. Ulloa***, 958 F.2d 864, 873 (9th Cir. 1992) (recognizing "courts retain the inherent power to sanction bad faith conduct during litigation, and that this power exists independent of RULE 11").

¶25 Central Bank next argues the circuit court erred by imposing sanctions because RiverBank—not Central Bank—executed the patently false Affidavits of Correction. Central Bank is correct that it did not execute the patently false Affidavits of Correction. But the two people who drafted, signed, and notarized the false Affidavits of Correction on behalf of RiverBank, Erickson and Paetznick, later became Central Bank employees. Significantly, Erickson and Paetznick were Central Bank employees when Central Bank twice moved for summary judgment and when it proffered the Affidavits of Correction at trial. It was the use of these documents in litigation, not their initial execution, that constituted the misconduct for which sanctions were ordered. Therefore, we conclude the court had the inherent authority to sanction Central Bank for submitting the false Affidavits of Correction—which were drafted, signed, and notarized by Erickson and Paetznick, now Central Bank employees—even though Central Bank did not itself execute the Affidavits of Correction. *See supra* ¶¶19-22.

¶26 Finally, Central Bank argues 12 U.S.C. § 1825(b)(3) (2012)[6] precluded the circuit court from imposing sanctions on Central Bank. Subsection (b)(3) of 12 U.S.C. § 1825 provides:

> **(b) Other exemptions**
>
> When acting as a receiver, the following provisions shall apply with respect to the [FDIC]:
>
> ….
>
> (3) The [FDIC] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

12 U.S.C. § 1825(b)(3). Section 1825(b) "extended the FDIC's immunity from state taxation, previously limited to its corporate function, to its role as receiver." ***Irving Indep. Sch. Dist. v. Packard Props.***, 970 F.2d 58, 61 (5th Cir. 1992). This provision arguably applies only to the FDIC. *See, e.g.*, ***Old Bridge Owners Coop. Corp. v. Township of Old Bridge***, 981 F. Supp. 884, 888 (D. N.J. 1997) ("There is no authority in the language of [12 U.S.C. § 1825(b)(3)] for transferring this exemption to a private party."). Central Bank is obviously not the FDIC.

¶27 Moreover, even assuming 12 U.S.C. § 1825(b)(3) could apply to an entity other than the FDIC, at most this provision provides an exemption from fines or penalties levied against the FDIC and its property during the receivership to an assignee that subsequently acquires the property from the FDIC. *See* ***RTC***

[6] The 2006 and 2012 versions of 12 U.S.C. § 1825(b)(3) were in effect during this litigation. However, there are no substantive differences between the 2006 and 2012 versions of this statutory provision. Therefore, all subsequent references to 12 U.S.C. § 1825(b)(3) are to the 2012 version.

Commer. Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co., 169 F.3d 448, 458 (7th Cir. 1999) (concluding that an assignee "acquired whatever it was that [the receiver] held at the time of assignment, complete with whatever limitations on encumbrances [the receiver] enjoyed"). However, the circuit court did not impose fines or penalties on the FDIC and its property during the receivership. Rather, the circuit court imposed sanctions on Central Bank because—notwithstanding the fact RiverBank executed the false Affidavits of Correction—Central Bank itself submitted the patently false Affidavits of Correction to the court. Therefore, we reject the argument that § 1825(b)(3) precluded the circuit court from imposing sanctions on Central Bank.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.