COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2005

Cornelia G. Clark
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. 2004AP1799 **Cir. Ct. No. 2003CV254**

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

MATTHEW K. ODA AND TAMARA L. ODA,

PLAINTIFFS-APPELLANTS,

V.

PORT WASHINGTON STATE BANK,

DEFENDANT-RESPONDENT,

S. DUANE STROEBEL, JR.,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Matthew and Tamara Oda appeal pro se from an order dismissing their complaint against the Port Washington State Bank. They argue that summary judgment was not appropriate because questions of fact exist on their claims that the Bank fraudulently removed Matthew as a signatory on a business account and discriminated against Matthew, who is of Japanese heritage, by not protecting his interest in the business account. We affirm the order granting summary judgment.

¶2 The Bank held the mortgage on the Odas' residence. In 2001, the Odas defaulted on the mortgage. A foreclosure action was filed against the Odas in October 2001. In January 2002, the Bank obtained a default judgment of foreclosure. The property was sold June 9, 2003, at a sheriff's sale to S. Duane Stroebel, Jr., an intervenor-respondent in this appeal. A May 2001 agreement to sell Stroebel seventeen acres of the Odas' property never closed. In other litigation, Stroebel sued the Odas for failure to complete the real estate transaction. The Odas contend that Stroebel was anything but an innocent purchaser at the sheriff's sale.

¶3 In 1996, Matthew Oda and Stephen P. Smith formed Smith-Oda Architects, Inc. A business account was opened at the Bank. The "depository declaration" listed both Matthew and Smith as signatories on the business account with only one signature needed for transactions. The declaration provided that the signature cards were "continuing and shall remain in effect and that the persons authorized under this Declaration continue to have such authority until the Bank receives written notice from the Depositor to the contrary advising the Bank of any changes or alterations."

¶4 In May 2000, Smith, as president of Smith-Oda Architects, notified the Bank that Matthew was no longer authorized to use the accounts. The corporate name on the accounts was changed to Stephen Perry Smith Architects, Inc. In prior litigation, Smith obtained a judgment against Matthew for $190,120 on claims arising out of the failed business relationship, including the repayment of monies Matthew diverted to his personal use.

¶5 The Odas contend that the Bank fraudulently removed Matthew as a signatory on the business account and refused to uphold Matthew's equal ownership in the Smith-Oda Architects account. They claim it was discriminatory for the Bank to protect Smith's access to the business account and not to protect Matthew's access. They explain that as a result of the Bank's allegedly improper and discriminatory action, Matthew lost his employment and income and they were unable to pay the mortgage held by the Bank. The Odas seek damages for actions of the Bank which allegedly bankrupted Smith-Oda Architects, thereby rendering the Odas unable to pay their mortgage and forcing them to borrow money from a friend. They also seek punitive damages. A summation of their appellate argument is that there are disputed material facts from which a jury could conclude that the actions of the Bank and Stroebel were wrong, negligent, malicious and caused harm to the Odas.

¶6 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2) (2003-04).[1]

¶7 As to Stroebel, the Odas' complaint does not state any cause of action. The complaint does not name Stroebel as a party. Stroebel is only a respondent to this appeal because he intervened in the action to discharge the lis pendens the Odas recorded on May 4, 2004, with respect to the property then owned by Stroebel.[2] Although the appellants' brief insinuates that Stroebel is linked to the alleged wrongdoing by the Bank, there is no such allegation in the complaint. There is no argument that the order discharging the lis pendens was error.[3] The argument is waived. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998). In their reply brief the Odas attempt to create claims against Stroebel suggesting collusion between Stroebel and the Bank and intentional interference by Stroebel in the Odas' right to develop their property since 1989. We will not consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). Further, the failure of the complaint

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] This action was commenced on June 6, 2003, just before the sheriff's sale of the Odas' property.

[3] We do not accept Stroebel's position that because the notices of appeal failed to identify the June 28, 2004 discharge order, there is no appellate jurisdiction to review that order. The notices of appeal were filed after entry of that order. The failure of the notice of appeal to correctly identify the appealable document is not fatal to appellate jurisdiction. *See* ***Carrington v. St. Paul Fire & Marine Ins. Co.***, 169 Wis. 2d 211, 217 n.2, 485 N.W.2d 267 (1992).

to state any claim against Stroebel is controlling and there is no basis to reverse the order with respect to Stroebel.

¶8 The complaint alleges that the Bank engaged in fraud and theft by fraud because the Bank changed the name and signatories on the Smith-Oda Architects account. The critical element of any fraud claim is a knowingly false representation. *See* ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985). The Odas' claims rest on the premise that removing Matthew as a signatory and changing the name on the corporate account was a knowingly false representation.

¶9 The undisputed facts are that Smith, as the corporate president, notified the Bank that Matthew was no longer an authorized signatory. Following the directions of its depositor, the Bank made the change to the account, albeit without notice to Matthew. The Bank acted in accordance with the depository declaration. It was not fraud for the Bank to act in accordance with the directions of its depositor.[4]

¶10 Turning to the claim of oppression and discrimination, we are first struck by the complaint's reference to WIS. STAT. § 178.15(5) that all partners have equal rights in the management and conduct of partnership business. Matthew and Smith did not use a partnership form of business organization. Smith-Oda Architects was a Wisconsin corporation. Matthew was a shareholder of the corporation. Thus, the Odas' belief that the Bank owed them a

[4] At best the complaint alleges that the Bank was misinformed about changes within the corporation. The affidavit of Tamara Oda in opposition to the motion for summary judgment states that no corporate resolutions were voted on to remove Matthew or to change the corporate name. Those allegations do not state a claim against the Bank.

responsibility to protect their equal access to the corporate accounts and information is without any basis. Further, that Matthew is Japanese does not alone create a discrimination claim.

¶11 The circuit court's decision addresses the many nuances of the Odas' claims. The appellants' brief does not specifically argue those points, and we do not individually address them. *See* ***Fritz v. McGrath***, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988) (we need not consider arguments broadly stated but not specifically argued). It is sufficient to observe that the circuit court addressed the Odas' theories of liability carefully and thoroughly. We adopt by reference the circuit court's reasoning as our own. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003).

¶12 The Bank moves for the award of attorney fees and costs because the Odas' appeal is frivolous. *See* WIS. STAT. RULE 809.25(3)(c)2. Whether an appeal is frivolous is a question of law. ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 841, 520 N.W.2d 93 (Ct. App. 1994). "The standard to be applied is an objective one: what should a reasonable person in the position of this pro se litigant know or have known about the facts and the law relating to the arguments presented." ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998).

¶13 Without a doubt the Odas' claim that the Bank discriminated against them is frivolous. However, we cannot award fees under WIS. STAT. RULE 809.25(3) unless "the entire appeal is frivolous." *See* ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶16, 238 Wis. 2d 535, 618 N.W.2d 218. The remaining portion of the appeal is perilously close to being held frivolous. It appears to be nothing more than an attempt to get a trial so as to gain the sympathies of a jury. Yet we

are not convinced that there was no reasonable basis for arguing that summary judgment was improper. The mechanics of summary judgment can be difficult for a pro se litigant to understand. The Odas cited facts they believed made the Bank responsible. They simply fail to appreciate the elements of fraud and the legal significance of the depository declaration and the corporate form of business. All doubts about whether an appeal is frivolous must be resolved in favor of the appellant. *See* ***Rabideau v. City of Racine***, 2001 WI 57, ¶46, 243 Wis. 2d 486, 627 N.W.2d 795. We deny the Bank's motion to have the appeal declared frivolous.

By the Court.—Order affirmed.

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