COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1452 **Cir. Ct. No. 2015CV3668**

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

LISA JACOBSON,

PLAINTIFF-APPELLANT,

V.

COMMONWEALTH MORTGAGE GROUP, LLC AND JASON BOWER,

DEFENDANTS,

BMO HARRIS NA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Kessler, P.J., Brennan and Brash, JJ.

¶1 PER CURIAM. Lisa Jacobson appeals from an order of the circuit court that granted BMO Harris NA's motion for summary judgment and dismissed Jacobson's claims. Jacobson contends the circuit court improperly found facts when deciding the summary judgment motion. We conclude that summary judgment was properly granted in BMO's favor, so we affirm the order.

BACKGROUND

¶2 While a divorce action between them was pending, Jacobson's then-husband, Robin, applied for a mortgage loan to purchase a house in West Allis. At the time, Robin was living in an apartment, separate from the marital home Jacobson lived in with the couple's daughter in Wauwatosa. On the mortgage application, Robin represented that he was unmarried, and he submitted a copy of the divorce petition. The loan was approved with BMO as the lender and closed in December 2011.[1] Jacobson learned of the house in January 2012. She and Robin also reconciled around this time, and the divorce action was dismissed.[2]

¶3 After the Jacobsons reconciled, they recombined their assets in February or March 2012. In March 2012, Jacobson stopped making payments on the Wauwatosa home and other bills; in a deposition, she explained that Robin had been diverting some of his income away from the couple's joint account and had prioritized his individual debts over family debts, leaving Jacobson with a shortfall

[1] Although BMO originated the mortgage, the mortgage was assigned to Wells Fargo shortly after closing.

[2] Jacobson petitioned for divorce again in April 2014; the divorce was finalized in August 2015.

in her budget each month. The Wauwatosa mortgage holder eventually foreclosed on that property.

¶4 In December 2013, Jacobson moved into the West Allis home with her daughter; Robin stayed in the Wauwatosa home until the foreclosure was complete. By this time, payments on the West Allis property had fallen behind and the property was also foreclosed upon. In May 2014, Jacobson moved to reopen and vacate the foreclosure judgment on the West Allis property. As part of the reopening, she made a payment of $11,500 to bring the mortgage loan current, believing this would allow her to keep the property for her and her daughter. Jacobson continued to make payments on the West Allis mortgage until October 2014, when she learned that she was receiving no credit for these payments on her own credit history. The West Allis property was eventually foreclosed upon for a second time.[3]

¶5 Jacobson commenced the underlying action in April 2015, originally alleging claims for negligence, civil conspiracy, and rescission against BMO. She filed a second amended complaint in May 2016.[4] This complaint abandons the

[3] *See* ***Wells Fargo Bank, NA v. Jacobson***, No. 2016AP2292, unpublished slip op. (WI App Jan. 30, 2018). Around the time that the Jacobsons recombined their assets, Robin executed a quitclaim deed on the West Allis property, naming him and Jacobson as joint tenants with a right of survivorship. Jacobson had assumed or acquired responsibility for the property under the parties' divorce decree. *See* ***id.***, ¶8. In defending against the foreclosure, she argued that the mortgage was unenforceable against her as a non-signing spouse and that the mortgage was invalid under federal law. *See* ***id.***, ¶12. We determined that the mortgage was valid, *see* ***id.***, ¶¶18-21, and noted that the bank was only foreclosing on its lien, not seeking a personal judgment against Jacobson, *see* ***id.***, ¶25.

[4] This complaint named two other defendants, who were also granted summary judgment. Jacobson has not appealed the order dismissing those defendants, and her appeal is limited to matters involving BMO. We therefore do not discuss the other defendants or their role in subsequent matters.

earlier claims and specifies that this is instead "an action for damages under Wis. Stat. Sec. 224.80," which permits a private cause of action by a party aggrieved by an act committed in violation of subchapter III of WIS. STAT. ch. 224 (2017-18),[5] including violations of WIS. STAT. § 224.77.[6] *See* WIS. STAT. § 224.80(2).

¶6 As relevant to this appeal, Jacobson made three specific allegations against BMO. She claimed that "[b]y accepting the divorce petition as sufficient proof of Robin's marital status and by failing to properly verify Robin's debt-to-income ratio," BMO: (1) "violated [rule] that relates to practice as a mortgage banker, in violation of Wis. Stat. Sec. 224.77(1)(k)"; (2) "engaged in conduct that violates the standard of professional behavior which, through professional experience, has become established for mortgage bankers, in violation of Wis.

[5] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[6] Under WIS. STAT. § 224.77(1):

> No mortgage banker, mortgage loan originator, [or] mortgage broker ... may do any of the following:
>
> ….
>
> (k) Violate any provision of this subchapter, ch. 138, or any federal or state statute, rule, or regulation that relates to practice as a mortgage banker, mortgage loan originator, or mortgage broker.
>
> (L) Engage in conduct that violates a standard of professional behavior which, through professional experience, has become established for mortgage bankers, mortgage loan originators, or mortgage brokers.
>
> (m) Engage in conduct, whether of the same or a different character than specified elsewhere in this section, that constitutes improper, fraudulent, or dishonest dealing.

Stat. Sec. 224.77(1)(L)"; and (3) "engaged in conduct that constitutes improper dealing, in violation of Wis. Stat. Sec. 224.77(1)(m)." (Brackets in original.)

¶7 According to the amended complaint, BMO's issuance of the mortgage loan to Robin "greatly increased [Jacobson's] marital debt." This caused Jacobson "to have insufficient funds to pay the preexisting marital debt." Because the preexisting debts were not paid, Jacobson's credit score "drop[ped] substantially" between 2011 and 2016. When, in July 2015, Jacobson began applying for banking jobs after a layoff, she was "specifically rejected for several employment opportunities due to her low credit score[.]" In an itemized statement of damages, Jacobson sought recompense for "[v]alue lost in properties [due] to the transaction at issue," the difference between her income "before [and] after the transaction at issue, for her remaining years of work, totaling $840,000," and attorney fees.

¶8 Relying in large part on Jacobson's deposition testimony, BMO moved for summary judgment, asserting that Jacobson could not demonstrate that she was aggrieved or that she suffered any actual damages as a result of the loan to Robin. BMO argued that Robin's loan was something for which he was solely responsible, so the loan did not increase the marital debt. Further, because Jacobson was not obligated to repay the loan, any payments she made on the mortgage to the detriment of her other debts were voluntary, and any lower credit score resulting from her own delinquencies was because of those voluntary payments. BMO also pointed out Jacobson's failure to offer any objective, evidentiary proof for the itemized damages she claimed to have suffered as a result of the loan. Jacobson countered that any factual dispute about her financial difficulties worsening due to the loan was a jury question not appropriate for resolution by summary judgment.

¶9 The circuit court held a hearing on the motion. Ultimately, the circuit court concluded that there were "no genuine issues of material fact concerning this as it applies to the claim made by [Jacobson] and her claim for damages." It noted that the loan had been made only in Robin's interest, not the interest of the marriage or family, and that it was Jacobson's decision to pay over $11,000 to bring the mortgage current, even going so far as to have a foreclosure judgment vacated. The circuit court concluded that "[t]his is something that she clearly and knowingly placed herself in a position[,]" and her allegations were insufficient to make her an aggrieved party. It thus granted summary judgment to BMO. Jacobson appeals, complaining that any questions about what might be called her contributory negligence were for the jury and not appropriate for resolution on summary judgment.[7]

DISCUSSION

¶10 We review a grant of summary judgment *de novo*. *See* ***Schreiner v. Wieser Concrete Prods., Inc.***, 2006 WI App 138, ¶7, 294 Wis. 2d 832, 720 N.W.2d 525. Summary judgment is appropriate "if the pleadings, depositions,

[7] BMO asserts that we have no jurisdiction over this appeal because the notice of appeal was untimely in light of BMO's notice of entry of the order, which BMO says shortened the appeal time from ninety days to forty-five days. *See* WIS. STAT. § 808.04(1). Jacobson filed her notice of appeal on day forty-nine. "The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal." WIS. STAT. RULE 809.10(1)(e).

The notice of entry incorrectly listed the date of entry as June 2, 2015, instead of the actual date of June 5, 2015. BMO acknowledges this error but contends the date of entry was still provided—and the notice should therefore suffice—because it also served Jacobson with a true and correct copy of the order, the face of which had the date of entry clearly identified.

Strict compliance with the notice of entry procedures is required. *See* ***Nichols v. Conlin***, 198 Wis. 2d 287, 289, 542 N.W.2d 194 (Ct. App. 1995). The notice itself was defective on its face, so it was ineffective for shortening the appeal deadline. *See* ***id.*** The appeal is timely, and we have jurisdiction.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶11 "[W]e look at the parties' submissions in a light most favorable to the party against whom summary judgment is sought, and all reasonable inferences are to be assessed against the party seeking summary judgment." *See* ***Novell v. Migliaccio***, 2010 WI App 67, ¶9, 325 Wis. 2d 230, 783 N.W.2d 897. "The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment." *See* ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). The opponent of a summary judgment motion "'must advance specific facts showing the presence of a genuine issue for trial.'" ***Schreiner***, 294 Wis. 2d 832, ¶12; *see also* WIS. STAT. § 802.08(3). The ultimate burden of demonstrating that there is sufficient evidence to go to trial at all is on the party with the burden of proof on the issue that is the subject of the motion. *See* ***Schreiner***, 294 Wis. 2d 832, ¶13.

¶12 As noted above, *supra*, ¶6, Jacobson alleged that BMO violated three paragraphs of WIS. STAT. § 224.77(1); § 224.77 is part of subchapter III of WIS. STAT. ch. 224. *See* WIS. STAT. §§ 224.71-224.82. "A person who is aggrieved by an act which is committed by a mortgage banker, mortgage loan originator, or mortgage broker in violation of any provision of this subchapter or of any rule promulgated under this subchapter" may bring a private action in which he or she may recover:

> (a) An amount equal to the greater of the following:
>
> 1. Twice the amount of the cost of loan origination connected with the transaction, except that the liability

> under this subdivision may not be less than $100 nor greater than $25,000 for each violation.
>
> 2. The actual damages, including any incidental and consequential damages, which the person sustained because of the violation.
>
> (b) The aggregate amount of costs and expenses which the court determines were reasonably incurred by the person in connection with the action, together with reasonable attorney fees, notwithstanding s. 814.04 (1).

WIS. STAT. § 224.80(2). A person is aggrieved for purposes of § 224.80(2) only if he or she can show some actual injury or damage. *See* ***Avudria v. McGlone Mortg. Co. Inc.***, 2011 WI App 95, ¶¶24, 31, 334 Wis. 2d 480, 802 N.W.2d 524; *see also* ***Liebovich v. Minnesota Ins. Co.***, 2008 WI 75, ¶37, 310 Wis. 2d 751, 751 N.W.2d 764. Section 224.80 is not a strict liability statute; a mere technical violation of WIS. STAT. ch. 224 does not suffice. *See* ***Avudria***, 334 Wis. 2d 480, ¶¶26-30.

¶13 Our standard of review requires that we review the summary judgment request anew, without deference to the circuit court's reasoning. However, we reach the same conclusion—that BMO was entitled to summary judgment—because Jacobson's claims suffer from a failure of proof, both in terms of damages and causation. If Jacobson cannot show a genuine issue of material fact regarding damages caused by BMO under subchapter III, she is not aggrieved and is not entitled to maintain a claim under WIS. STAT. § 224.80.

¶14 Jacobson sought compensation for "[v]alue lost in properties" due to the loan; a total of $840,000, representing the "[d]ifference between [her] income before [and] after the transaction at issue, for her remaining years of work"; and attorney fees. The summary judgment record, however, is devoid of any evidence supporting these claims: it is not clear what Jacobson means by "value lost in

properties" due to the loan, but she directs us to no evidence regarding any property values or a change therein, and she points to no evidence establishing the $840,000 sum she seeks for her lifetime income differential.

¶15 When asked at her disposition how Jacobson had calculated her damages, her attorney objected, asserting that both the wage and property calculations had to be established by expert testimony. In her reply brief on appeal, Jacobson contends that "once liability is determined, the burden to show damages is … more relaxed." However, a summary judgment opponent may not simply rest on her allegations; she must "set forth specific facts showing that there is a genuine issue for trial." *See* WIS. STAT. § 802.08(3). Jacobson has identified no specific factual basis for her damage claims, not even something as basic as showing the lay calculations by which she arrived at her demand for $840,000.

¶16 Additionally, we note that attorney fees under WIS. STAT. § 224.80(2)(b) are authorized as a part of recoverable costs, separate from damages under § 224.80(2)(a), so the attorney fees are not damages themselves. *See, e.g.*, ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 378, 488 N.W.2d 82 (1992), *limited on other grounds in* ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.

¶17 We are therefore unpersuaded that Jacobson has established a sufficient issue of material fact regarding the existence of any damages as a result of BMO's mortgage loan to Robin. But even if Jacobson had established a genuine issue of material fact regarding the existence of damages, she fails to establish that BMO actually violated any part of WIS. STAT. § 224.77 or that there is any causal link between any violations committed in issuing the loan to Robin and her damages.

¶18 Jacobson first alleged that BMO violated "any provision of [subchapter III], WIS. STAT. ch. 138, or any federal or state statute, rule, or regulation that relates to practice as a mortgage broker[,]" contrary to WIS. STAT. § 224.77(1)(k). Other than the additional alleged violations of § 224.77—which, as we shall see, are unsupported—Jacobson does not identify a specific statute, rule, or regulation that has been violated by BMO's loan to Robin. Jacobson's second allegation was that BMO violated a "standard of professional behavior[,]" contrary to § 224.77(1)(L), but she does not tell us what the applicable standard is. Jacobson's third contention was that BMO's "accepting the divorce petition as sufficient proof of Robin's marital status and … failing to properly verify his debt-to-income ratio" constitutes improper dealing, contrary to § 224.77(1)(m). However, she does not explain why this is so.

¶19 In an attempt to establish that she put forth sufficient evidence to establish a genuine issue of material fact regarding whether BMO violated any provision of WIS. STAT. § 224.77, Jacobson briefly alludes to her proposed expert witness's summary, although without any significant analysis or discussion of this opinion. The expert wrote that "the industry practice of VA financing"[8] expects a spouses' credit will be considered in marital property states, regardless of whether the spouse will be liable on the note, so "both credit in its entirety as well as all liabilities found on [Jacobson's] credit report at that time should have been counted against Robin's debt-to-income ratio." The expert further opined that the Jacobsons' joint debts "were erroneously omitted using the petition for the divorce

[8] We presume "VA" refers to the Veterans' Administration, but neither the expert's report nor Jacobson's brief so confirms.

and not an actual divorce decree allowing for approval of a loan that otherwise would not have been approved."

¶20 The expert's summary lacks any factual basis for these conclusions. It does not establish that "VA financing" rules applied in this case. Further, though it references a "VA handbook," there is no indication whether the information therein constitutes a "statute, rule, or regulation" or is merely advisory. The opinion also does not equate "the industry practice of VA financing" with any standard of professional behavior. Finally, the opinion does not establish any basis on which to conclude Robin's loan "otherwise would not have been approved" had his debt-to-income ratio been "properly verif[ied]."

¶21 Notably, the specific conclusion offered by the expert is that BMO "[m]ade a substantial misrepresentation in the court of practice injurious to one or more of the parties to a transaction." But Jacobson's complaint does not allege that BMO made a misrepresentation, and Jacobson herself was not a party to the transaction. Thus, Jacobson has not shown a genuine issue of material fact regarding whether BMO committed any actionable violation for purposes of WIS. STAT. § 224.80.

¶22 Jacobson also fails to causally link any of BMO's alleged violations to her alleged damages. Again, there is no evidence regarding property values, and there is certainly no evidentiary linkage between the loan to Robin and any decrease in those values. The claim for $840,000 in lifetime income differential is presumably presented as a result of Jacobson having to take lower-paying jobs because her allegedly lower credit score disqualified her for higher-paying positions. But Jacobson offered no evidence to show a change in her credit score, much less any evidence that BMO caused the decrease. Indeed, the fact that her

payments on the BMO loan would never impact her credit score was the precise reason that she stopped paying on the mortgage. Rather, the record indicates only that her credit score decreased because she did not pay her own debts.

¶23 Further, Jacobson critically fails to show that she was ever obligated to pay on the mortgage that BMO issued or that anyone ever tried to hold her liable for paying it.[9] She acknowledged in her deposition that she "had not signed even one piece of paper for that loan."[10] She acknowledged that she made payments toward the mortgage not because she had to but because she believed doing so would entitle her to the property. She acknowledged that the $11,500 payment made to reopen the foreclosure judgment could have been used on the delinquent accounts whose nonpayment allegedly reduced her credit score. But ultimately, it is undisputed on this record that Jacobson had no legal obligation on the mortgage loan BMO issued to Robin.

¶24 Thus, it is not the loan BMO gave to Robin that caused any of Jacobson's damages; rather, it was her own voluntary, if imprudent, acts of diverting funds from other obligations to the BMO mortgage loan. *See* ***LeBeau v. Minneapolis, St. P. & S. S. M. Ry. Co.***, 164 Wis. 30, 37-38, 159 N.W. 577 (1916);

[9] As noted above, when Wells Fargo foreclosed on the West Allis property, it did not seek a personal money judgment against Jacobson.

[10] In the circuit court, the parties made arguments regarding whether Wisconsin's marital property laws obligated Jacobson on the mortgage. These arguments are not revisited on appeal and we do not consider them. We do note that, in her reply brief, Jacobson argued she was obliged on the loan by virtue of WIS. STAT. § 706.02(1)(f). However, that statute is part of a chapter governing in transactions by which interests in land are mortgaged. *See* WIS. STAT. § 706.001(1). Section 706.02 lists the requirements for such a transaction to be valid, and paragraph (1)(f) simply requires a conveyance be signed by both spouses if it alienates an interest in the homestead, while "on a purchase money mortgage pledging that property as security only the purchaser need sign the mortgage[.]" In this case, the homestead was not alienated and Robin executed a purchase money mortgage.

see also ***Lofton v. Beneficial Fin. I Inc.***, 569 B.R. 747, 753-54 (Bankr. W.D. Wis.) (2017) (analyzing whether debtors were damaged by second mortgage lender's alleged violation of WIS. STAT. § 224.77(1)(m), and thereby aggrieved for purposes of WIS. STAT. § 224.80(2), when debtors voluntarily continued to pay first mortgage, and concluding volitional act by debtors does not constitute actual damages caused by lender). Why Jacobson felt she had to make those payments is irrelevant; the mortgage loan itself posed no threat to Jacobson's credit score.

¶25 Based on the foregoing, there is no genuine issue of material fact regarding damages arising from BMO's mortgage to Robin—Jacobson has shown none, nor has she demonstrated how BMO caused any of them.[11] If Jacobson has no actual damages caused by BMO violating WIS. STAT. ch. 224, she is not aggrieved by BMO's actions. *See* ***Avudria***, 334 Wis. 2d 480, ¶31. If Jacobson is not aggrieved, she cannot maintain a private action under WIS. STAT. § 224.80. Thus, BMO was entitled to summary judgment dismissing Jacobson's § 224.80 claims.

By the Court.—Order affirmed.

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

[11] Jacobson has adequate reason to be upset by this loan, but the party primarily responsible for it appears to be Robin, not BMO. Indeed, one of Jacobson's first arguments against summary judgment was that she had shown sufficient material facts to establish that "*Robin* had in fact misrepresented his marital status on the mortgage loan application … and that the result of *that action* had caused her substantial economic injury." (Emphasis added.)