COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2285 **Cir. Ct. No. 2007CV1113**

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

BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2006-OA9 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-OA9, AND/OR MERS AS APPROPRIATE,

PLAINTIFF-RESPONDENT,

V.

PATRICK J. JOHNSON AND TOWN AND COUNTRY BANK,

DEFENDANTS,

SHORECREST APARTMENTS LIMITED PARTNERSHIP,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Neubauer, J.

¶1 PER CURIAM. The dispute in this foreclosure action involves the priority of mortgages on property Patrick Johnson owned. Shorecrest Apartments Limited Partnership appeals from an order granting summary judgment in favor of Bank of New York (BoNY) in its capacity as trustee for certain entities. The parties focus on whether principles of equitable subrogation apply and, if so, whether the "clean hands doctrine" precluded its use. After much deliberation, we affirm, despite BoNY's marginally adequate pleading and near disregard for proper summary judgment procedure.

¶2 The undisputed facts are taken from the pleadings and the parties' summary judgment submissions. Johnson, a real estate investor, is the sole member of Island Enterprises, LLC. On April 12, 2006, Shorecrest made a $1,010,000 loan to Johnson on behalf of Island Enterprises. Johnson pledged eight parcels of property as collateral. The mortgage documents show that Central States Mortgage held a first mortgage on some of the parcels, including on his homestead, the parcel at issue here. The mortgage was recorded on April 17.

¶3 On April 18, Johnson obtained a $493,000 loan from Universal Savings Bank secured by a mortgage encumbering Johnson's homestead. Johnson used most of the loan proceeds to satisfy the Central States first mortgage. The "Specific Closing Instructions" form Johnson signed indicates that he authorized the Universal loan to be recorded in first lien position. He also certified that he had fully disclosed on the loan application all the properties he owned and any associated debts. Despite the certification, he did not disclose to Universal that Shorecrest also held a note and mortgage on the property. Universal recorded the mortgage on May 4, 2006, and assigned it to BoNY on July 11.

¶4 Johnson defaulted on his mortgage with Universal/BoNY and BoNY filed a foreclosure action in April 2007. BoNY did not join Shorecrest in the action. In May, the court granted BoNY a judgment of foreclosure on the pleadings in the amount of $531,279.

¶5 On Friday, November 30, 2007, Shorecrest learned that a sheriff's sale was set for 9 a.m. on Monday, December 3. Shorecrest attended the sale and advised all present that it had a prior mortgage on the property. BoNY was the sole—and, thus, the winning—bidder. Shorecrest then intervened in the action and counterclaimed that any interest BoNY had in the foreclosed property was junior to Shorecrest's. BoNY denied that its interest was subordinate. It reserved the right to amend its answer, but did not.

¶6 BoNY moved for summary judgment on the basis that principles of equitable subrogation entitled it to first mortgage priority despite recording its mortgage after Shorecrest's. Shorecrest responded that equitable subrogation had not been sufficiently pled and that facts remained in dispute regarding whether a definite agreement existed that Universal/BoNY would ascend to first lien position and whether or not BoNY was a "volunteer."

¶7 Shorecrest argued most strenuously, however, that the "clean hands" doctrine barred recovery. It asserted that BoNY offered a "teaser" interest rate and obscured the actual rate, in violation of the Truth-in-Lending Act (TILA), and relied on an index for determining the interest rate that violated WIS. STAT. § 138.056(2)(b) (2007-08),[1] which governs adjustable rate loans. Shorecrest

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

argued that equitable relief is unavailable to one who comes to the court with unclean hands. The circuit court granted summary judgment to BoNY on the issue of mortgage priority and concluded that Shorecrest had no standing to challenge interest rates between Johnson and BoNY. Shorecrest appeals. The facts will be fleshed out as needed.

¶8 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***Westphal v. Farmers Ins. Exch.***, 2003 WI App 170, ¶9, 266 Wis. 2d 569, 669 N.W.2d 166. We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins a material issue of fact or law. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). If we conclude that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Id.*** Summary judgment must be entered "if the pleadings, depositions, 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).

¶9 Shorecrest asserts that BoNY's pleadings fail to allege any facts that would support a claim of equitable subrogation. The initial complaint, of course, was not filed with an eye toward equitable subrogation because Shorecrest was not yet a party to the suit. As intervening defendant, Shorecrest's counterclaim asserted that BoNY's interest, if any, was subordinate to its own. BoNY's answer denied that its interest was subordinate to Shorecrest's. Thus, issue was joined. Wisconsin is a notice-pleading state, and resolution of facts which sustain a pleading is left to discovery. ***Studelska v. Avercamp***, 178 Wis. 2d 457, 463, 504 N.W.2d 125 (Ct. App. 1993). We conclude, therefore, that the pleadings suffice,

if just passably so. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 352, 294 N.W.2d 473 (1980) (stating that a complaint still may pass muster although "barebone" and "conclusory in part") *abrogated on other grounds* in ***Meyers v. Bayer AG***, 2007 WI 99, ¶28, 303 Wis. 2d 295, 735 N.W.2d 448. BoNY's answer could have been vastly improved upon with the addition of more specifics, but it gives Shorecrest adequate notice of the nature of the claim asserted.[2]

¶10 BoNY then moved for summary judgment, its motion supported by a brief and one affidavit. The affidavit is of an employee of Countrywide Home Loans, Inc., a loan servicer for BoNY, and relates the facts of Johnson's default on the April 18, 2006 loan from Universal. The note and mortgage, the settlement statement showing the payoff to Central States and the assignment of the mortgage from Universal to BoNY were appended to the summary judgment brief as "exhibits." None found their way as attachments to any affidavit despite the requirement set forth in WIS. STAT. § 802.08(3) that supporting papers "shall set forth such evidentiary facts as would be admissible in evidence."

¶11 Shorecrest filed a brief in opposition. It did not dispute that Johnson used the Universal loan to refinance his existing first mortgage with Central States. In fact, its Statement of Facts, citing as sources BoNY's summary judgment brief exhibits, and again in its proposed findings of facts submitted to the court, Shorecrest recites that "Johnson used the majority of the [Universal] loan proceeds to refinance his existing first mortgage on the Property with Central States Mortgage." Rather, Shorecrest disputed whether the Central States payoff

[2] We frankly are mystified by BoNY's failure or decision not to amend its complaint or its answer, especially after reserving the right to do so. We also see no evidence that either party ever did a title search.

was based on an agreement that Universal then would assume first lien position. Shorecrest argued that since BoNY failed to demonstrate that such an agreement existed, its own earlier-recorded mortgage was superior.

¶12 BoNY filed a reply brief, again unsupported by an affidavit but with attached exhibits. BoNY asserted that the agreement Shorecrest questioned was answered by Exhibit A, a copy of the "Specific Closing Instructions" from Universal to Milwaukee Title in regard to the $493,000 loan to Johnson. The document lists as a requirement of issuing title insurance that the Universal loan "must record in 1st lien position on or prior to the disbursement date."

¶13 We are bothered by BoNY's failure to properly authenticate its summary judgment submissions and we seriously considered reversing. Shorecrest did not object to this defect, however, and it is not this court's duty to develop their argument for them. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997). Furthermore, to reverse the grant of summary judgment in this case would be a colossal waste of the circuit court's and this court's resources.[3] Therefore, in the interest of judicial economy, we will overlook the deficiency and treat the exhibits as if they were in an affidavit, as summary judgment procedure requires. *See* ***State v. Bruckner***, 151 Wis. 2d 833, 864 n.15, 447 N.W.2d 376 (Ct. App. 1989). Upon examining the various mortgage documents, we conclude that there is no genuine issue as to any material fact and BoNY is entitled to judgment as a matter of law.

[3] BoNY presumably would seek leave to amend its pleadings, move again for summary judgment and support its filings with affidavits.

¶14 Subrogation is an equitable doctrine invoked to avoid unjust enrichment. ***Ocwen Loan Serv., LLC v. Williams***, 2007 WI App 229, ¶7, 305 Wis. 2d 772, 741 N.W.2d 474. It is properly applied when one not a mere volunteer pays a debt which in equity and good conscience another should satisfy. ***Id.*** To invoke subrogation, a lender must have lent a debtor money to pay a debt on which the lender was secondarily liable, or lent the money to protect the lender's own interest, or entered into an agreement that the lender was to have security on the debt. ***Rock River Lumber Corp. v. Universal Mortgage Corp.***, 82 Wis. 2d 235, 241, 262 N.W.2d 114 (1978). Equity treats such transactions as tantamount to assignments of the original security from the discharged lender to the subrogated lender. ***Id.*** The remedy of subrogation is highly favored, and the courts are inclined to give it a liberal application. *See* ***Jindra v. Diederich Flooring***, 181 Wis. 2d 579, 599 n. 11, 511 N.W.2d 855 (1994).

¶15 When Shorecrest made its loan to Johnson on April 12, 2006, it was in second position to Central States. As part of the April 18 Universal loan transaction, Johnson signed the "Specific Closing Instructions," which authorized recording the loan in first lien position. That agreement is an important consideration in determining whether subrogation is appropriate, but subrogation arises as a matter of doing justice after a balancing of the equities, not as a direct legal consequence of the parties' contract. *See* ***Rock River Lumber Corp.***, 82 Wis. 2d at 242. Here, Universal made the loan in reliance upon the justifiable expectation that it would have security equivalent to Central States'—that is, first lien position. *See* ***id.*** at 241. So with that authorization, Universal stepped into Central States' shoes. Thus, even though Shorecrest's interest is senior in time to Universal/BoNY's, it remains in a junior position—the same position it would

have been in had the Universal loan to Johnson to satisfy the Central States' mortgage never taken place. *See* ***Ocwen Loan Servicing***, 305 Wis. 2d 772, ¶20.

¶16 Shorecrest next raises the "clean hands" doctrine. One of the maxims of an equitable proceeding is that a plaintiff who seeks affirmative equitable relief must have clean hands before the court will entertain his or her plea. ***Westfair Corp. v. Kuelz***, 90 Wis. 2d 631, 637, 280 N.W.2d 364 (Ct. App. 1979). Shorecrest asserts that BoNY comes to the court with unclean hands because the BoNY mortgage terms and disclosures violate TILA by: (1) obscuring the true interest rate; (2) failing to disclose that the one-percent interest rate was a discounted "teaser" rate; (3) failing to disclose that negative amortization was certain to occur; and (4) adding misleading information.

¶17 The circuit court held that Johnson, not Shorecrest, would have standing to raise the clean hands doctrine. Shorecrest contends it does not need standing because it is not asserting a claim for damages under TILA but simply is attempting to show that BoNY used TILA violations "to springboard ahead of Shorecrest's superior mortgage." Further, it asserts, "technical concerns" such as standing are inapplicable in a court of equity. We disagree.

¶18 As stated, Shorecrest's mortgage never was superior. It first was junior to Central States' and then to Universal's. Also, the clean hands doctrine does not preclude recovery absent a showing that the alleged conduct constituting "unclean hands" caused the claimed harm. *See* ***Security Pac. Nat'l Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987). Shorecrest forges no nexus between BoNY's alleged TILA violations and Johnson's default. Indeed, Johnson makes no such claim. We reject the clean hands argument.

By the Court.—Order affirmed.

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