

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 29, 2004

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. 03-0043
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000072

**IN COURT OF APPEALS
DISTRICT IV**

**CENDANT MORTGAGE CORPORATION F/K/A PHH MORTGAGE
SERVICES CORPORATION,**

PLAINTIFF-RESPONDENT,

v.

**OSCAR WILSON, JR. AND CATHERINE TUI WILSON
A/K/A CATHERINE WILSON,**

DEFENDANTS-APPELLANTS,

**JANE DOE WILSON, JOHN DOE WILSON AND JOHN MOE
WILSON,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. MCALPINE, Judge. *Reversed and cause remanded.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Oscar Wilson and Catherine Wilson appeal a summary judgment granting a judgment of foreclosure in favor of Cendant Mortgage Corporation. The issue is whether mortgage-holder Cendant properly proved on summary judgment that the Wilsons were in default. We conclude Cendant did not, and therefore we reverse.

¶2 Summary judgment methodology is well established. *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). On review, we apply the same standard the circuit court is to apply. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶3 We first review Cendant's complaint to determine if it states a claim. The complaint's main allegations are that plaintiff Cendant holds a note and recorded mortgage on property owned by the Wilsons, and that the Wilsons failed to make contractual payments as required. This states a claim for foreclosure. The Wilsons' answer denies that they failed to make payments. The answer raises an issue for further litigation.

¶4 We turn next to the proofs submitted on summary judgment.¹ Cendant's summary judgment motion contains only one affidavit relating to the Wilsons' alleged default. It is by Marc Hinkle, an employee of Cendant.

¹ The record is unclear as to what chronological order those proofs were filed in. The motion and its attached affidavits are file-stamped October 28, 2002, but the cover letter and the documents themselves are dated September 27, 2002. The cover letter advises that the motion is set for hearing on October 25, 2002, although that was later changed to November 5, 2002. The affidavit that the Wilsons submitted in opposition to summary judgment was dated and filed October 23, 2002. Obviously there is an anomaly here, because the response to the motion was officially filed before the motion itself. However, we infer from these dates that the summary judgment motion was probably sent in late September, received by the Wilsons and the court, and then responded to by the Wilsons, but was not immediately file-stamped by the clerk, for unknown reasons.

Attached to the affidavit are copies of letters sent by Cendant to the Wilsons between November 2001 and May 2002. Hinkle avers that during the first portion of 2001 the Wilsons entered into a repayment plan to reinstate their delinquent account. He averred: “This repayment plan was successful when, on April 26, 2001, the defendants’ April 2001 monthly mortgage payment was received. The defendants’ account was current at that time.” Hinkle further averred that the Wilsons “have defaulted under the terms of the note and mortgage” by failing to make the payments due on and after October 1, 2001. However, the note itself was not attached to the motion or the complaint. The attached letters show that Cendant rejected payments that were tendered later, based on Cendant’s belief that those payments were insufficient to bring the Wilsons’ account current.

¶5 We are doubtful that the Hinkle affidavit establishes a prima facie case for foreclosure. The loan note is the source for a court to determine what legal obligations are required of the borrower, such as when payments are due. Cendant’s affidavit presents only its employee’s conclusion that the Wilsons are in default because they failed to do something the employee believes is required by the note. By not putting the note in the record to establish the borrowers’ obligations, it is difficult to see how the lender has established a prima facie case that the borrowers failed to fulfill those obligations. Nonetheless, we will proceed on the assumption that a prima facie case for foreclosure has been made.

¶6 The Wilsons’ material in opposition to summary judgment contains an affidavit by their attorney, Lyle Schaller. Attached to that affidavit are copies of documents, including correspondence from Cendant, a canceled check for a payment dated October 10, 2001, and a computer printout of a loan payment record for a loan held by “Oscar Wilson, Jr.”

¶7 Cendant argues that we should disregard all of Schaller’s affidavit because it is not compliant with WIS. STAT. § 802.08(3) (2001-02),² which provides that affidavits “shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.” Cendant argues that Schaller’s affidavit is improper because Schaller has no personal knowledge of what occurred in the Wilsons’ account. Oddly, even while Cendant asks us to disregard Schaller’s affidavit, Cendant’s appellate brief contains a statement of facts and a legal argument that rely heavily on the documents included with that affidavit. In our view, Schaller’s affidavit makes few statements of fact beyond describing the documents he attached. We see no reason to doubt the admissibility of the documents themselves and, therefore, we will consider those documents.

¶8 As to the merits, the Wilsons argue on appeal that, if we start from the statement in Hinkle’s affidavit that the Wilsons’ account was current in April 2001, and we then review the payment record printout for the months after that, we can see that the payment they made in October 2001 was the one due in that month. Therefore, they argue, they were not in default for October, and Cendant acted improperly by rejecting payments tendered later. Cendant responds by arguing that the payment record shows that the payment received in April 2001 was actually the one due in March. Therefore, Cendant argues, the remainder of the payment record shows that the Wilsons remained behind by one month, and that the payment made in October 2001 was actually the one due in September, leaving the Wilsons in default for October.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶9 Cendant's argument does not acknowledge, and is entirely contrary to, the affidavit it submitted by its own employee. Cendant argues that the payment received in April 2001 was the one due in March, yet Hinkle averred that the payment received in April was applied to April and that the account was then current. We agree that the payment record printout can be read as supporting Cendant's argument, but Hinkle's affidavit avers facts that are inconsistent with that interpretation.

¶10 Furthermore, Hinkle's affidavit differs from the printout in another significant respect. Hinkle refers to a payment received on April 26, 2001, but the payment record itself shows only a payment received on April 12, 2001. This raises an inference that the Wilsons made two payments in April, one of which does not appear on the computer printout given to the Wilsons but which was known to Hinkle through examination of a different or more complete record. If a second payment was indeed made on April 26, Hinkle's affidavit might well be correct in asserting that that payment was applied as the April payment and brought the Wilsons' account into currency.

¶11 Based on the above analysis, we conclude the affidavits show that a dispute of material fact remains. Our best guess is that, with more complete documentation and more thorough review of its records, Cendant will ultimately be able to show that the Wilsons were not current in April 2001, and were in default in October 2001. However, summary judgment cannot be granted based on guesses. It is the movant's burden to establish that there are no disputes of material fact and that they are entitled to judgment without trial. *Grams*, 97 Wis. 2d at 338-39. Therefore, we reverse the judgment of foreclosure.

By the Court.—Judgment reversed and cause remanded.

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

