COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1909 **Cir. Ct. No. 2008CV2441**

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

AURORA LOAN SERVICES LLC,

PLAINTIFF-RESPONDENT,

V.

DAVID J. CARLSEN AND NANCY L. CARLSEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Reversed*.

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 LUNDSTEN, J. This appeal involves a foreclosure action initiated by Aurora Loan Services against David and Nancy Carlsen. Following a court trial, the circuit court granted judgment of foreclosure in favor of Aurora, finding that Aurora is the holder of the note and owner of the mortgage and that the

Carlsens were in default. We conclude that the circuit court's finding that Aurora was the holder of the note, a finding essential to the judgment, is not supported by admissible evidence. We therefore reverse the judgment.

Background

¶2 Aurora Loan Services brought a foreclosure suit against David and Nancy Carlsen, alleging that Aurora was the holder of a note and owner of a mortgage signed by the Carlsens encumbering the Carlsens' property. The Carlsens denied several allegations in the complaint and, especially pertinent here, denied that Aurora was the holder of the note. Aurora moved for summary judgment, but that motion was denied.

¶3 A trial to the court was held on June 9, 2010. Aurora called one of its employees, Kelly Conner, as its only witness. Aurora attempted to elicit testimony from Conner establishing a foundation for the admission of several documents purportedly showing that Aurora was the holder of a note that obligated the Carlsens to make payments and that the Carlsens were in default. It is sufficient here to say that the Carlsens' attorney repeatedly objected to questions and answers based on a lack of personal knowledge and lack of foundation, and that the circuit court, for the most part, sustained the objections. Aurora's counsel did not move for admission of any of the documents into evidence. After the evidentiary portion of the trial, and after hearing argument, the circuit court made findings of fact and entered a foreclosure judgment in favor of Aurora. The Carlsens appeal. Additional facts will be presented below as necessary.

Discussion

¶4 It is undisputed that, at the foreclosure trial, Aurora had the burden of proving, among other things, that Aurora was the current "holder" of a note obligating the Carlsens to make payments to Aurora. Because Aurora was not the original note holder, Aurora needed to prove that it was the current holder, which meant proving that it had been assigned the note. There appear to be other failures of proof, but in this opinion we focus our attention solely on whether Aurora presented evidence supporting the circuit court's findings that "the business records of Aurora Loan Services show ... a chain of assignment of that ... note" and that "Aurora is the holder of the note."

¶5 As to assignment of the note, the Carlsens' argument is simple: the circuit court's findings are clearly erroneous because there was no admissible evidence supporting a finding that Aurora had been assigned the note. The Carlsens contend that, during the evidentiary portion of the trial, the circuit court properly sustained objections to Aurora's assignment evidence, but the court then appears to have relied on mere argument of Aurora's counsel to make factual findings on that topic. We agree.

¶6 We focus our attention on a document purporting to be an assignment of the note and mortgage from Mortgage Electronic Registration Systems to Aurora. At trial, this document was marked as Exhibit D. Although Aurora's counsel seemed to suggest at one point that certain documents, perhaps including Exhibit D, were certified, the circuit court determined that the

documents were not certified. Under WIS. STAT. § 889.17,[1] certified copies of certain documents are admissible in evidence based on the certification alone. Aurora does not contend that Exhibit D is admissible on this basis.

¶7 Aurora argues that Conner's testimony is sufficient to support the circuit court's finding that Aurora had been assigned the note. Our review of her testimony, however, reveals that Conner lacked the personal knowledge needed to authenticate Exhibit D. *See* WIS. STAT. § 909.01 (documents must be authenticated to be admissible, and this requirement is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims"). Relevant here, Conner made general assertions covering several documents. Conner either affirmatively testified or agreed to leading questions with respect to the following:

- She works for Aurora.
- She "handle[s] legal files" and she "attend[s] trials."
- "Aurora provided those documents that are in [her] possession."
- She "reviewed the subject file" in preparing for the hearing.
- She declined to agree that she is the "custodian of records for Aurora."
- She "look[s] at documentation ... [does] not physically handle original notes and documents, but [she does] acquire documentation."
- "Aurora [is] the custodian of records for this loan."

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

- She is "familiar with records that are prepared in the ordinary course of business."
- She has "authority from Aurora to testify as to the documents, of [Aurora's] records."

As it specifically pertains to Exhibit D, the document purporting to evidence the assignment of the note and mortgage from Mortgage Electronic Registration Systems to Aurora, Conner testified:

- Aurora has "possession of Exhibit D."
- Exhibit D is "an assignment of mortgage."

With respect to possession of Exhibit D, Conner did not assert that Exhibit D was an original or that Aurora had possession of the original document. For that matter, Conner did not provide a basis for a finding that any original document she might have previously viewed was what it purported to be.[2]

¶8 Thus, Conner did no more than identify herself as an Aurora employee who was familiar with some unspecified Aurora documents, who had reviewed some Aurora documents, and who had brought some documents, including Exhibit D, to court. Although Conner was able to say that Exhibit D, on its face, was an assignment, she had no apparent personal knowledge giving her a basis to authenticate that document. *See* WIS. STAT. § 909.01.

[2] Our summary of Conner's testimony omits several assertions Conner made that were stricken by the circuit court. Similarly, we have not included examples of the circuit court repeatedly sustaining hearsay and foundation objections. For example, the court repeatedly sustained objections to Aurora's attempts to have Conner testify that Aurora "owns" the note. Aurora does not and could not reasonably argue that the Carlsens have not preserved their authentication objections. The Carlsens' attorney repeatedly and vigorously objected on hearsay, foundation, and authentication grounds. The record clearly reflects that the Carlsens were objecting to the admission of all of Aurora's proffered documents on the ground that Conner lacked sufficient knowledge to lay a foundation for admission.

¶9 Aurora points to various provisions in WIS. STAT. chs. 401 and 403, such as those relating to the definition of a "holder" (WIS. STAT. § 401.201(2)(km)), to a person entitled to enforce negotiable instruments (WIS. STAT. § 403.301), and to the assignment of negotiable instruments (WIS. STAT. §§ 403.203, 403.204, and 403.205). This part of Aurora's argument addresses the underlying substantive law regarding persons entitled to enforce negotiable instruments, such as the type of note at issue here, but it says nothing about Aurora's proof problems. That is, Aurora's discussion of the underlying law does not demonstrate why Exhibit D was admissible to prove that Aurora had been assigned the note and was, under the substantive law Aurora discusses, a party entitled to enforce the note.

¶10 Similarly, Aurora discusses the relationship between a note and a mortgage and, in particular, the equitable assignment doctrine. But here again Aurora's discussion fails to come to grips with Aurora's failure to authenticate Exhibit D, the document purporting to be an assignment of the note to Aurora. Aurora points to testimony in which Conner asserted that Aurora acquired and possessed Exhibit D, but possession of Exhibit D is meaningless without authentication of the exhibit.

¶11 Aurora argues that we may look at the "record as a whole," including summary judgment materials, to sustain the circuit court's factual findings. Thus, for example, Aurora asks us to consider an affidavit filed with its summary judgment motion. In that affidavit, an Aurora senior vice-president avers that the note was assigned to Aurora, that the assignment was recorded with the Rock County Register of Deeds, and that Aurora is the holder of the note. This argument is meritless. Aurora was obliged to present its evidence *at trial*. It could not rely on the "record as a whole" and, in particular, it could not rely on summary

judgment materials that were not introduced at trial. *See* ***Holzinger v. Prudential Ins. Co.***, 222 Wis. 456, 461, 269 N.W. 306 (1936). For that matter, even if Aurora had, at trial, proffered the affidavit of its senior vice-president, the affidavit would have been inadmissible hearsay. *See* WIS. STAT. § 908.01(3) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

¶12 In sum, Aurora failed to authenticate Exhibit D, the document purporting to be an assignment of the note. Thus, regardless of other alleged proof problems relating to that note and the Carlsens' alleged default, the circuit court's finding that Aurora was the holder of the note is clearly erroneous—no admissible evidence supports that finding. Aurora failed to prove its case, and it was not entitled to a judgment of foreclosure.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.