COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0867 **Cir. Ct. No. 03CV004400**

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

CHASE MANHATTAN BANK,

PLAINTIFF-RESPONDENT,

V.

IRA R. BANKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Ira R. Banks, *pro se,* appeals from a grant of summary judgment resulting in a real estate foreclosure judgment against him in favor of Chase Manhattan Bank (Chase Manhattan). He raises what we surmise to be seven claims of error: (1) the trial court did not have jurisdiction over the parties; (2) Chase Manhattan was not a real party of interest; (3) the trial court

violated his rights to equal protection by its selective use of its sanction powers under WIS. STAT. §§ 802.10(3) & (7), 802.05 and 804.12 (2001-02);[1] (4) the trial court violated his due process rights when it permitted a motion for summary judgment to be heard before the deadline set in the scheduling order for discovery; (5) the trial court erred in granting summary judgment to Chase Manhattan; (6) the actions of the trial court in denying his motion for an injunction deprived him of his Fourteenth Amendment right to equal protection and rights afforded him under the Civil Rights Act, 42 U.S.C. § 1981; and (7) the trial court erred in failing to conclude that Chase Manhattan's attorneys did not comply with SCR 20:1.2 (2001) and SCR 62.02 (2002). Because there are no reasonable grounds to conclude that the trial court erred, we affirm.

BACKGROUND

¶2 On February 24, 1997, Banks refinanced a home mortgage with BNC Mortgage, Inc. His home was located at 6507 North 84th Street, Milwaukee, Wisconsin. The note and mortgage Banks executed was for the sum of $42,000. Subsequently, the note and mortgage was assigned to Chase Manhattan, as Trustee of IMC Home Equity Loan Trust 1997-4 under a polling and servicing agreement dated August 1, 1997. Banks made loan payments for a number of years. Beginning on or about February 1, 2003, he failed to make any more payments on the loan. On May 14, 2003, Chase Manhattan filed a foreclosure action against Banks. Banks filed an answer, but did not file a counterclaim. After a scheduling conference, Chase Manhattan served Banks with a demand to produce copies of

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

all the mortgage payments that he made to Chase Manhattan from January 2003 to the present. Banks did not respond to the demand. Chase then filed a motion to compel discovery. After a hearing, the trial court ordered Banks to pay Chase Manhattan $100 as costs unless he responded to the discovery request by September 9, 2003. On September 6, 2003, Banks responded, indicating he had no proof of the payments that Chase Manhattan demanded.

¶3 On November 17, 2003, Chase moved for summary judgment of foreclosure. Banks opposed the motion. On January 5, 2004, after a hearing, the trial court granted the motion. The court executed the Order and Judgment of Foreclosure on January 21, 2004. Judgment was entered on February 4, 2004. Banks timely filed a notice of appeal on March 22, 2004.

ANALYSIS

¶4 Banks has filed a *pro se* brief. It is very difficult to read, not to mention, understand. Although we are not obligated to address issues that are not developed or are beyond the bounds of comprehension, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), we shall endeavor, to the best of our ability, to address the issues that we believe he has raised. Banks challenges the propriety of the summary judgment for seven reasons. Before addressing his specific claims of error, we first set forth the well-recognized standards for review of a summary judgment.

¶5 We review orders for summary judgment independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶6 Summary judgment is appropriate when "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). Courts examine summary judgment motions by using a three-step process. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶7 First, it must be determined that the pleadings set forth a claim for relief as well as a material issue of fact. ***Id.*** Second, the court must determine whether the moving party's affidavit and other proofs present a *prima facie* case for summary judgment. ***Id.*** A defendant states a *prima facie* case for summary judgment by showing a defense that would defeat the claim. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material facts exist, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. ***Grams***, 97 Wis. 2d at 338. The court proceeds to each succeeding step only if it determines that the appropriate party has satisfied the preceding one.

¶8 The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). One purpose of summary judgment is to avoid a trial where no genuine issues of material fact exist—leaving nothing to try. ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).

¶9 Summary judgment is appropriate when sufficient time for discovery has passed and the party asserting a claim on which it bears the burden of proof at trial has failed to demonstrate the existence of an element essential to that party's case. ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (following ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)). The party moving for summary judgment must explain the basis for its motion and identify those submissions and pleadings demonstrating the absence of a genuine issue of material fact. ***Transportation Ins. Co., Inc.***, 179 Wis. 2d at 292. If the non-moving party has failed to produce any evidence of an essential fact, it is not necessary for the moving party to produce affidavits or other submissions that specifically negate the opponent's claim. ***Id.*** A non-moving party may not rest upon the mere allegations of its pleadings, but must come forward with evidence supporting those allegations. WIS. STAT. § 802.08(3).

A. Jurisdiction and Standing.

¶10 Banks' first two claims of error embody challenges to the court's jurisdiction over the parties to this action and whether Chase Manhattan is a real party of interest in this foreclosure action. Because these two claims of error can be addressed and resolved by application of the same rubrics of review, we shall examine them together.

¶11 It is not precisely clear what type of jurisdiction Banks claims is lacking: subject matter jurisdiction, the absence of competency to entertain the foreclosure action, or personal jurisdiction. Regardless, we comment briefly on each alternative. Since article VII, section 8 of the Wisconsin Constitution provides that "except as otherwise provided by law, the circuit court shall have

original jurisdiction in all matters civil and criminal within this state," there is no doubt that the trial court had subject matter jurisdiction to hear this matter. As for the lack of competency, its absence can be triggered by defects in statutory procedure. Here, there is no claim that a defect in statutory procedure occurred. What remains then for our consideration is the possible absence of personal jurisdiction.

¶12 Whether a court has personal jurisdiction is a question of law which we review independently. ***Marsh v. Farm Bureau Mut. Ins. Co.***, 179 Wis. 2d 42, 52, 505 N.W.2d 162 (Ct. App. 1993).

> [A] defendant to a claim for relief may move to dismiss it on the ground of lack of jurisdiction over the person or the property. Once raised by motion or defensive pleading the issue of lack of jurisdiction of the person or property must be heard and determined by the court without a jury in advance of any issue going to the merits. This defense is waived only if a party … makes no motion prior to pleading and fails to include the defense in his or her responsive pleading or in any amendment to the pleading permitted to be made as of course.

Callaghan's Wis. Pl & Pr, vol. 4, § 22.29 (3d ed. 2000) (footnotes omitted); *see also* WIS. STAT. §§ 801.08(1), 802.06(8)(a). Similarly, when examining the issue of whether a cause of action has been filed by a real party in interest:

> An objection that the action is not brought by the real party in interest is made by motion to dismiss the complaint for failure to state a claim, by affirmative allegations in a responsive pleading or otherwise by motion within the time set by the scheduling order. Otherwise the objection will be considered waived.

Callaghan's Wis. Pl & Pr, vol. 2, § 13.09 (4th ed. 1996) (footnotes omitted); *see also* WIS. STAT. §§ 802.02(3), 802.06(2)(a)6, 802.06(8)(b); ***Caley v. Flegenheimer***, 8 Wis. 2d 72, 88, 98 N.W.2d 473 (1959).

¶13 Banks did not file motions to dismiss for either lack of jurisdiction or for the failure to state a claim based on the absence of a real party in interest. Nor were there any affirmative allegations made to achieve the same purposes. Furthermore, in Banks' affidavit and memorandum filed for the purpose of defeating the summary judgment motion, the only defensive material submitted was the claim that the federal truth-in-lending and fair debt collection provisions were violated along with WIS. STAT. § 779.06(2).

¶14 Finally, both of these claims are being raised for the first time on appeal. We may decline to review issues raised for the first time on appeal. ***Allen v. Allen***, 78 Wis. 2d 263, 270-71, 254 N.W.2d 244 (1977). From this discussion, we conclude that both issues have been waived; consequently, we shall not address them.

B. Equal Protection Violation.

¶15 Banks' third claim of trial court error involves the selective application of a trial court's sanctioning and calendaring authority under WIS. STAT. §§ 804.12, 802.05 and 802.10(3) & (7).

¶16 WISCONSIN STAT. § 804.12 authorizes trial courts to impose sanctions for failure to meet discovery requests. Banks contends that the trial court selectively imposed sanctions against him and not against Chase Manhattan. We are not persuaded for two reasons. First, Banks never made a discovery request of Chase Manhattan. Second, after Banks failed to supply the discovery requested by Chase Manhattan, the trial court imposed, but stayed, $100 in costs if Banks did not provide an answer to the request for mortgage payment receipts by September 9, 2003. Banks complied with the court's order on September 6, 2003.

Thus, a sanction for noncompliance was never imposed. For these reasons, this claim of error fails.

¶17 The second part of Banks' claim of the misapplication of the trial court's sanction power relates to WIS. STAT. § 802.05, Wisconsin's counterpart to Federal Rule of Civil Procedure 11. Banks has not developed any argument to support this claim. Therefore, we eschew any consideration of this claim of error. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

¶18 Banks also claims an equal protection violation relating to the trial court's scheduling power under WIS. STAT. § 802.10(3) & (7). We are not persuaded. First, Banks makes no effort whatsoever to develop his argument. As a consequence, we are not obliged to entertain his contention. ***Reiman Assocs., Inc.***, 102 Wis. 2d at 306 n.1. Second, our review of the record demonstrates that Banks attended the pretrial scheduling conference, participated in the discussion, and agreed to all of the dates set forth in the order. He cannot now claim foul. We reject this claim.

C. Procedural Due Process.

¶19 Next, Banks claims the trial court deprived him of his right to procedural due process by conducting a summary judgment motion hearing on January 5, 2004. He argues that entertaining the motion on January 5, 2004, violated the pretrial scheduling order, which set February 1, 2004, as the deadline for discovery. Banks is mistaken in his claim.

¶20 The trial court's scheduling order was dated July 11, 2003. It required that all dispositive pretrial motions be filed on or before December 1,

2003. Chase Manhattan's motion for summary judgment was filed November 17, 2003. Thus, Chase Manhattan fully complied with the deadline date for filing pretrial motions. Banks confuses the filing deadline date with the discovery deadline date. From the date of the scheduling order to the date of the summary judgment hearing, Banks made no discovery demands upon Chase Manhattan. Additionally, at the hearing, Banks made no requests to adjourn the summary judgment hearing so that he could conduct discovery. We are unable to find any legal support for Banks' position that the summary judgment motion should not have been conducted prior to the discovery cut-off date. In fact and in law, Banks abandoned any rights he may have had under the pretrial scheduling order.

D. Propriety of Summary Judgment.

¶21 Banks claims the trial court erred in granting the motion for summary judgment because there were disputed issues of material facts. Pursuant to WIS. STAT. § 802.08(3), our summary judgment statute:

> When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.

Thus, unless Banks submitted an affidavit which sets forth specific facts showing that there are genuine issues of material fact, courts should enter summary judgment.

¶22 Our search of the record reveals that the basis for Chase Manhattan's foreclosure action was Banks' failure to make monthly mortgage payments due on or after February 1, 2003. Banks filed a timely answer. On July 11, 2003, the trial court held a scheduling conference. Banks was present. He did not object to any

of the deadlines that were ordered. Previously, on June 23, 2003, Chase Manhattan made a discovery demand upon Banks for copies of all mortgage installment payments from January 2003,[2] to the date that discovery was requested. When Banks did not respond, Chase Manhattan filed a motion to compel. On September 2, 2003, the trial court held a hearing on the motion. It ordered Banks, under the threat of sanction, to comply with the discovery request by September 9, 2003. On September 6, 2003, Banks responded that he did not have any mortgage payment receipts that were requested. On November 17, 2003, Chase Manhattan filed a motion for summary judgment. Banks filed a memorandum and affidavit in response.

¶23 Chase Manhattan's motion contained two affidavits: one from Michael Riley, its counsel, and one from Joy Brodowsky Lines. Lines avers that she is employed by the Fairbanks Capital Corp., a loan-servicing agent for Chase Manhattan. In that capacity, she has possession, control and responsibility for the accounting records and loan documents relating to the mortgage loan made by BNC Mortgage, Inc. Attached to her affidavit, were the regularly maintained payment records for Banks' loan account.

¶24 Banks submitted no averments challenging the contents of Lines' affidavit, nor disputing his failure to make timely mortgage payments. He did, however, raise questions about a violation of WIS. STAT. § 779.06(2) and the application of 15 U.S.C. § 1635. The trial court concluded that Banks' truth-in-lending defenses under the former statute and fair debt collection defenses under

[2] Although the demand refers to the year 2002, it appears from other documents and the context of the record that the date ought to have been 2003.

the latter statute were without merit. It further concluded that § 779.06(2) does not apply since this was not a construction loan dispute and that any right to rescind pursuant to § 1635 had been waived or abandoned due to the expiration of the three-day notification rule. From our review, the trial court did not err.

¶25 Thus, the only issue left for examination is whether Banks defaulted in his mortgage loan payments. No evidence was submitted to demonstrate that this material issue of fact was in dispute. Thus, the trial court did not err in granting the summary judgment for foreclosure.

E. Equal Protection and Civil Rights Violations.

¶26 The next discernible claim of error asserted by Banks is the contention that he was deprived of his right to equal protection provided by the Fourteenth Amendment and rights afforded him under the Civil Rights Act, 42 U.S.C. § 1981, because the trial court failed to grant his request for an injunction. As best as we can ascertain from the motion for an injunction, Banks filed two other actions in circuit court relating ostensibly to this "same contract." However, an examination of the motion document does not reveal any additional helpful information to determine what the "same contract" is or how it affects this foreclosure action. There is no other document or entry in the court record relating to this motion. In the absence of any source of illumination, we deem the motion abandoned. ***Dumas v. State***, 90 Wis. 2d 518, 523, 280 N.W.2d 310 (Ct. App. 1979) (constitutional issues argued but not adequately briefed will not be considered); ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (arguments without adequate citations to legal authority will not be considered).

F. Violation of Supreme Court Rules.

¶27 Lastly, Banks claims that Chase Manhattan's attorneys failed to comply with SCR 20:1.2 and SCR 62.02 by violating the federal truth-in-lending law, the Fair Debt Collection Practices Acts, and in filing the motion for summary judgment before the expiration of the time allotted for discovery as set forth in the pretrial scheduling order. Because we have already concluded that no valid defenses were raised to defeat the motion and order for summary judgment, we further concluded that there were no violations of SCR 20:1.2 or SCR 62.02. Banks has failed to produce any evidence supporting his claim that these rules were violated. Accordingly, his claim fails.

By the Court.—Judgment affirmed.

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