COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP473 **Cir. Ct. No. 2009CV2680**

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

WATERSTONE BANK SSB, F/K/A WAUWATOSA SAVINGS BANK,

PLAINTIFF-APPELLANT,

V.

JOEL S. HELLER AND TERESA R. CLEWELL,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed and cause remanded with directions*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 GUNDRUM, J. Waterstone Bank SSB, f/k/a Wauwatosa Savings Bank, appeals from an order denying its request for summary judgment on a trespass counterclaim brought by Joel Heller and Teresa Clewell (collectively referred to as "the Hellers").

¶2 Waterstone brought a foreclosure action against the Hellers after they defaulted on their mortgage. The circuit court granted Waterstone summary judgment. The Hellers then amended their answer to include a counterclaim for trespass due to Waterstone's entering upon their property and placing a sign in the window with its contact information and, eleven days later, changing the locks on the house and installing a lockbox. Both Waterstone and the Hellers moved for summary judgment on the trespass claim. The court denied both motions. In denying Waterstone's motion, the court concluded that even if Waterstone had consent to first enter the property, a question of fact exists regarding the actions taken by Waterstone when it returned to the property. On appeal, Waterstone contends that the Hellers consented to all of its challenged actions by the terms of the mortgage note and mortgage they previously signed.[1] We agree and reverse.

BACKGROUND

¶3 The relevant facts of record are not in dispute. Waterstone lent the Hellers $1,117,500 to construct a home in Kenosha county. In addition to other language regarding default, paragraph 12 of the mortgage note provides:

> **12. OPTIONS OF BANK IN CASE OF DEFAULT**
>
> ….
>
> The Borrower hereby assigns to the Bank as additional cash collateral security all rents and profits derived from the Property and all escrow funds paid to the Bank pursuant to this Note. The Borrower does hereby appoint said Bank agent for the management of the Property; and *the Bank shall at any time and without notice have the right to enter upon, take possession of, and manage the Property*, including the right to hire and pay a property manager and to collect the rents of the Property, including those past

[1] The Hellers do not appeal the circuit court's denial of their summary judgment motion.

> due, directly from the occupants or past occupants of the Property, and bring or defend any action in connection with said premises, *which* appointment and *rights the Bank may elect and exercise to accept in the event the Bank, in its sole discretion, determines there has been a default* or breach of covenant by the Borrower. The failure on the part of the Bank to exercise any of its rights hereunder shall not be construed to prejudice its other rights or its rights upon any other or subsequent default or breach of covenant. (Emphasis added.)

The mortgage provides in relevant part:

> The undersigned Mortgagor(s) … hereby mortgage(s) to [the Bank] real estate in Kenosha County, Wisconsin described as follows (hereinafter the "Property"): [legal description of property] … hereby *releasing and waiving* all rights under any homestead exemption laws and *all right to retain possession of said premises after any default in payment* or breach of any of the covenants or agreements herein.
>
> ….
>
> The Mortgagors hereby assign to the Mortgagee as additional cash collateral security all rents and profits derived from the property and all escrow funds paid to the Mortgagee pursuant to the Note. The Mortgagors hereby appoint said Mortgagee agent for the management of the Property, and *the Mortgagee shall at any time and without notice have the right to enter upon, take possession of and manage the Property*, including the right to hire and pay a property manager, and to collect the rents of the property, including those past due, directly from the occupants and past occupants of the Property, and bring or defend any actions in connection with the property, *which* appointment and *rights the Mortgagee may elect to accept and exercise in the event the Mortgagee, in its sole discretion, determines there has been a default* or breach of covenant by the Mortgagors. The Mortgagee may elect from time to time not to enforce some or all of the provisions of this paragraph. (Emphasis added.)[2]

[2] The terms and conditions of the mortgage are incorporated into the mortgage note through a separate paragraph in the note.

¶4 The Hellers last payment on the note was made on June 4, 2009. On August 7, 2009, Waterstone wrote to the Hellers advising them their account was past due and informing them that action would be taken if they did not bring their loan account current or enter into a payment plan. While some subsequent negotiations did occur, the Hellers made no additional payments and they had no further communication with Waterstone after October 9, 2009.[3]

¶5 On October 25, 2009, Bryan Olen, an assistant vice president for Waterstone, went to the property to make sure it was secure and see if anyone was living there. He determined that no one was present at the property, and observed that the overhead garage door was open and the door leading from the garage into the house was unlocked. Olen secured the door from the garage into the house and placed a sign in the front window that read: "For Information Contact WaterStone Bank SSB 414.459.4210." Olen returned to the property on November 5, 2009, changed the locks, and placed a lockbox on the front door containing a key for the locks. Four days later, Waterstone filed its foreclosure action against the Hellers. The Hellers contacted Waterstone on November 24, 2009, asking if they could access the house. Waterstone informed them they could access the property and provided them with the lockbox combination.

DISCUSSION

¶6 We review de novo the circuit court's decision on summary judgment, applying the same methodology as the circuit court. ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 287, 531 N.W.2d 357 (Ct. App. 1995).

[3] The Hellers do not argue that they were not in default when Waterstone engaged in the actions at issue in this case.

Summary judgment "shall be rendered 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 judgment as a matter of law." WIS. STAT. § 802.08(2) (2009-10).[4]

¶7 Here, the parties agree on the relevant facts. The question on appeal is whether, by signing the mortgage note and mortgage, the Hellers consented to Waterstone entering the property and placing a sign in the window with its contact information on October 25, 2009, and changing the locks on the house and installing a lockbox on November 5, 2009. To answer this question, we must interpret the parties' contract and apply the contract to the undisputed facts in this case. These are matters of law we review independently of the circuit court. ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶21, 326 Wis. 2d 300, 786 N.W.2d 15.

¶8 In their counterclaim, the Hellers allege trespass. A trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." ***Antoniewicz v. Reszcynski***, 70 Wis. 2d 836, 843, 236 N.W.2d 1 (1975) (quoting RESTATEMENT (SECOND) OF TORTS § 329 (1965)). Thus, consent is a defense to a claim of trespass. *See* ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶41, 328 Wis. 2d 436, 787 N.W.2d 6.

¶9 Waterstone argues that, as a matter of law, it did not trespass because the Hellers consented to its actions on October 25 and November 5, 2009.

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

Waterstone points to the following language in paragraph 12 of the mortgage note, and similar language in the mortgage,[5] as allowing it, in its sole discretion, to enter upon and take possession of the property in the event of a default:

> [T]he Bank shall at any time and without notice have the right to enter upon, take possession of, and manage the Property ... in the event the Bank, in its sole discretion, determines there has been a default or breach of covenant by the Borrower.

¶10 The Hellers respond that "paragraph 12 of the mortgage note only comes into play when the house is being leased," and thus Waterstone did not have the right to enter, possess, and manage the property because there was no lessor-lessee relationship. Absent a lessor-lessee relationship, the Hellers argue, Waterstone was required to bring legal action before taking the actions it did on October 25 and November 5, 2009, because "[o]nly a court-appointed receiver has the power to take possession of the Hellers' house if the house is not being leased." Additionally, the Hellers contend that even if the mortgage note and mortgage permitted Waterstone to lawfully enter and take possession of the house absent a lessor-lessee relationship or a court-appointed receiver, a question of fact exists regarding whether Waterstone exceeded the scope of consent afforded by the documents by placing its sign in the window on October 25 and then changing the locks and putting a lockbox on the door on November 5 and not immediately informing the Hellers of the access code for the lockbox.[6]

[5] Our analysis here focuses on paragraph 12 of the mortgage note. The mortgage itself contains similar language. *See supra*, ¶3.

[6] The Hellers also contend in their response brief that Waterstone committed wrongful eviction by locking them out of the house. We do not address this issue because they raise it for the first time on appeal. ***Brooks v. Hayes***, 133 Wis. 2d 228, 241, 395 N.W.2d 167 (1986) ("The general rule is that this court will not consider arguments raised for the first time on appeal or review.").

¶11 We hold that by signing the mortgage note and mortgage, the Hellers consented to Waterstone entering upon, taking possession of, and managing the property upon default, without first requiring a lessor-lessee relationship or legal action. Further, Waterstone's actions on October 25 and November 5 were within the scope of the consent afforded by the documents.

¶12 The Hellers state generally that paragraph 12 of the mortgage note "basically operate[s] as an assignment of rents." They argue that, absent the institution of legal action, paragraph 12 only would permit Waterstone "to enter upon, take possession of, and manage the Property" in the event of a default if the property also were leased. The Hellers fail to explain how the specific terms lead to that conclusion.

¶13 The plain language of paragraph 12 does not support the Hellers' position. Paragraph 12 states that, in the event of a default by the Hellers, Waterstone "ha[s] the right to enter upon, take possession of, and manage the Property." The preceding sentence does "assign[] to [Waterstone] as additional cash collateral security all rents and profits derived from the Property and all escrow funds paid to [Waterstone] pursuant to this Note." However, nothing about this language suggests the rights granted to Waterstone to enter upon, take possession of, and manage the property in the event of a default do not "come[] into play" absent the existence of a lease.

¶14 Other language related to the collection of rents also shows that the rights to enter upon, take possession of, and manage the property do not depend on a lessor-lessee relationship. The relevant provision of paragraph 12 states:

> [Waterstone] shall at any time and without notice have the right to enter upon, take possession of, and manage the Property, *including* the right to hire and pay a property

> manager and to collect the rents of the Property, including those past due, directly from the occupants or past occupants of the Property …. (Emphasis added.)

Far from creating a condition precedent to the rights to enter upon, take possession of, and manage the property, this provision clarifies that the rights to hire and pay a property manager and to collect rents are separate from the right to enter upon and take possession of the property and are actually a subset of the broad right to manage the property.

¶15 Our interpretation of paragraph 12 is consistent with the terms of the first paragraph of the mortgage, which state in relevant part:

> The undersigned Mortgagor(s) … hereby mortgage(s) to [Waterstone] real estate located in Kenosha County, Wisconsin described as follows (hereinafter the "Property"): [legal description of property] … hereby *releasing and waiving* all rights under any homestead exemption laws and *all right to retain possession of said premises after any default in payment* or breach of any of the covenants or agreements herein. (Emphasis added.)

By this language, the Hellers "releas[ed] and waiv[ed] ... all right to retain possession of" the property "after any default in payment." Thus, it is not surprising the Hellers gave Waterstone the right to "enter upon, take possession of, and manage" the property upon default through paragraph 12 of the mortgage note.

¶16 The Hellers also contend: "Waterstone needed to file a lawsuit and have the court appoint a receiver before it performed the actions it did with respect to the Hellers' house. Only a court-appointed receiver has the power to take possession of the Hellers' house if the house is not being leased." This is conclusory; the Hellers again identify no specific terms in the contract that support this position.

¶17 The Hellers do point to another paragraph in the mortgage note granting authority to a court to appoint a receiver *if* a court action is filed, and detailing the powers and responsibilities of a receiver, including the power to take possession of the property, in such a circumstance. That provision provides in part:

> Upon the filing of any complaint, or the filing of any action to foreclose the Mortgage in any court having jurisdiction, such court may, at any time and without notice to the Borrower ... appoint a receiver ... to take possession of the Property, with the authority and power to rent and lease the Property; to maintain the Property, to collect all rents and profits; and to pay expenses incurred .... Monies received by said receiver shall be applied ... toward expenses ... and the amount due the Bank. Upon foreclosure and sale of the Property, proceeds shall be applied as follows: [toward expenses and debt]. In case of payment of the Note Debt prior to the confirmation of sheriff's sale but after the filling of any complaint ... all costs and disbursements incurred ... shall be added to the Note Debt.

¶18 Nothing about this provision suggests Waterstone did not have the Hellers' consent under the plain language of paragraph 12 to enter upon, take possession of and manage the property in the event of a default, and without the need to file a lawsuit. This provision merely addresses what happens if legal action is filed.

¶19 By signing the mortgage note and mortgage, the Hellers consented to Waterstone entering upon, taking possession of, and managing the property in the event of a default and without need of a lessor-lessee relationship or legal action.

¶20 We next consider the scope of the consent the Hellers granted Waterstone through the mortgage note and mortgage. The Hellers contend that Waterstone's actions of placing a sign with its name and contact information in the window, changing the locks, and placing a lockbox on the front door, without

immediately informing the Hellers of the code for the lockbox, exceeded the scope of the Hellers' consent.

¶21 As stated, the mortgage note permits Waterstone to enter upon, take possession of, and manage the Property. "Possess" and "manage" provide a wide breadth of authority. To "possess" means "to have as belonging to one," "to make (someone) owner, holder, or master, as of property, information, etc.," and "to occupy or hold." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1509 (2d ed. 1987). To "manage" means "to take charge or care of," "to handle, direct, govern, or control in action or use," and "to conduct business, commercial affairs, etc.; be in charge." ***Id.*** at 1166. Waterstone's actions of placing a sign with its contact information in the window, changing the locks on the property, and placing the key for the locks in a lockbox, regardless of whether Waterstone immediately informed the Hellers of the combination, were within the scope of "tak[ing] possession of" and "manag[ing]" the property. Indeed, the Hellers actually concede this themselves in another section of their brief, where they *argue* that the complained of actions were consistent with "manag[ing] the Property": "WaterStone performed certain actions consistent with it being the manager of the Hellers' house such as placing a WaterStone sign in the window, changing the locks, and placing a lockbox on the front door." We agree.

¶22 For the foregoing reasons, we hold that, as a matter of law, the Hellers consented to Waterstone's actions with regard to the property at issue and, therefore, Waterstone cannot be found to have committed a trespass. In hindsight, the Hellers may wish they had not given such broad authority to Waterstone in the event they defaulted on the $1,117,500 loan Waterstone provided them. Nonetheless, they did.

¶23 We remand for the circuit court to grant summary judgment on the trespass counterclaim in favor of Waterstone.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶24 REILLY, J. (*dissenting*). I respectfully dissent. The majority opinion reverses Wisconsin law which requires banks to begin a foreclosure action or obtain a receiver via court action in order to obtain possession of their mortgage customer's home. The majority opinion allows a bank to unilaterally declare a default and to obtain the remedy of possession without court oversight. The old saying that "possession is nine-tenths of the law" is apropos to the majority opinion. Today's decision will result in foreclosure becoming the option of last resort rather than the required course of action.

¶25 It has long been the law in Wisconsin that "[a] mortgage in this state merely gives a lien upon the land mortgaged for the sum of money secured thereby." ***Tobin v. Tobin***, 139 Wis. 494, 498-99, 121 N.W. 144 (1909). It has also long been the law in Wisconsin that legal title to and the right to possession of mortgaged property does not rest in a mortgagee (bank) but continues in the mortgagor (homeowner) until terminated by sale on foreclosure or the appointment of a receiver in a foreclosure action to prevent waste. ***Zimmerman v. Walgreen Co.***, 215 Wis. 491, 496, 255 N.W. 534 (1934).

¶26 That was the law until today. The majority concludes, supported only by the contractual language of the note and mortgage, that a bank (mortgagee) may seize possession of a home when the bank, "in its sole discretion, determines there has been a default or breach of covenant by the borrower." While a mortgagee has the right to protect its interest in the collateral (such as the bank's action on October 25 when it locked up the Hellers' home), a mortgagee does not have the right to unilaterally take possession of a property it does not

own. We do not allow landlords (who own the property) to engage in self-help evictions, yet the majority decision allows a mortgagee to do what an owner of property cannot—take possession. I agree with the circuit court that it is for the jury to determine whether the bank trespassed upon the Hellers' property.

¶27 The bargaining power between a homeowner and his or her creditor changes measurably when the homeowner is locked out of his or her home and the creditor literally holds the keys to get back in. Foreclosure/appointment of a receiver is the procedure Wisconsin has long required of creditors who seek possession of property they hold a security interest in. As the decision authorizes a bank to take property that it does not own without court approval, I respectfully dissent.