



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 3, 2014

To:

Hon. Patrick J. Madden
Circuit Court Judge
Iron County Courthouse
300 Taconite Street
Hurley, WI 54534

Diane L. Sennholz
Clerk of Circuit Court
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403

John A. Cravens
Mallery & Zimmerman, S.C.
P.O. Box 479
Wausau, WI 54402-0479

Timothy L. Kostka
Kostka & Associates
P.O. Box 1291
Wausau, WI 54402-1291

Ryan D. Lister
Attorney Ryan D. Lister
415 Division Street, Suite A
Wausau, WI 54403

Diane L. Meulemans
Marathon County Corporation Counsel
500 Forest Street
Wausau, WI 54403

Mary M. Foss
c/o Metro Ride
420 Plumer Street
Wausau, WI 54403

United States of America
Department of Justice
660 W. Washington Ave., Ste. 200
Madison, WI 53701-1585

You are hereby notified that the Court has entered the following opinion and order:

2012AP2360

Associated Bank v. Darryn W. West (L. C. No. 2006CV478)

Before Hoover, P.J., Mangerson and Stark, JJ.

Darryn West appeals an order dismissing his cross-claim against Mary Foss arising out of a foreclosure action. Based upon our review of the briefs and record,¹ we conclude at conference

¹ We note Foss did not file a response brief to this court.

that this case is appropriate for summary disposition. We summarily reverse and remand for further proceedings. *See* WIS. STAT. RULE 809.21 (2011-12).

In 2006, Associated Bank commenced foreclosure proceedings against West and Foss. West cross-claimed against Foss, claiming conversion, theft and intentional misrepresentation. West essentially alleged Foss absconded with proceeds received from the promissory note.²

Associated Bank moved for summary judgment of foreclosure, which the circuit court granted on October 23, 2006. On May 28, 2008, the circuit court held an “ancillary hearing in which Mr. West is alleging that Ms. Foss is obliged to him for some money.” The court stated it “has reviewed documents and heard statements by Mr. West.” The court also indicated it had received a document from the district attorney’s office indicating there was “a lack of any evidence to issue any criminal charges, which answers any questions about any wrongdoing.” The court stated Foss’s “credibility is not questioned by the Court,” based on “a document by Ms. Foss indicating her indebtedness” The court further found “Mr. West’s credibility is doubtful.” The court concluded, “[I]t’s Mr. West’s obligation and not Ms. Foss,” and dismissed the cross-claim with prejudice. A written order was filed on October 30, 2012. A subsequent motion by West was denied after a hearing on July 30, 2013.³ West now appeals.

² Foss filed a cross-claim against West for breach of implied contract. Foss alleged she agreed to borrow money from Associated Bank to consolidate West’s debts on the proviso that West would make all mortgage payments, the parties would live together and share expenses. Foss also alleges that after their break-up, she offered to return the funds if West agreed to arrange for her to be released from liability to Associated Bank, but West failed to make such arrangements. Foss’s cross-claim is not the subject of this appeal.

³ The basis of this motion is unclear from the record. It appears the hearing involved West’s attempt to create a supplemental or “reconstructed” record for appeal.

This appeal presents itself in an unusual posture. The transcript of the May 28, 2008 hearing indicates the circuit court “reviewed documents and heard statements,” and it determined credibility on that basis. However, the court apparently neither heard sworn testimony nor received any exhibits into evidence. Moreover, the circuit court never addressed the elements relating to the conversion and intentional misrepresentation claims, or determined how the facts supported or failed to support those claims. Although the court mentioned the district attorney declined to pursue criminal proceedings arising from this matter, there was also no attempt to address whether the failure to prosecute criminally would be dispositive of a civil burden of proof for theft.

Here, the lack of an opportunity for the parties to testify under oath and introduce exhibits or other evidence into the record indicates the real controversy has not been fully tried nor justice done. Accordingly, we choose to invoke our statutory discretionary reversal power under WIS. STAT. § 752.35 (2011-12), and remand the matter to the circuit court for further proceedings in accordance with this decision.

Therefore,

IT IS ORDERED that the order is reversed and cause remanded for further proceedings.

Diane M. Fremgen
Clerk of Court of Appeals