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DISTRICT II

July 23, 2014

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

2013AP742

U.S. Bank National Association v. Suzanne S. Simonovich
(L.C. # 2009CV1432)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Melvin and Suzanne Simonovich appeal from a circuit court order denying their WIS. STAT. § 806.07(1)(c) (2011-12)¹ motion to reopen a judgment of foreclosure due to alleged fraud by the foreclosing bank. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21. We

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version. WIS. STAT. § 806.07(1)(c) contemplates relief from a judgment for “[f]raud, misrepresentation, or other misconduct of an adverse party.”

affirm because we agree with the circuit court that the Simonoviches did not establish fraud for purposes of § 806.07(1)(c) relief.

The Simonoviches defaulted on a 2006 note secured by a mortgage on their home. In December 2011, the circuit court entered a judgment of foreclosure in favor of U.S. Bank. In December 2012, the Simonoviches sought WIS. STAT. § 806.07(1)(c) relief from the judgment of foreclosure on the grounds of fraud.

At the hearing on their WIS. STAT. § 806.07(1)(c) motion, the Simonoviches conceded that they were indebted under the 2006 note. Nevertheless, they argued that U.S. Bank did not have the right to foreclose. As a basis for this claim, the Simonoviches alleged various inconsistencies between the note and mortgage documents produced in the foreclosure case and the note and mortgage documents produced in their 2012 Chapter 13 bankruptcy case as the bank sought relief from the bankruptcy stay in order to pursue the foreclosure action. Among the inconsistencies cited by the Simonoviches was the appearance of “U.S. Bank” on copies of the note produced post-foreclosure. Essentially, the Simonoviches argued that U.S. Bank’s standing to foreclose arose only after it commenced the foreclosure. Therefore, U.S. Bank engaged in fraud when it commenced the foreclosure action. The Simonoviches argued that they remained liable to the actual owner and holder of the note.

U.S. Bank countered that it possessed the original note, which was endorsed in blank and therefore negotiable by the holder. At the hearing on the Simonoviches’ WIS. STAT. § 806.07(1)(c) motion, counsel for U.S. Bank displayed the original note to the court and counsel, confirming that U.S. Bank possessed the original note. U.S. Bank further argued that during the foreclosure litigation and the bankruptcy case, the Simonoviches stipulated that U.S.

Bank was the holder of the note to whom repayment was due. U.S. Bank urged that any alleged discrepancy between copies of the note did not mean that U.S. Bank had engaged in fraud.

The circuit court made the following findings on the WIS. STAT. § 806.07(1)(c) motion. The circuit court did not draw the inference urged by the Simonoviches: because the notes produced at different stages of the dispute were not exact duplicates, U.S. Bank must have defrauded the Simonoviches when it commenced the foreclosure action. The court determined that the appearance of “U.S. Bank” on copies of the note produced later in the parties’ three-year dispute did not establish fraud and that a difference between documents, without more, could not support an allegation of fraud. Furthermore, the Simonoviches did not show a deceitful act or an intent to defraud, and they never denied that they defaulted on the note. The 2006 note was a negotiable instrument, i.e., a bearer note owned by the holder, and no other party had come forward during the litigation seeking payment on the note and foreclosure of the mortgage. The court concluded that the Simonoviches’ § 806.07(1)(c) motion did not establish fraud as a basis for relief from the foreclosure judgment. The Simonoviches appeal.

Whether to vacate an order pursuant to a WIS. STAT. § 806.07 motion is within the circuit court’s discretion. *Werner v. Hendree*, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423. To justify relief under § 806.07(1)(c), “a party must show a ‘plain case’ of misrepresentation.” *Johnson v. Johnson*, 157 Wis. 2d 490, 498, 460 N.W.2d 166 (Ct. App. 1990). We agree with the circuit court that the Simonoviches did not meet their § 806.07 burden.

We agree with the circuit court that the Simonoviches did not establish a right to relief under WIS. STAT. § 806.07(1)(c). The law governing negotiable instruments disposes of the Simonoviches’ fraud claim. In pleadings filed in support of their § 806.07(1)(c) motion, the

Simonoviches concede that the note, at or about the time of its execution in 2006 and before their February 2009 default, contained a blank endorsement by the original lender, MILA, Inc. A note endorsed in blank is payable to the bearer, in this case U.S. Bank. WIS. STAT. § 403.205(2); *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ¶12, 346 Wis. 2d 1, 827 N.W.2d 124. U.S. Bank held a note payable to the bearer and was therefore entitled to enforce the note. WIS. STAT. § 403.301.² These facts do not establish an intent to defraud.³

The circuit court's refusal to grant WIS. STAT. § 806.07(1)(c) relief to the Simonoviches was a proper exercise of discretion.

We observe that the respondent's brief cites to unpublished cases of this court in violation of WIS. STAT. RULE 809.23(3).⁴ Future violations of the Rules of Appellate Procedure may be subject to sanctions. RULE 809.83(2).

Upon the foregoing reasons,

² The Simonoviches offer various arguments that hinge upon when the mortgage assignment was recorded. These arguments are unavailing. An unrecorded mortgage assignment does not insulate the mortgagor from the consequences of defaulting on the note secured by the mortgage. The note held by U.S. Bank carried with it the mortgage securing its payment. *Dow Family v. PHH Mortgage Corp.*, 2013 WI App 114, ¶¶26, 39, 350 Wis. 2d 411, 838 N.W.2d 119, *review granted*, 2014 WI 3, 352 Wis. 2d 351, 842 N.W.2d 359 (when a note is transferred or assigned, the equitable interests in the mortgage follow). U.S. Bank's status as the holder of the note effected an equitable assignment of the mortgage to U.S. Bank. *Id.*, ¶¶40-41.

³ The elements of fraud are: (1) a false representation; (2) made with intent to defraud; and (3) justifiable reliance on the misrepresentation by the injured party. *Ritchie v. Clappier*, 109 Wis. 2d 399, 404, 326 N.W.2d 131 (Ct. App. 1982).

⁴ Page six of the respondent's brief cites to the unpublished decisions of *Oldenburg v. Jacque*, No. 1987AP1419, unpublished slip op. (WI App Aug. 9., 1988), and *Bank of Sun Prairie v. Meyer*, No. 1986AP1359, unpublished slip op. (WI App Jan. 22, 1987). The citations to these unpublished decisions do not fall within any of the exceptions set out in WIS. STAT. RULE 809.23(3).

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals