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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 IV

March 9, 2015

To:

Hon. Patrick J. Taggart
Circuit Court Judge
Sauk Co. Courthouse
515 Oak Street
Baraboo, WI 53913-0449

Vicki Meister
Clerk of Circuit Court
Sauk Co. Courthouse
515 Oak Street
Baraboo, WI 53913-0449

Kimberly W. Hibbard
Johnson, Blumberg & Associates LLC
230 W. Monroe St., Ste. 1125
Chicago, IL 60606

Mortgage Electronic Registration Systems
1901 E. Voorhees Street, Ste. C
Danville, IL 61834

Jennifer S. Limbach
Krekeler Strother, S.C.
Suite 301
2901 West Beltline Highway
Madison, WI 53713

David P. Muth
John R. Remington
Valerie Paulette Vidal
Quarles & Brady LLP
411 E. Wisconsin Ave., Ste. 2350
Milwaukee, WI 53202

Secretary of Housing and Urban Development
451 7th Street S.W.
Washington, DC 20410

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

2014AP694 Bank of America, N.A. v. Andrew Rau and Rhonda L. Rau, Secretary of Housing and Urban Development, and Mortgage Electronic Registration Systems, Inc. (L.C. # 2013CV221)

Before Lundsten, Sherman and Kloppenburg, JJ.

Andrew and Rhonda Rau appeal the final order in favor of Bank of America, N.A. (BANA) in this foreclosure action. The Raus contend that the circuit court erred by granting summary judgment to BANA and dismissing the Raus' counterclaims. Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily affirm.

BANA filed this foreclosure action against the Raus in April 2013. The Raus answered the complaint, raising affirmative defenses and counterclaims.[2] BANA moved to dismiss the Raus' counterclaims for failure to state a claim, and for summary judgment as to their foreclosure action. The Raus opposed summary judgment and moved for judgment on the pleadings as to their counterclaims, contending that BANA had failed to answer. Rhonda also moved to dismiss for lack of personal jurisdiction, arguing that BANA had improperly used substitute service as to Rhonda by leaving the summons with Andrew.[3] BANA opposed the motion for judgment on the pleadings and the motion to dismiss. The circuit court entered a judgment of foreclosure and an order dismissing the Raus' counterclaims.

The Raus contend, first, that the circuit court lacked personal jurisdiction over Rhonda because BANA did not personally serve Rhonda as required under WIS. STAT. § 801.11(1)(a). They argue that BANA did not exercise reasonable diligence in attempting to personally serve Rhonda before using substitute service. *See* WIS. STAT. § 801.11(1)(b). We disagree.

Due process requires that a court have personal jurisdiction over a defendant in a civil suit. ***Loppnow v. Bielik***, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The responsive pleading in the record was filed by Andrew Rau. The parties indicate that Rhonda Rau filed her own pleading on the same day, also raising defenses and counterclaims.

[3] Because the appellants share a surname, we use their first names when referencing them in their individual capacities.

"Fundamental to that due process requirement is the provision of notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" ***Id.*** (quoted source omitted). Under WIS. STAT. § 801.11(1), personal service must be attempted with "reasonable diligence" before an alternative method of service may be used. ***Loppnow***, 324 Wis. 2d 803, ¶10. Reasonable diligence is that diligence "which is reasonable under the circumstances and not all possible diligence which may be conceived." ***Haselow v. Gauthier***, 212 Wis. 2d 580, 589, 569 N.W.2d 97 (Ct. App. 1997) (quoted source omitted).

The Raus cite cases in which efforts to personally serve the defendant were found insufficient. *See* ***Heaston v. Austin***, 47 Wis. 2d 67, 73-74, 176 N.W.2d 309 (1970) (two attempts at personal service on the same day did not amount to reasonable diligence); ***Beneficial Fin. Co. of Wis. v. Lee***, 37 Wis. 2d 263, 155 N.W.2d 153 (1967) (single attempt at personal service at defendant's residence prior to substitute service held not reasonable diligence); ***Haselow***, 212 Wis. 2d at 589-90 (no due diligence when plaintiff made one attempt to personally serve the defendant, learned the defendant had moved to Hawaii, and made no attempt to locate the defendant and personally serve him in Hawaii). The Raus then cite ***Welty v. Heggy***, 124 Wis. 2d 318, 325-27 & n.3, 369 N.W.2d 763 (Ct. App. 1985), as an example of what does amount to reasonable diligence. There, we held that nineteen attempts at personal service prior to service by publication was reasonable diligence. However, none of the cases the Raus cite are squarely on point, and none dictate the outcome in this case. Rather, the determination of reasonable diligence is a question of what is reasonable under the facts of a particular case. ***Haselow***, 212 Wis. 2d at 589.

We conclude that BANA exercised reasonable diligence before effecting substitute service on Rhonda through Andrew. BANA provided an affidavit by its process server stating that the server made three attempts to personally serve Rhonda at the Raus' residence. The attempts were made on three separate days, at different times of day. On the third attempt, the server accomplished substitute service by leaving the summons with Andrew, noting that Andrew was Rhonda's husband and co-occupant of the residence. We are not persuaded by the Raus' assertions that more was necessary.

Next, the Raus contend that BANA presented only inadmissible hearsay evidence of default because BANA's supporting affidavit did not set forth personal knowledge to authenticate the Raus' payment history. Thus, the Raus assert, BANA was not entitled to a summary judgment of foreclosure. Again, we disagree.

Summary judgment affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. WIS. STAT. § 802.08(3). While hearsay is generally inadmissible, records are admissible if they were generated at or near the time by a person with knowledge in the course of regularly conducted activity. WIS. STAT. § 908.03(6); ***Bank of America v. Neis***, 2013 WI App 89, ¶18, 349 Wis. 2d 461, 835 N.W.2d 527. Thus, we have explained that an affiant must set forth "personal knowledge (1) of how the account statements were prepared and (2) that they were prepared in the course of a regularly conducted activity." ***Id.***, ¶21 (emphasis omitted). "'On summary judgment, the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit.' Rather, '[t]hat party need only make a prima facie showing that the evidence would be admissible at trial.'" ***Id.***, ¶22 (quoted source omitted).

We conclude that BANA's affidavit made a prima facie showing that the payment history was admissible under WIS. STAT. § 908.03(6). The affidavit states that: (1) the affiant is an officer of BANA; (2) as part of her job responsibilities for BANA, the affiant is familiar with the type of records maintained by BANA in connection with BANA's loan to the Raus; (3) the information in the affidavit is taken from BANA's business records; and (4) the affiant has personal knowledge of BANA's procedures for creating the records, which were made at or near the time of the occurrence by persons with personal knowledge or from information transmitted by persons with personal knowledge, made and kept in the course of BANA's regularly conducted business activities. The affiant states that the Raus failed to make monthly payments as they became due, and attached a copy of the payment history for the loan account. This is sufficient for a prima facie showing as to the admissibility of the payment history. *See* ***id.***, ¶¶31-34.

The Raus contend that BANA's affidavit was insufficient to establish personal knowledge because there was no showing of the affiant's knowledge of the particular methods BANA used to create and maintain the payment history. The Raus contend that BANA's affidavit merely averred a familiarity with the procedures of the bank and then parroted the substance of the business records statute. The Raus contend that BANA's affidavit contained less information than the amount we deemed sufficient in ***Neis***, pointing to the averment in the Neis affidavit that the affiant had been trained on the bank's computer system. ***Id.***, ¶27. We are not persuaded. We held in ***Neis*** that the affidavit made at least a prima facie showing of the necessary personal knowledge, even though it did not specify the procedures used to create the business records and some of the averments "parrot[ed]" the statutory requirements, because the affiant made a showing that she "had the requisite personal knowledge and was qualified to

testify that the [business records] '(1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.'" ***Id.***, ¶¶31-34 (quoted source omitted). Such is the case here.

Finally, the Raus argue that the circuit court improperly dismissed their counterclaims against BANA without allowing the parties to argue BANA's motion to dismiss. They argue that the circuit court did not explain its determination that the Raus' claims failed to state a claim, and argue that each of their counterclaims states a claim upon which they may recover. We disagree.

At the outset, the Raus do not explain what further procedure they believe the court should have provided as to BANA's motion to dismiss the counterclaims, nor do they argue they were denied the opportunity to submit arguments to the court. Moreover, we review de novo whether counterclaims state a claim upon which relief may be granted. *See* ***DeBruin v. St. Patrick Congregation***, 2012 WI 94, ¶10, 343 Wis. 2d 83, 816 N.W.2d 878. Accordingly, we turn to the claims stated in the Raus' counterclaims.

The first counterclaim the Raus asserted against BANA was a breach of contract claim for failing to negotiate with the Raus for a loan modification. The Raus concede that they could not assert a claim against BANA for failing to modify the original note, and assert instead that they stated a claim that BANA breached a separate contract to evaluate the Raus for a loan modification. However, there is nothing in the counterclaim that asserts the Raus and BANA entered into a contract for a loan modification evaluation; the counterclaim asserts that BANA told the Raus they would show good faith towards obtaining a modification by making

payments, but then BANA would not accept the payments. The Raus' contract claim fails as a matter of law.

Next, the Raus asserted a claim for false representation in violation of WIS. STAT. § 100.18. The Raus asserted that BANA made false representations to the Raus that making payments would show "good faith" and help them obtain a loan modification. However, § 100.18 applies to false statements of fact. *See* ***K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792. The Raus did not assert that BANA made any statement of fact, only that it gave advice as to what might help. Accordingly, the Raus did not state a claim under § 100.18.

Finally, the Raus asserted a claim for intentional misrepresentation because BANA failed to explain the Raus' alternatives to foreclosure. The Raus assert that this claim arises in tort but that it is not barred by the economic loss doctrine because BANA made misrepresentations to the Raus outside of their contractual relationship. We are not persuaded. The Raus' claims arise from their contract with BANA; the economic loss doctrine bars negligence and strict responsibility misrepresentation claims. *See* ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶30, 283 Wis. 2d 555, 699 N.W.2d 205.

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals