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DISTRICT II

September 2, 2015

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

2014AP1405

Green Tree Servicing LLC v. Dean Schwichtenberg
(L.C. #2010CV799)

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

Teresa Schwichtenberg appeals an order granting summary judgment to Green Tree Servicing LLC. Pursuant to WIS. STAT. § 846.09 (2013-14),¹ the order amended the judgment of foreclosure entered earlier against her husband, Dean Schwichtenberg, to add Teresa's interest and foreclose on it. 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 affirm.

In 2007, American Sterling Bank made Dean a \$215,000 loan. He and Teresa executed the mortgage but only he signed the note. The mortgage later was assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP (BAC). In 2010, BAC filed this foreclosure action, naming Dean and Jane Doe Schwichtenberg as defendants. While the "countersuit" in Dean's pro se answer requested "[t]hat Jane Doe be recognized as Spouse," the affidavit of personal service indicated that Dean advised the process server he was not married.

Dean filed bankruptcy in early 2012 and the case was dismissed. A year later, Bank of America, N.A. (BANA), successor by merger to BAC, petitioned to vacate the dismissal order and reopen the foreclosure case. BANA moved for summary judgment, submitting in support the affidavit of Michael Bajsec, Jr., a BANA officer. Dean filed nothing in opposition. At the May 2013 hearing, the court had before it the original note signed only by Dean. BANA indicates that when specifically questioned, Dean advised the court through counsel that he had no spouse.²

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

² Teresa asserts that nothing in the record shows that the court or BANA asked Dean if he was married. The transcript of the April 2014 summary judgment hearing suggests otherwise. There, the court referenced its concern over the fact that the parties discussed fictitious defendant Jane Doe at the May 2013 hearing with Dean "sitting right here in court" and saying nothing about adding a party. The transcript of the May 2013 hearing is not in the record. It is the appellant's duty to ensure the record is complete. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

The court granted BANA's motion, found Dean in default on the loan, and entered a judgment of foreclosure against him. The judgment also provided that, as the fictitious Jane Doe had not been served, no further reference would be made to her, and she was dismissed. The judgment further granted BANA leave to add defendants and dismissed Dean's counterclaims.

BANA filed an amended summons and complaint and shortly thereafter executed assignments of mortgage and of judgment and rights to Green Tree. In January 2014, on notice of the sheriff's sale, Teresa retained counsel. A second amended summons and complaint followed, this one naming her as defendant and including just one claim against her, her possible marital interest in the foreclosed property. Green Tree moved for summary judgment and to amend the judgment of foreclosure to add Teresa as if she originally had been made a party.

After Green Tree submitted Bajsec's affidavit with its summary judgment motion, Teresa noticed his deposition so as to examine its adequacy under *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶¶10-11, 324 Wis. 2d 180, 781 N.W.2d 503. Green Tree sought a protective order, alleging delay, harassment, and that the issues were moot. The trial court rejected Teresa's argument that she had a right independent of Dean's to challenge the affidavit, granted the protective order, and ruled that she was barred from raising the already-decided issue of Dean's default. As Teresa filed nothing in response to the summary judgment motion, the court granted summary judgment to Green Tree and amended the judgment of foreclosure to include her interest, but also granted her a six-month redemption period.

On appeal, Teresa argues that the case was "negligently prosecuted"; that the trial court lost competency to proceed when BANA reopened the case after the bankruptcy dismissal; and that the court erred by adding her as a defendant, by giving its prior decision a preclusive effect, by granting summary judgment to Green Tree, and by not allowing her to litigate issues decided before she was a named party, to have input on scheduling, or to conduct written discovery.

Teresa did not raise these issues in the trial court. She filed only general denials to the second amended complaint and offered no briefs, affidavits, or arguments in opposition to Green Tree's summary judgment motion. She has forfeited the right to raise the issues on appeal and, out of fairness to the trial court and the other side, we decline to address them. See *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177.

Just one issue is preserved: whether Teresa should have been allowed to depose Bajsec. Whether to limit discovery through a protective order is a matter addressed to the trial court's discretion. WIS. STAT. § 804.01(3); *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 232, 594 N.W.2d 370 (1999). A proper exercise of discretion requires the court to examine the relevant facts, apply the proper standard of law, and through a rational process, reach a conclusion a reasonable judge could reach. *Paige K.B.*, 226 Wis. 2d at 232-33.

Bajsec's affidavit concerned the loan made to Dean and the note on which only he was liable. The court reasoned that examining its sufficiency ten months after finding Dean in default under the note was "totally irrelevant" to the issues to be decided on summary judgment involving Teresa, who executed only the mortgage. Granting the motion for a protective order reflects a proper exercise of discretion.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals