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DISTRICT IV

March 24, 2017

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

2016AP1336

National Exchange Bank and Trust v. Niles W. Braunschweig
(L.C. # 2015CV625)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

Niles and Barbara Braunschweig appeal a summary judgment of foreclosure granted to the National Exchange Bank and Trust. The Braunschweigs argue that the Bank was not entitled to foreclosure because the Braunschweigs had a confirmed bankruptcy plan that modified the Bank's rights as a creditor. 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 (2015-16).¹ We summarily affirm.

In December 2015, the Bank filed this foreclosure action against the Braunschweigs. It asserted that the Braunschweigs were in default on their payments to the Bank under the terms of the Braunschweigs' bankruptcy plan. It also asserted that the Braunschweigs had breached the terms of the mortgages executed by the Braunschweigs in favor of the Bank by failing to pay property taxes for the years 2008, 2009, 2013 and 2014. The complaint sought foreclosure of the mortgages that the Bank held on the Braunschweigs' property and also attorney's fees. The Braunschweigs filed a pro se answer disagreeing with the allegations in the complaint.

The Bank moved for summary judgment and submitted supporting affidavits. The Braunschweigs retained counsel and opposed summary judgment, arguing that the Braunschweigs had paid property taxes for 2004 and that the Bank had not established the reasonableness of its attorney's fees. At a summary judgment hearing, the Bank agreed it was not entitled to unpaid taxes for 2004. The court granted summary judgment of foreclosure to the Bank.²

The Braunschweigs contend that the Bank's rights as a creditor are governed exclusively by the Braunschweigs' bankruptcy plan, to the exclusion of any prior agreements between the parties. They argue that the circuit court erred by granting summary judgment because the Bank's complaint relied on the terms of the original notes and mortgages. The Braunschweigs

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² The court later entered an order as to attorney's fees, which is not at issue in this appeal.

assert that they preserved their bankruptcy argument for review on appeal because their attorney raised the issue at the summary judgment hearing.

We conclude that the Braunschweigs' argument that their bankruptcy plan precluded summary judgment was forfeited because it was not sufficiently raised in the circuit court. *See State Farm Mut. Auto Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (quoted source omitted) (“Arguments raised for the first time on appeal are generally deemed forfeited”). Counsel for the Braunschweigs asserted at the summary judgment hearing that the Braunschweigs had entered a bankruptcy plan, and posited that it is possible for a bankruptcy plan to alter the terms of a secured debt. Counsel stated, however, that he had not had time to research whether the Braunschweigs were in default under the terms of the bankruptcy plan or to make a case that the plan altered the terms of the secured interest in the property.³ The argument was insufficiently developed and therefore forfeited. *See Townsend v. Massey*, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 (“[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court.”).

³ Counsel for the Braunschweigs stated at the summary judgment hearing that he had been retained just the previous week and that he would like time to present a motion on the bankruptcy issue. The circuit court determined that the bankruptcy did not affect the summary judgment motion and that it was too late to raise the issue, and granted summary judgment to the Bank. The Braunschweigs did not thereafter submit any argument on this issue to the circuit court. On appeal, the Braunschweigs reiterate that they retained counsel late in the foreclosure proceedings and assert that they were therefore unable to develop the issue in greater detail in the circuit court. We are not persuaded that the Braunschweigs could not have sufficiently developed the issue in the circuit court, either before or after the summary judgment hearing. Additionally, we note that the Braunschweigs present largely conclusory arguments on appeal, with insufficient analysis to allow this court to assess Braunschweigs' argument that the bankruptcy plan precluded summary judgment. We could affirm the circuit court on this basis, as well. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we generally decline to address insufficiently developed arguments).

Although we review a circuit court’s decision to grant summary judgment de novo, we nonetheless may apply forfeiture to arguments presented for the first time on appeal from a summary judgment. See *Gruber v. Village of North Fond du Lac*, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. Moreover, we are reluctant to reverse a circuit court on an issue that, as here, the circuit court did not have a full opportunity to address. See *id.*; see also *Townsend*, 338 Wis. 2d 114, ¶25 (quoted source omitted) (“[T]he ‘fundamental’ forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would ‘blindsides’ the circuit court.”). We discern no basis to reach the Braunschweigs’ argument that the Bank was not entitled to summary judgment due to the Braunschweigs’ bankruptcy plan when that argument was not advanced in the circuit court. See *State v. Kaczmariski*, 2009 WI App 117, ¶¶7-9, 320 Wis. 2d 811, 772 N.W.2d 702 (declining to address issues raised for the first time on appeal because we saw “no compelling reason to ignore forfeiture here”).

Therefore,

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

Diane M. Fremgen
Clerk of Court of Appeals