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DISTRICT II

August 16, 2017

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

2016AP1812 Johnson Bank v. The Lisa R. French Family Trust
(L.C.# 2016CV935; 2016CV1101)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The Lisa R. French Family Trust and Lisa R. French (collectively "French") appeal from summary judgment granting a money judgment on French's mortgage note and the dismissal of her accompanying 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 (2015-16).[1]

In 2005, French and her husband[2] entered into a debt consolidation agreement with Johnson Bank. As part of this agreement, French signed a promissory note in the amount of $272,650, secured by a mortgage on her house (the first mortgage). Two years later, on December 28, 2007, French and Johnson Bank entered into a home equity line-of-credit agreement in the amount of $81,000, executing a second promissory note secured by a second mortgage on French's property. French defaulted on both promissory notes in 2015.

Johnson Bank foreclosed on the first mortgage. Pursuant to WIS. STAT. § 846.101, the bank waived its right to sue for deficiency in exchange for a six-month redemption period. After filing for foreclosure on the first mortgage, Johnson Bank filed suit for a money judgment on the second promissory note. On French's motion, the circuit court consolidated the two cases. The court granted summary judgment to Johnson Bank on both the foreclosure and the money judgment and denied French's counterclaims for abuse of process and negligent infliction of emotional distress. French appeals, claiming § 846.101 should have precluded Johnson Bank from suing on the second promissory note because the second lawsuit was essentially a suit for deficiency.

WISCONSIN STAT. § 846.101 provides, in relevant part:

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

[2] French's husband, Rodney, was also a party to the foreclosure action. Default judgment was entered against him, and he is not party to this appeal.

> **(1)** [T]he plaintiff in a foreclosure action of a mortgage on real estate of 20 acres or less ... may elect by express allegation in the complaint to waive judgment for any deficiency which may remain due to the plaintiff after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage….
>
> **(2)(**a) When plaintiff so elects, judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered nor separately rendered against any party who is personally liable for the debt secured by the mortgage.

The question of whether a foreclosing mortgage holder can sue for a money judgment on a second mortgage under WIS. STAT. § 846.101 has already been decided by this court. In ***Harbor Credit Union v. Samp***, 2011 WI App 40, ¶3, 332 Wis. 2d 214, 796 N.W.2d 813, this court held that a money judgment on a second mortgage from the same lender is not a deficiency judgment, and thus the election to shorten the redemption period on the foreclosed first mortgage to six months does not preclude a suit for a money judgment on the second promissory note.

The facts and procedural posture of ***Harbor Credit*** mirror this case almost identically. Harbor Credit Union held two mortgages on the same piece of property owned by Christopher Samp. ***Id.***, ¶2. In foreclosing on the first mortgage, the credit union elected to shorten the redemption period to six months under WIS. STAT. § 846.101, and then filed suit for a money judgment on the second promissory note. ***Harbor Credit***, 332 Wis. 2d 214, ¶6. Samp claimed that the second suit amounted to a deficiency judgment on the foreclosure and therefore was prohibited by § 846.101. ***Harbor Credit***, 332 Wis. 2d 214, ¶18.

We disagreed, holding that a deficiency judgment is a completion of the foreclosure, not an independent judgment. ***Id.***, ¶29. Hence, WIS. STAT. § 846.101 applies only to the foreclosure action and does not apply to lawsuits for the collection of other debts by the same mortgage holder. We concluded "there is no reasonable way to read WIS. STAT. §§ 846.04(1) and 846.101 to mean that the money judgment obtained on the second mortgage and note should count as a

deficiency judgment for purposes of the foreclosure action on the separate indebtedness secured by the first mortgage." ***Harbor Credit***, 332 Wis. 2d 214, ¶27. Thus, "the … debt that the first mortgage secured resulted in a sheriff's sale but no deficiency judgment," and "[t]he debt that the second mortgage secured was reduced to a judgment." ***Id.*** As there was no deficiency judgment on the foreclosure, § 846.101 was not violated and Samp's claim was rejected.

In the present case, French attempts to distinguish the facts and rationale from those of ***Harbor Credit.*** First, she argues that the court in ***Harbor Credit*** was unable to consider issues of equity, public policy, or unconscionability because both judgments were based on defaults, whereas her judgments were not based on defaults and should therefore be considered in equity. However, as we stated in ***Harbor Credit***, while mortgage proceedings are equitable in nature, the construction of statutes and application of facts to statutes are questions of law. ***Harbor Credit***, 332 Wis. 2d 214, ¶19. ***Harbor Credit***'s holding was based on our interpretation of the statute; the default judgments were irrelevant to the outcome.[3] Therefore, the absence of default in this case does not distinguish it from ***Harbor Credit***.

French also attempts to distinguish the case based on her successful motion to consolidate the foreclosure action and the money judgment. She claims that the circuit court consolidated the cases because of French's demonstration that the second promissory note merely refinanced the first mortgage and therefore reflects the same indebtedness. However, the order clearly states the court's reasons for consolidation: the identity of the parties and French's identical counterclaims in both cases, not any finding that the two separate notes reflected the same debt.

[3] In fact, the court of appeals' decision makes no mention that the judgments were defaults. French cites to the records from the trial court in support of distinguishing the two cases.

In any event, French did not raise the claim that the two mortgage notes reflect the same debt with sufficient prominence. She therefore waives the issue on appeal.[4] *See* ***Bilda v. Milwaukee Cty.***, 2006 WI App 159, ¶46, 295 Wis. 2d 673, 722 N.W.2d 116.

Finally, French asks us to modify, reverse, or overturn ***Harbor Credit*** on the basis that the statutory interpretation of the court of appeals is unconscionable, a violation of public policy, and a violation of Wisconsin's bar against claim splitting. We have no such authority. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Furthermore, because French's abuse of process claim relies entirely on the notion that Johnson Bank acted unconscionably in following ***Harbor Credit***, it also is without merit and was properly denied.[5]

In short, whether a money judgment on a second mortgage by the foreclosing mortgage-holder is a violation of WIS. STAT. § 846.101 was decided by this court in ***Harbor Credit***. It is not. Therefore, summary judgment was correctly granted to Johnson Bank.

[4] French did repeatedly insist to the circuit court (and to this court) that the two mortgages that were consolidated in the 2005 debt consolidation are the same mortgage. While the 2007 document is labeled Modification of Mortgage, and internally references the 2005 mortgage, French never specifically challenges the assertion that the 2007 note—which Johnson Bank filed suit to collect—was a separate indebtedness and does not develop an argument to that effect here. We need not address undeveloped arguments. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[5] French makes a conclusory and undeveloped argument regarding her claim of negligent infliction of emotional distress. Therefore, we need not address it. ***Pettit***, 171 Wis. 2d at 646.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition will not be published.

Diane M. Fremgen
Clerk of Court of Appeals