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DISTRICT II

February 27, 2019

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

2018AP752 Steve Craycraft v. Franklin Credit Management Corporation
(L.C. #2016CV2026)

Before Neubauer, C.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).

Steve and Jennifer Craycraft appeal from an order dismissing their complaint seeking a declaration that enforcement of a second mortgage on their residence was time-barred. 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 (2017-18).¹ We affirm in part, reverse in part, and remand with directions.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

In October 2006, the Craycrafts executed a second mortgage note to Decision One Mortgage Company, LLC (Decision One) and a second mortgage to Mortgage Electronic Registration Systems, Inc., as nominee for Decision One. The mortgage is on the Craycrafts' residence in Muskego, Wisconsin. After making a few payments, the Craycrafts filed for bankruptcy about a year later, receiving a discharge in February 2008. Their bankruptcy lawyer advised them that their liability to Decision One for the second mortgage was discharged.

The last payment made by the Craycrafts to Decision One or its successor in interest, Franklin Credit Management Corporation (Franklin Credit), was in early 2008. They have, however, continued to pay on the primary mortgage, have paid insurance and taxes, and have paid for improvements, including a new roof, bathroom fixtures, deck, and furnace. They did so, they claim, in the belief that the Decision One mortgage debt was gone.

In 2016, the Craycrafts applied for a home equity loan but were surprised to learn that the Decision One mortgage showed up on a title report. The Craycrafts did not obtain the loan.

The Craycrafts commenced this action, seeking a declaratory judgment that enforcement of the Decision One mortgage is time-barred either by the six-year statute of limitations for contracts, WIS. STAT. § 893.43, or in the alternative by the doctrine of laches.

Franklin Credit moved to dismiss the complaint for failure to state a claim, asserting that foreclosing on a mortgage was not barred, as it was subject to the thirty-year limitation under WIS. STAT. § 893.33(2). The Craycrafts submitted an affidavit of Steve, asked the court to treat the motion to dismiss as one for summary judgment, and requested summary judgment in their favor.

After briefing and oral argument, the circuit court issued a written decision, concluding that the thirty-year limitation applied and granting Franklin Credit's motion to dismiss. The court did not address the Craycrafts' request to treat the motion as one for summary judgment nor their alternative ground of laches. This appeal followed.

Determining the correct statute of limitations to apply to a claim is a legal question, which we review de novo. *Zastrow v. Journal Commc'ns, Inc.*, 2006 WI 72, ¶12, 291 Wis. 2d 426, 437, 718 N.W.2d 51. Whether a complaint states a claim for relief is likewise a question of law subject to our de novo review. *Wausau Tile, Inc. v. County Concrete Corp.*, 226 Wis. 2d 235, 245, 593 N.W.2d 445 (1999).

The purpose of a motion to dismiss is to test the legal sufficiency of the complaint. *See id.* We accept as true all well-pled facts and the reasonable inferences from those facts. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. A complaint survives a motion to dismiss if those facts would entitle the plaintiff to relief. *Id.*, ¶21.

Pointing out that a signed mortgage is a contract, the Craycrafts assert the applicable statute of limitation is the six-year limit for contracts under WIS. STAT. § 893.43. The statute provides in pertinent part: “[A]n action upon any contract, obligation, or liability, express or implied, including an action to recover fees for professional services, except those mentioned in [WIS. STAT. § 893.40], shall be commenced within 6 years after the cause of action accrues or be barred.”² Sec. 893.43(1).

² WISCONSIN STAT. § 893.40 sets the limit for actions on a court judgment, which is twenty years.

Franklin Credit concedes that the six-year limit applies to and bars any claim on the promissory note, but asserts that an action to foreclose on the mortgage remains available for much longer, specifically for thirty years under WIS. STAT. § 893.33(2). The statute provides in pertinent part: “[N]o action affecting the possession or title of any real estate may be commenced ... by any person ... that is founded ... upon any instrument recorded more than 30 years prior to the date of commencement of the action.” *Id.*

The Craycrafts’ argument is unavailing under binding precedent. The argument “has been soundly and repeatedly rejected by Wisconsin courts since at least 1866.” *Bank of New York Mellon v. Klomsten*, 2018 WI App 25, ¶15, 381 Wis. 2d 218, 911 N.W.2d 364. The *Klomsten* court cited numerous cases holding that a “mortgagee can foreclose a mortgage executed to secure a note, after the shorter statute of limitations on the note has extinguished the mortgagee’s rights to sue” the debtor on the personal obligation. *Id.*, ¶17 (citation omitted).

We are bound to follow applicable precedent; we cannot overrule court of appeals’ decisions. See *State v. Weissinger*, 2014 WI App 73, ¶20, 355 Wis. 2d 546, 851 N.W.2d 780. *Klomsten* holds that the six-year contract statute does not apply to mortgage foreclosures and therefore governs this issue. We must follow it. Because the Craycrafts do not assert that there is another statute of limitations that would bar a foreclosure action, we need not further address what statute of limitation applies. See *Klomsten*, 381 Wis. 2d 218, ¶14 n.4 (“We need not address whether the thirty-year statute of limitations applies, because the Klomstens do not argue that this foreclosure action is untimely if the six-year statute of limitations does not bar it.”).

The Craycrafts assert *Klomsten* “was wrongly decided.” They argue that *Klomsten* did not take into consideration that the cases upon which it relied were decided when Wisconsin had

a twenty-year statute of limitation for actions on a sealed instrument, which was the statute deemed to apply to mortgages. *See, e.g., First Nat'l Bank v. Kolbeck*, 247 Wis. 462, 467, 19 N.W.2d 908 (1945) (nineteen years had gone by, barring a claim on the note but not on the mortgage that was under seal, which had a twenty-year limit). Almost forty years ago, the legislature repealed the sealed instrument statute when it rewrote WIS. STAT. ch. 893. *See* 1979 Wis. Laws, ch. 323, § 28. Because *Klomsten* relied on cases whose statutory underpinnings are no more, the Craycrafts argue *Klomsten*'s conclusion is incorrect and should not be followed.

We express no view on this argument. As noted, we are bound by *Klomsten*. The recourse for the Craycrafts is to present this argument to the Wisconsin Supreme Court.

As an alternative basis, the Craycrafts asserted that the doctrine of laches barred enforcement of the second mortgage. An equitable doctrine, laches applies when a party's delay in making a claim results in the loss of its right to assert the claim even though the statute of limitations has not run. *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W. 889. Laches has three elements: (1) unreasonable delay by the party seeking, in this context, to enforce the mortgage; (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay. *Id.*

The complaint alleged that, because of the bankruptcy, the Craycrafts had no liability to Decision One or Franklin Credit, that more than six years had elapsed since they defaulted on the note and mortgage, and that they have relied to their detriment on the defendants' inaction in enforcing the mortgage at issue. Steve Craycraft's affidavit further explained that, in the decade since the Craycrafts ceased making payments on the mortgage, they paid the primary mortgage,

insurance and taxes, and for improvements to the house, including a new roof, bathroom fixtures, deck, and furnace. He believed that “the Decision One mortgage debt was long since gone, and relied on that belief” in making those expenditures.

In light of the affidavit, the Craycrafts asked the court to treat the motion to dismiss as one for summary judgment. If a motion to dismiss for failure to state a claim is filed and “matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.” WIS. STAT. § 802.06(2)(b).

The circuit court erred by not addressing and deciding the question of laches. The Craycrafts sufficiently placed the issue before the court, supported by the complaint, briefing, and an affidavit. There is no explanation in the record as to why the circuit court did not consider the affidavit and the Craycrafts’ request to convert the motion into one for summary judgment. When a court fails to address an argument properly presented, a remand for further proceedings is in order. See *Maritato v. Maritato*, 2004 WI App 138, ¶¶1, 40, 275 Wis. 2d 252, 685 N.W.2d 379.

Franklin Credit argues that, because the parties provided briefing and oral argument on the laches issue, the circuit court must have implicitly considered it and denied it. This does not follow. The circuit court’s written decision makes no mention of laches or the affidavit. Franklin Credit’s point actually begs the question, i.e., if the issue was fully and clearly before the court, why was it not addressed?

Franklin Credit is also wrong to assert that the doctrine of laches does not apply when a party commences an action within the statute of limitations. See *Zizzo*, 312 Wis. 2d 463, ¶7

(“Laches ... may be found where the statute of limitations has not yet run.”). Much of the purpose of laches would be lost if it could only apply after a statute of limitations had expired.

Accordingly, we remand the case back to the circuit court for consideration of the Craycrafts’ request to convert the motion to dismiss into one for summary judgment and for a determination on the applicability of laches.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed in part; summarily reversed in part and the cause remanded with directions pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals