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DISTRICT IV

February 12, 2020

To:

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

2019AP1012

Ocwen Loan Servicing, LLC v. Cassandra L. Butcher
(L.C. # 2014CV1883)

Before Fitzpatrick, P.J., Blanchard and Nashold, 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).

Cassandra Butcher and Darrel Butcher appeal a judgment of foreclosure in favor of Ocwen Loan Servicing, LLC. 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 an earlier appeal in this case, we reversed the judgment of foreclosure and remanded to the circuit court “for the sole purpose of determining the only issue still in dispute; that is, whether Ocwen possesses the original note.” *Ocwen Loan Servs., LLC v. Butcher*, No. 2016AP2146, unpublished slip op. ¶50 (WI App June 28, 2018). On remand, the circuit court concluded that Ocwen is in possession of the note, and the court reinstated the earlier foreclosure judgment.

The Butchers now argue in this appeal that the circuit court erred by not also considering on remand their arguments regarding the validity of the endorsement signatures that appear on the note. They argue that this issue would have been appropriate for the court to consider, despite the limitation in our remand, because the existence of the issue was “unanticipated” by this court and by the Butchers at the time of our decision.

The Butchers argue that the issue was unanticipated because it was not until after our remand that “the original note was produced.” They assert that the “endorsement on the copies of the note submitted by Plaintiffs was of such quality that the issues observed by the Butchers’ expert were not apparent” until the expert inspected the original after the remand.

The Butchers’ argument fails, even if we assume that the circuit court could properly address on remand an unanticipated issue that newly arose from new evidence Ocwen presented

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

to address the issue we expressly remanded on. The argument fails for lack of a factual basis. The Butchers do not provide a citation to the record for their factual assertion that the original note was not produced until after the remand. Nor do they explain how we could otherwise deduce that fact from the record.

Furthermore, their factual assertion is refuted by Ocwen. Ocwen notes that the record includes its discovery response to a request for production in 2015. In that response Ocwen informed the Butchers that the original note was available for inspection in the office of Ocwen's counsel. After the remand, Ocwen provided the circuit court with an affidavit in which its attorney averred that the Butchers' attorney did not inspect the original note until after the remand. The Butchers' reply brief does not dispute these points.

Therefore, we conclude that the issue about the endorsement signatures was not an unanticipated one that arose in some way from the issue to be decided on remand. Instead, it was an issue the Butchers could have identified and raised in the first summary judgment motion, if they had inspected the original note then. Accordingly, the circuit court did not err by declining to review this issue after the first appeal and in response to our remand. And, we decline to review the issue now for the first time on appeal.

Other than the endorsement signature issue, the Butchers' only argument is that even if Ocwen is in possession of the note, Ocwen is not entitled to judgment. The Butchers argue that the pleadings fail to give them sufficient notice that Ocwen is the real party in interest, rather than Deutsche Bank, which was also identified in the complaint as a plaintiff. However, the Butchers cite no authority to support the proposition that amendment of the pleadings for this purpose is necessary at this late stage of the proceedings.

IT IS ORDERED that the judgment appealed is summarily affirmed under 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