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DISTRICT III

March 16, 2021

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

2019AP2412-FT The Bank of New York Mellon FKA The Bank of New York v. Daniel J. Fitzpatrick (L. C. No. 2019CV19)

Before Stark, P.J., Hruz and Seidl, 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).

Daniel Fitzpatrick appeals from a non-deficiency foreclosure judgment granted in favor of The Bank of New York Mellon f/k/a The Bank of New York (the Bank). Pursuant to this court's order of January 14, 2020, and a presubmission conference, the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17(1) (2019-20).[1] Upon review of those memoranda and the record, we affirm the judgment of the circuit court.

After Fitzpatrick defaulted on his loan payments, the loan was modified to cure the default.[2] Fitzpatrick again defaulted, and the loan servicer sent a thirty-five-day right to cure letter. The default was not cured, the entire indebtedness was accelerated, and the present foreclosure action was commenced.

The Bank moved for summary judgment against Fitzpatrick. Fitzpatrick responded, conceding that the loan was delinquent but arguing that genuine issues of material fact existed precluding summary judgment. The circuit court granted summary judgment, and Fitzpatrick now appeals.

The summary judgment standard is well known. Judgment shall be rendered if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted. Fitzpatrick failed to file a reply brief in this matter.

[2] Fitzpatrick concedes this is the fourth foreclosure action filed by the Bank against him regarding this property. Each of the prior cases was resolved by a loan modification agreement. It is the most recent modification agreement that is involved in the present case.

Fitzpatrick does not dispute that the Bank is the holder of the note and mortgage. He also concedes that the modification agreement required him to make monthly payments of $2,297.24 beginning on September 1, 2017. Moreover, Fitzpatrick does not deny that his mortgage was in default. He argues, however, that but for the Bank's behavior, he "would have made all mortgage obligations in a timely manner."

Specifically, Fitzpatrick contends that following the modification agreement, the Bank's billing statements were inaccurate, and that the billing statements failed to request payment of $2,297.24. He also argues, "It is clear [the Bank] breached the contract between the parties by not producing one accurate billing statement for [Fitzpatrick] to perform on." He further asserts that he has "bent over backwards" to attempt to fix the Bank's mistakes.

Fitzpatrick's arguments, however, are unsupported by citation to legal authority, and we need not consider the arguments on that basis alone. *See* ***Kruczek v. DWD***, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (2004). Fitzpatrick also failed to submit evidence showing a genuine issue of material fact. Rather, in opposition to summary judgment, Fitzpatrick submitted an affidavit with generic and conclusory statements alleging a belief that he had received inaccurate billing statements and the Bank thus "breached the contract between the parties with its inability to provide Defendant the ability to fulfill said contract."

But the crux of the matter is that Fitzpatrick has not made any payment whatsoever since the loan modification agreement. As mentioned, Fitzpatrick admitted the loan modification agreement required monthly payments of $2,297.24. Fitzpatrick also conceded that he received written "Notice of Servicing Transfer," advising that beginning on September 1, 2017, a new loan servicer would be collecting payments and that all payments on or after September 1, 2017

should be sent to the address provided in the notice. Yet, at no time after the modification agreement did Fitzpatrick tender a payment.

The record also establishes that Fitzpatrick received a written notice dated December 18, 2017, advising him that the loan was in default due to failure to make four monthly installment payments beginning on September 1, 2017—and that it was necessary to remit payment by January 22, 2018, to avoid acceleration of the loan.[3] Again, Fitzpatrick did not provide evidence of any payment made to avoid acceleration. As the circuit court noted, the "defendant did not cure the default but instead in January 2018 attempted to negotiate another agreement for re-payment of the past due amount to avoid the default." The court further stated, "I do not find that the Defendant at any time bent over backwards and tried to rectify this matter. In fact, to date he still has not made one payment on the loan Modification Agreement or one payment for the past mortgage amount."

It was not impossible for Fitzpatrick to perform the contract, as he now contends. And while not explicitly set forth as a legal position, to the extent he attempts to rely upon the equitable principles of equitable estoppel and unclean hands, Fitzpatrick's actions in tendering no payment whatsoever since the modification agreement were neither reasonable nor justifiable. *See* ***Kohlenberg v. American Plumbing Supply Co.***, 82 Wis. 2d 384, 396, 263 N.W.2d 496 (1978). The court properly granted summary judgment.

[3] The written notice of default and intent to accelerate specified the total amount to pay to cure the default as $9,221.96, which included four monthly payment amounts of $2,297.24 totaling $9,188.96, and other charges of $33 for a corporate advance balance. In his brief to this court, Fitzpatrick does not argue that amount is incorrect.

Upon the foregoing,

IT IS ORDERED that the judgment of the circuit court is affirmed.

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

Sheila T. Reiff
Clerk of Court of Appeals