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DISTRICT II

February 13, 2013

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

2012AP204

BAC Home Loans Servicing, LP v. John T. Sheridan
(L.C. #2010CV690)

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

John Sheridan appeals from a judgment of foreclosure in favor of BAC Home Loans Servicing, LP (BAC). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).¹ We conclude that the affidavit submitted in support of BAC's summary judgment motion was sufficient, and BAC was entitled to foreclose on the mortgage securing the note. Therefore, we affirm the judgment of foreclosure.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The following facts are undisputed. Sheridan borrowed money from First Magnus Financial Corporation. Sheridan's May 4, 2007, First Magnus note was secured by a mortgage on Sheridan's Ozaukee county homestead. First Magnus failed, and BAC succeeded to possession of the note via intermediate holders. Sheridan made payments to BAC until he defaulted in May 2010. BAC sued to foreclose on the mortgage securing the note.

At the summary judgment hearing, BAC argued that it was the holder of the note. BAC further argued that the mortgage was equitably assigned to it as the note holder. Sheridan countered that holder status was insufficient to enforce the note and mortgage. Sheridan further argued that the affidavit in support of BAC's summary judgment motion was insufficient.

The circuit court concluded that there were no material facts in dispute. The record established that Sheridan's note was assigned to Mortgage Electronic Registration Systems (MERS), then to Countrywide, then to Countrywide Bank, and then to BAC. The affidavit in support of BAC's summary judgment motion was sufficient, Sheridan defaulted, and BAC was entitled to foreclose on the mortgage because the mortgage accompanied the note. Sheridan appeals.

We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

The summary judgment record does not reveal any genuine issues of material fact regarding BAC's status as the note holder. In support of its summary judgment motion, BAC submitted the

affidavit of Kimberly Sue Daley, an officer of Bank of America, NA (BANA). Daley averred that the facts in her affidavit came from BANA's business records. Daley stated that First Magnus endorsed the note to Countrywide Bank, N.A., which made the note payable to Countrywide Home Loans, Inc. The latter endorsed the note in blank, which rendered the note payable to the bearer, BAC.² WIS. STAT. § 403.205(2). A copy of the note with endorsements was attached as an exhibit to Daley's affidavit.³ The note and its endorsement are contracts offered as evidence of a legal act and are not hearsay. See *Lyon Fin. Servs., Inc. v. Dr. Manelle Fernando Med. Clinic, Inc.*, No. 2011AP222, unpublished slip op. ¶15 (WI App Nov. 10, 2011). Further, these documents are presumed to be authentic and authorized. See WIS. STAT. § 403.308(1); see also WIS. STAT. § 909.02(9). There is no dispute that BANA is the holder and therefore entitled to enforce the note. WIS. STAT. § 403.301.

In *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ___ Wis. 2d ___, ___ N.W.2d ___, we addressed the circumstances under which a bank employee's affidavit would suffice to establish the bank's right to enforce a note for purposes of summary judgment. In *Bierbrauer*, the court concluded that a bank employee had adequate personal knowledge to aver that PNC was the current note holder where the affidavit established that the bank had possession of the loan records and the affidavit was based upon the affiant's inspection of those records. *Id.*, ¶10.

² Our independent review of the documents reveals the following. The mortgage identified MERS as the mortgagee and First Magnus as the lender. The mortgage authorized MERS to act as a nominee for First Magnus and its successors and assigns, which included the authority to transfer the note. MERS assigned the mortgage to BAC on August 5, 2010, and BAC sued Sheridan on August 13, 2010.

³ Sheridan argued that the note attached to Daley's affidavit was not the same note as attached to the complaint. We agree that the note attached to the Daley affidavit bore more endorsements. However, the validity of the note and Sheridan's default under it are not contested.

We are sufficiently persuaded that, given the particular facts of this case and considering the reasoning in *Bierbrauer*, BAC established itself as the note holder.

We next address whether Daley's affidavit qualified under the WIS. STAT. § 908.03(6) hearsay exception for records of regularly conducted activity as to the documents other than the self-authenticating commercial paper. The question is whether Daley's affidavit made a prima facie case showing that the facts alleged were admissible under this hearsay exception. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶¶10-11, 324 Wis. 2d 180, 781 N.W.2d 503. Daley had to "be qualified to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity." *Id.*, ¶20. To be qualified, Daley "must have personal knowledge of how the [records] were prepared and that they were prepared in the ordinary course of [BANA's] business." *Id.*, ¶21.

Daley averred that she had "personal knowledge of BANA's procedures for creating these records." Daley averred that BAC merged into BANA in July 2011,⁴ BANA maintained servicing records for the loan at issue, she was familiar with the type of records maintained by BANA in connection with the loan, and the information in the affidavit derived from BANA's business records. We conclude that Daley's affidavit qualified under the WIS. STAT. § 908.03(6) hearsay exception for records of regularly conducted activity. The affidavit was sufficient to support BAC's summary judgment motion.

⁴ BAC serviced the note and mortgage in 2010 when Sheridan defaulted and BAC sued him. Effective July 1, 2011, servicing of the note and mortgage was transferred to BANA.

We turn to whether BAC established Sheridan's liability under the note and mortgage. Daley's affidavit established Sheridan's default, the acceleration of the loan, and the balance Sheridan owed. Daley's affidavit averred that after BAC merged into BANA, BANA became the owner and servicer of the note and mortgage. Sheridan did not show the existence of any material dispute regarding his liability on the note and mortgage.

Sheridan argues that BAC's status as the holder of the note was insufficient to effect an equitable assignment of the mortgage to BAC. We disagree. BAC possessed a note payable to the bearer. WIS. STAT. § 403.205(2). BAC had the right to demand payment of the debt evidenced by the note. WIS. STAT. § 403.203(2). The note carried with it the mortgage securing its payment. *See Tidioute Sav. Bank v. Libbey*, 101 Wis. 193, 196-97, 77 N.W. 182 (1898); *see Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 327, 260 N.W.2d 680 (1978) (when a note is transferred or assigned, the equitable interests in the mortgage follow).

Summary judgment was appropriate. BAC was the holder of Sheridan's note. The mortgage followed the note, and BAC had the right to foreclose. We affirm the judgment of foreclosure.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals