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DISTRICT IV

April 9, 2013

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

2012AP1423

Mortgage Electronic Registration Systems, Inc. v. Clay A.
Ostrowsky (L.C. # 2007CV4316)

Before Sherman, Blanchard and Kloppenburg, JJ.

Clay Ostrowsky appeals an order denying his motion for relief from a judgment of foreclosure. Ostrowsky argues that the interests of justice support relief from the judgment under WIS. STAT. § 806.07(1)(h) (2011-12).¹ 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. We summarily affirm.

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

Mortgage Electronic Registration Services, Inc. (MERS) obtained a judgment of foreclosure against Ostrowsky in April 2008. In January 2012, Ostrowsky moved to vacate the judgment under WIS. STAT. § 806.07(1)(d) (providing for relief from judgment when the judgment is void). He argued that the foreclosure judgment was void because MERS lacked standing to initiate foreclosure proceedings, and the lack of standing deprived the court of jurisdiction to enter the judgment. The court denied the motion, explaining that Ostrowsky had not established that the judgment of foreclosure was void.

Ostrowsky contends that the circuit court erred by failing to address whether he was entitled to relief from judgment in the interests of justice under WIS. STAT. § 806.07(1)(h).² He argues that he is entitled to an order vacating the judgment under the interest of justice factors outlined in *Sukala v. Heritage Mutual Ins. Co.*, 2005 WI 83, ¶11, 282 Wis. 2d 46, 698 N.W.2d 610.

The problem with Ostrowsky's argument is that he did not raise it in the circuit court. As a general rule, we deem arguments forfeited if not raised in the circuit court. *See State v. Ndina*, 2009 WI 21, ¶¶29–30, 315 Wis. 2d 653, 761 N.W.2d 612 (in general, the failure to timely raise an argument in the circuit court forfeits the argument on appeal).

Ostrowsky argues that we should address his WIS. STAT. § 806.07(1)(h) interests of justice argument despite his failure to raise that argument below because the circuit court had the

² Ostrowsky also argues, again, that MERS lacked standing to initiate foreclosure proceedings. However, he does not argue that lack of standing deprived the foreclosure court of jurisdiction, but only that we should reach the standing issue based on public policy concerns. It appears, then, that Ostrowsky is relying on MERS' alleged lack of standing as further support for relief from the judgment in the interests of justice.

opportunity to address the issue but declined to do so. He points out that the circuit court recognized the issue before it as whether Ostrowsky had established that he was entitled to relief from judgment under § 806.07, yet did not discuss the applicability of subsection (1)(h). Ostrowsky argues that forfeiture generally applies only if a circuit court did not have the opportunity to “pass” on an issue, citing *Hopper v. City of Madison*, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977) (“It is the practice of this court not to consider issues raised for the first time on appeal since the trial court has had no opportunity to pass upon them.”).

We do not agree with Ostrowsky’s interpretation of our general rule of forfeiture. The question is not whether the circuit court could have addressed an issue that the appellant did not argue. Rather, the question is whether the circuit court had the opportunity to address an argument actually made to the court. See *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (“It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.”). Simply put, a circuit court does not have an “opportunity to pass” on an issue sufficient to preserve the issue for appeal if the issue was not argued to the court.

We determine that Ostrowsky forfeited his interests of justice argument by failing to raise it in the circuit court. Additionally, Ostrowsky has not established a basis for us to deviate from the general rule that issues not raised in the circuit court may not be raised on appeal. Accordingly, we affirm.

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals