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**DISTRICT II**

June 12, 2013

To:

Hon. Patrick L. Snyder  
Reserve Judge

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

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2012AP1955

GMAC Mortgage, LLC v. Richard P. Hessel (L.C. # 2011CV4297)

Before Brown, C.J., Reilly and Gundrum, JJ.

Richard Hessel appeals *pro se* from circuit court orders granting summary judgment to GMAC Mortgage, LLC and denying Hessel's motion for reconsideration. 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). We affirm the circuit court because Hessel did not contest GMAC's summary judgment motion.

Hessel defaulted on a note secured by a mortgage on his home. GMAC's foreclosure complaint alleged Hessel's indebtedness and default. The note attached as an exhibit to the complaint bore an endorsement to GMAC Mortgage, LLC. Hessel, proceeding *pro se*, filed a motion for a more definite statement. In that motion, Hessel alleged that he never executed the note or mortgage at issue and questioned whether GMAC was the holder of the note and

mortgage and had standing to foreclose. Hessil attended an April 9, 2012 scheduling conference, and the circuit court's scheduling order set GMAC's summary judgment motion and Hessil's motion for a more definite statement for a hearing on June 11, 2012.

On April 16, GMAC filed a motion seeking default judgment and summary judgment. In response to Hessil's motion for a more definite statement, GMAC argued that it had standing to foreclose because it is the holder of Hessil's note pursuant to a proper endorsement, and the mortgage followed the note. GMAC's affidavit in support of its summary judgment motion set out the default and amounts due. On June 7, Hessil served discovery on GMAC, but Hessil did not file an affidavit in opposition to GMAC's summary judgment motion.

At the June 11 hearing on GMAC's summary judgment motion and Hessil's motion for a more definite statement, Hessil asserted that he never executed a mortgage or note with GMAC "or any bank or any institution." The circuit court found that GMAC was the holder of Hessil's note. Hessil also argued that the bankruptcy of GMAC's parent company, Residential Capital, LLC, precluded GMAC's foreclosure action, and Hessil declined to participate in the action for that reason. The court stated its initial impression that Hessil's foreclosure case was not impeded by the bankruptcy case. The court adjourned the summary judgment hearing to permit GMAC to submit proof of the impact, if any, of Residential Capital's bankruptcy on Hessil's foreclosure action. The court warned that if the foreclosure action could continue unimpeded by Residential Capital's bankruptcy, summary judgment would be entered in favor of GMAC.

On June 22, GMAC submitted a copy of an order from the United States Bankruptcy Court presiding over Residential Capital's bankruptcy substantiating that foreclosure actions like Hessil's could proceed and that the bankruptcy did not impede GMAC's ability to collect upon

notes and foreclose upon mortgages. In response, Hessil reiterated his refusal to participate in the foreclosure action; his refusal also extended to filing pleadings in opposition to GMAC's summary judgment motion. Without presenting any evidence in opposition to GMAC's summary judgment motion, Hessil argued that the affidavit of GMAC's employee was inadequate and not made on personal knowledge. Hessil also argued that the circuit court could not proceed to summary judgment while discovery was outstanding.<sup>1</sup> The circuit court construed Hessil's motion for a more definite statement as Hessil's answer,<sup>2</sup> found that the bankruptcy did not impede GMAC's foreclosure action,<sup>3</sup> and concluded that GMAC proved Hessil's debt and default such that there were no outstanding factual disputes that would preclude summary judgment.

On June 29, Hessil filed an affidavit in opposition to GMAC's summary judgment motion. On July 5, Hessil sought reconsideration of the circuit court's summary judgment ruling. Hessil reiterated his arguments about the effect of the bankruptcy and that GMAC lacked standing to foreclose. Hessil added a new argument that GMAC's counsel had a conflict of

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<sup>1</sup> Hessil never moved the circuit court to adjourn the summary judgment hearing to permit discovery. We reject Hessil's argument that the circuit court could not entertain GMAC's summary judgment motion while Hessil's late-served discovery was outstanding. We also reject Hessil's argument that there were material facts in dispute because GMAC's discovery responses were outstanding when the circuit court granted summary judgment.

<sup>2</sup> A court is not bound by the label or caption affixed to a pleading. A court may examine the substance of a pleading to determine its purpose. *Nighbor v. DILHR*, 120 Wis. 2d 375, 381, 355 N.W.2d 532 (1984). While Hessil styled his motion as seeking a more definite statement, the substance of the motion disputed the allegations in the complaint. Because Hessil's motion joined issue, the circuit court properly construed it as an answer.

<sup>3</sup> The summary judgment record confirms that Residential Capital's bankruptcy was not a barrier to this foreclosure action.

interest that precluded the representation.<sup>4</sup> At a July 23 hearing, the circuit court denied Hessil's motion for reconsideration. Hessil appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

GMAC made a prima facie case for summary judgment on its claims. Hessil could not "rest on mere denials" but had to "affirmatively 'counter with evidentiary materials demonstrating there is a dispute.'" *Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106 (citation omitted).<sup>5</sup> Merely alleging a factual dispute or offering unsubstantiated conclusory remarks or speculation will not defeat an otherwise properly supported motion for summary judgment. *Helland v. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). When the party opposing summary judgment fails to respond or raise an issue of material fact, summary judgment can be rendered on that basis alone. See *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230

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<sup>4</sup> This issue lacks merit. See footnote 6.

<sup>5</sup> None of the following relieved Hessil of his obligation to file pleadings in opposition to GMAC's summary judgment motion: the Residential Capital bankruptcy, Hessil's outstanding discovery, and claims that GMAC was not a holder of the note and lacked standing to foreclose on the mortgaged property. Hessil had the opportunity to present his defense to the circuit court. In lieu of presenting his defense, Hessil held fast to his erroneous legal theory that the Residential Capital bankruptcy precluded the foreclosure action.

(1983). Because Hessil did not rebut GMAC's prima facie showing of entitlement to a judgment of foreclosure, the circuit court properly granted the motion for summary judgment. See *Town of Delafield v. Sharpley*, 212 Wis. 2d 332, 341-42, 568 N.W.2d 779 (Ct. App. 1997).

We acknowledge that after the circuit court granted summary judgment to GMAC, Hessil filed an affidavit in opposition to summary judgment. The affidavit was too late. A party's recalcitrance or reliance upon erroneous legal theories does not excuse the party's failure to comply with the rules of civil procedure and the scheduling order. The summary judgment proceedings concluded before Hessil filed pleadings in opposition to the motion.

Because Hessil did not contest summary judgment with evidentiary facts, he cannot belatedly present those facts here. Therefore, we do not consider Hessil's claims regarding the validity of the note and mortgage, GMAC's status as a holder of the note, GMAC's standing to foreclose, the assignment of the note and mortgage, whether an enforceable contract existed, and whether GMAC violated the Fair Debt Collection Practices Act. These arguments are raised for the first time on appeal, and we do not address them. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).<sup>6</sup>

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are summarily affirmed.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>6</sup> To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").