— D. BRASH III

5.14.2024

STATE OF WISCONSIN CIRCUIT COURT BRANCH 44 MILWAUKEE COUNTY

WILMINGTON SAVINGS FUND SOCIETY,

Plaintiffs,

v.

Case No. 23-CV-4685

NICKOLAS W ZAGORSKI et al.,

Defendants.

DECISION AND ORDER

The Plaintiff, Wilmington Savings Fund Society, has brought a motion for summary judgment, seeking to enforce a debt instrument in their possession. Nickolas Zagorski and Wendi Zagorski (collectively referred to as the "Zagorskis" or as the "Defendants") challenge this action arguing that the Plaintiff lacks proper standing to enforce the debt instruments and that as a matter of law the Plaintiff should be barred from pursuing this claim by the doctrine of laches. For the following reasons, the Court concludes that the Plaintiff's motion for summary judgment is **GRANTED**.

BACKGROUND

In November 1999, the Defendants, Nickolas Zagorski and Wendi Zagorski (collectively referred to as the "Zagorskis" or the "Defendants"), executed a note in the original sum of $15,000 (the "Note"). Doc. 6 at 11. The Note was secured by a mortgage on real property located in Milwaukee County, Wisconsin (the Property). *Id.* The Plaintiff, Wilmington Savings Fund Society, is the current holder of the Note securing the Property. Doc. 6 at 11. The Zagorskis are currently the owner of record on the Property. Compl. ¶ 5.

The Note went into default in October 2009. Doc 20 at 3. Following this default and prior to this action, two other actions were filed against the Defendants, 11CV5385 and 21CV2263. *Id.* Both cases were dismissed, however, by an order of the court without prejudice. This case was filed by the Plaintiff on June 23, 2023.

As of September 27, 2023, $34,576.04 remains due on the Note. Doc. 30 ¶ 11.

Procedural History

On November 13, 2023, a scheduling order was issued. Doc. 19. The order set November 27, 2023 as the deadline to amend any pleadings. No pleadings were amended.

The order further set April 26, 2024 as the deadline for the filing of all dispositive motions. *Id.* On December 13, 2023, the Defendants filed a motion to dismiss. Doc. 20. This motion sought dismissal based on the affirmative defense of laches and various other issues related to the Plaintiff's standing to enforce the Note. *Id.* The Plaintiff responded to this motion on January 11, 2024. Doc. 33. The Defendants' replied on January 25, 2024. Doc. 40.

The Plaintiff also moved the Court for Summary Judgment on December 22, 2023. Doc. 27, and the Defendants did not file a response to this motion. During the course of oral arguments, the Court discussed this deficiency with the Defendants who contended that their reply was intended as an umbrella response to the motion for summary judgment and a reply to the Plaintiff's response to the motion to dismiss. The Court agreed to treat the reply as such, and the Plaintiff consented, and the Court did so during the motion hearing.

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Summary judgment "is designed to eliminate unnecessary trials" because "there is no triable issue of fact" to present to a jury. *Maynard v. Port Publ'ns., Inc.*, 98 Wis. 2d 555, 562-63, 297 N.W.2d 500 (1980).

Courts apply a two-step test to determine whether summary judgment is appropriate. *In re Garza*, 2017 WI 35, ¶ 21, 374 Wis. 2d 555, 566, 893 N.W.2d 1 (citing *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 314-15, 401 N.W.2d 816 (1987)). First, the court looks at the pleadings to determine if the plaintiff has stated a claim for relief. *Id.* "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted." *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 6, 386 Wis. 2d 515, 926 N.W.2d 756. Then, if there is a claim for relief the court looks at the evidence to decide whether any factual issues exist and applies the summary judgment statute. *Id.* Once the moving party has satisfied the initial burden, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. § 802.08(3).

A party that opposes summary judgment cannot just rest on its mere denials or pleadings. *Dawson v. Goldammer*, 2006 WI App 158, ¶ 31, 295 Wis. 2d 728, 746, 722 N.W.2d 106. This is because the "the allegations of the pleadings may not be considered as evidence or other proof on a disposition of the motion." *Kavon Enterprises, Inc. v. Am. Universal Ins. Co.*, 74 Wis. 2d 53, 56-57, 245 N.W.2d 695, 697 (1976). Instead an opposing party "must affirmatively counter with evidentiary materials demonstrating there is a dispute." *Dawson*, 295 Wis. 2d 728, ¶ 31. (citations omitted).

The court takes "evidentiary facts in the record as true if not contradicted by opposing proof." *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751. However, "inferences to be drawn from the underlying facts," "should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *Id.*

The moving party has the burden of showing the absence of genuine issues of material fact. *Cent. Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶ 19, 272 Wis. 2d 561, 681 N.W.2d 178. "A 'material fact' is one that is of consequence to the merits of the litigation." *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294. A factual issue is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Baxter v. Wis. Dep't of Natural Res.*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991). If the court is satisfied that there is no genuine issue of material fact, the court shall enter judgment as a matter of law. Wis. Stat. § 802.08(2); *Jackson v. Benson*, 218 Wis. 2d 835, ¶ 18, 578 N.W.2d 602 (1998).

Under Wis. Stat. § 802.08, motions for summary judgment must be supported by evidentiary facts. These facts can be introduced via affidavits which "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § 802.08(3). As a result, "[a]ffidavits 'made by persons who do not have personal knowledge' are insufficient to support summary judgment 'and will be disregarded.'" *Gemini Cap. Grp., LLC v. Jones*, 2017 WI App 77, 378 Wis. 2d 614, 904 N.W.2d 131 (quoting *Leszczynski v. Surges*, 30 Wis. 2d 534, 538, 141 N.W.2d 261 (1966)). The determination of whether an affidavit is made on personal knowledge is "essentially the same analysis that [a circuit court] would undertake at trial to decide whether the affiant, now witness, testifying exactly as averred in the affidavit, is presenting admissible evidence." *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 13, 324 Wis. 2d 180, 781 N.W.2d 503

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them solely on that basis. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983).

Pro se litigants must satisfy all procedural requirements that are not waived by the court. *Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16, 20 (1992). "While some leniency may be allowed, neither a trial court nor a reviewing court has a duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law." *Id.*

ANALYSIS

In analyzing this claim, the Court must first make a determination relative to the standing and substantive rights of the Plaintiff. If the claim has legal sufficiency, the Court then determines if any affirmative defenses bar the claim.

I. Plaintiff's claim

The Plaintiff is seeking a foreclosure judgment against the Defendants.

> In mortgage foreclosure actions, the plaintiff has the burden of proving the terms of indebtedness secured by a mortgage. This includes verifying that foreclosure proceedings are maintained by the party with the right to enforce the note, a requirement that is not a mere formality. It is in fact a foundational precondition for any foreclosure action, protecting borrowers from wrongful loss of their homes, affording lenders a procedure for enforcing notes, and providing certainty surrounding property rights in mortgages.

Deutsche Bank Nat'l Tr. Co. v. Wuensch, 2018 WI 35, ¶ 20, 380 Wis. 2d 727, 911 N.W.2d 1 (internal citations omitted). This creates a two element test. First, does the party seeking relief have the right to enforce the debt instrument. Second, have the terms of the debt instrument been violated. Here, the Defendants have admitted to defaulting on the Note in October of 2009. Therefore this Court must only determine if the Plaintiff has the right to enforce the note.

The Plaintiff has the right to enforce the Note.

To support their claim to enforcement, the Plaintiff argues that by having possession of the Note they are a "holder" within the meaning set out by Wisconsin's Uniform

Commercial Code. They additionally argue that this can be established through secondary evidence which is admitted by the Defendants.

Conversely, Defendants first argue that because of the loss of the assignments of allonge and assignments of the mortgage, the Plaintiff can not establish itself as the "holder." Additionally, they argue that Wis. Stats. §§ 805.04(1), 403.302, and 403.309(1)(a) deprive the Plaintiff of standing to bring this claim.

In relevant part, Wis. Stat. § 403.301 states that a "'[p]erson entitled to enforce' an instrument means the holder of the instrument." In *Deutsche Bank Nat'l Tr. Co. v. Wuensch*, the Wisconsin Supreme Court held that "presentment to the trier of fact in a mortgage foreclosure proceeding of the original, wet-ink note endorsed in blank, establishes the holder's possession and entitles the holder to enforce the note." 2018 WI ¶ 34.

Here, the Plaintiff has presented sufficient evidence for this Court to determine that they do have a right to enforce the Note. Specially, in their affidavits, the Plaintiff has asserted that they possess the Note at issue in this case, and that they have attached a true copy of the same. The Note describes the terms of a loan with respect to the Property. Therefore, the under the holding in *Deutsche Bank Nat'l Tr. Co.*, this Court concludes that the Plaintiff has the right to enforce the debt instrument. The holding in *Deutsche Bank Nat'l Tr. Co.* ignores any issues that a broken chain of assignments of an allonge or mortgage would otherwise create.

The Defendants additionally argue that other statutes prevent the Plaintiff from having standing to bring this claim. Their first argument is based on Wis. Stat. § 805.04(1) which states:

> (1) **By plaintiff; by stipulation.** An action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

In this case, the statute is inapplicable. In both prior actions brought to enforce the Note, the actions were dismissed by orders of the court. Therefore, Wis. Stat. § 805.04(1) does not act to bar the Plaintiff from bringing their claim.

The Defendants next argument relies on Wis. Stat. § 403.305(3). In relevant part, Wis. Stat. § 403.305(3) states "[a]n obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument." Most relevant here, the Defendants highlight that the assignment of the mortgage and the allonge have been lost; however, there is no assertion that the Note, the actual debt instrument, has been lost. Therefore, this statute does not act to bar the Plaintiff from enforcing the Note.

The Defendants next argument relies on Wis. Stat. § 403.309(1)(a). This statute sets forth the conditions that must exist for "[a] person not in possession of an instrument" to be "entitled to enforce the instrument." Here, the Plaintiff is in possession of the debt instrument, the Note. Therefore, this statute is inapplicable.

Therefore, as a matter of law, the Court concludes that the Plaintiff has standing to enforce the debt instrument.

II. Affirmative Defenses

The Defendants have pled the affirmative defenses of laches and a failure to comply with the relevant statute of limitations.

Laches

"Laches is an affirmative, equitable defense designed to bar relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 317, 946 N.W.2d 101, 106. "The application of Laches is premised on the proof of three elements: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Id.* ¶ 12 (internal citations omitted).

"The party seeking application of laches bears the burden of proving each element. Whether that burden is carried is a question of law. Even if all three elements are satisfied, application of laches is left to the sound discretion of the court asked to apply this equitable bar." *Id.* (internal citations omitted). Here, the parties dispute all three elements. However, the Defendants have failed to meet their burden. Specifically, the Court finds that the Defendants' did not lack knowledge that a claim would be brought against them.

The belief that the debt securing the property was written off does not equate to a lack of knowledge that the holder of that debt would not bring a foreclosure action. In 1999, when the Defendants executed the Note, they were aware that, should they default, their property could be the subject of a foreclosure action. In 2009, when they did default and became aware of their own default, they knew they could be the subject of a foreclosure action. In 2011, after the first foreclosure action was dismissed, the Defendants knew that an action could still be brought against their property. Following the dismissal, when no action was taken, the Defendants believed that they were secure in their possession of the property, but they did not pursue knowledge to that effect. Their mistaken belief that the debt secured by their property was written off does not equate to a lack of knowledge that a claim could still be made to foreclose it. Therefore, as a matter of law, the Defendant has failed to prove this element of laches and the defense fails.

Statute of Limitations

The Defendants argue that Wis. Stat. § 894.43(1) bars the action brought by the Plaintiff. Wis. Stat. § 894.43(1) states "(1) Except as provided in sub. (2), an action upon any contract, obligation, or liability, express or implied, including an action to recover fees for professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred." "The problem with the [Defendants'] argument is that it has been soundly and repeatedly rejected by Wisconsin courts since at least 1866." *Bank of New York Mellon v. Klomsten*, 2018 WI App 25, ¶ 15, 381 Wis. 2d 218, 911 N.W.2d 364. The *Klomsten* court was confronted with the same argument regarding the securitization of mortgage loans and still found that the 30-year statute of limitations on foreclosure actions outlined in Wis. Stat. mortgage loans and still found that the 30-year statute of limitations on foreclosure actions outlined in Wis. Stat. § 893.33(2) & (5) allowed the plaintiff in that case to bring their foreclosure action.

Therefore, this Court will following precedent on this issue and hold that the Plaintiff was timely in filing their foreclosure action.

Conclusion

In conclusion, for the foregoing reasons, the Court concludes that the Plaintiff's motion for summary judgment is **GRANTED**.