

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2010AP3053
2011AP523**

Cir. Ct. No. 2009CV1749

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MULTICIRCUITS, INC.,

PLAINTIFF-RESPONDENT,

V.

**MICHAEL P. GRUNSTED, JOANNE M. GRUNSTED, STATE OF
WISCONSIN DEPARTMENT OF REVENUE AND INTERNAL REVENUE
SERVICE,**

DEFENDANTS,

CITIMORTGAGE, INC.,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
SCOTT C. WOLDT, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Reilly, J., and Neal Nettlesheim, Reserve Judge.

¶1 PER CURIAM. Citimortgage, Inc. (Citi) has appealed from an order entered in the trial court on December 10, 2010, determining that a mortgage held by the respondent, Multicircuits, Inc., has priority over a mortgage held by Citi. Citi has also appealed from an order entered in the trial court on February 2, 2011, confirming the sheriff's sale of the mortgaged property and ordering Citi to pay \$275,914.84 to Multicircuits.¹ Because we conclude that the mortgage held by Multicircuits is unenforceable and therefore cannot have priority over the mortgage held by Citi, we reverse the December 10, 2010 order. We reverse the portion of the February 2, 2011 order that required Citi to pay \$275,914.84 to Multicircuits, and remand the matter to the trial court with instructions to order Multicircuits to refund \$275,914.84 to Citi.

¶2 Multicircuits and Citi filed cross-motions for summary judgment in the trial court. The trial court granted summary judgment in favor of Multicircuits, determining that the mortgage held by Multicircuits had priority over the mortgage held by Citi based on WIS. STAT. § 706.11 (2009-10),² and that Citi was not entitled to equitable subrogation. It concluded that the sole issue before it was which mortgage had priority, and therefore did not address Citi's argument that Multicircuits' mortgage was unenforceable.

¶3 We review a trial court's grant of summary judgment de novo. *Krier v. Vilione*, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Upon review we apply the same standards as those used by the trial court, as set forth in WIS. STAT. § 802.08. *Krier*, 317 Wis. 2d 288, ¶14. If the pleadings state a claim and

¹ These appeals were consolidated by this court.

² All references to the Wisconsin Statutes are to the 2009-10 version.

demonstrate that material factual issues exist, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶22, 241 Wis.2d 804, 623 N.W.2d 751. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. *Id.* Evidentiary facts as set forth in the affidavits or other proof of the moving party are taken as true if not contradicted by opposing affidavits or other proof. *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶4 Although the facts underlying this litigation are complicated, the material facts are undisputed and relatively straightforward. Multicircuits is a Wisconsin corporation, and Michael Grunsted was its former president, shareholder and director. Michael and Joanne Grunsted were the owners of a residence in Oshkosh, Wisconsin. In 2004, the Grunsteds gave a mortgage on that property to Associated Bank, N.A., to secure a line of credit to them in the amount of \$328,000 (Mortgage 1). Approximately one year later Associated increased the Grunsteds' credit limit to \$527,300.00.

¶5 Multicircuits also took out commercial loans from Associated during the time periods relevant to this action. To provide security for some of Multicircuits' loans, in February 2006 the Grunsteds issued a second mortgage to

Associated on their residence, providing a lien not to exceed \$200,000 ((Mortgage 2). In July 2006, the Grunstedts granted a third mortgage to Associated on their residence to secure Multicircuits' debt and renew its loans, again providing a lien not to exceed \$200,000 (Mortgage 3).

¶6 In July 2006, the Grunstedts also applied for a loan of \$750,000 to refinance their obligations under Mortgages 1 and 2. They applied for a loan from American Brokers Conduit, with Mortgage Electronic Registration Systems, Inc. acting as nominee for American Brokers Conduit (hereafter, collectively MERS). The loan was approved in July 2006, and the Grunstedts executed a note in the amount of \$750,000 and granted MERS a mortgage on their residence. The proceeds advanced by MERS were used to satisfy the obligations secured by Mortgages 1 and 2, and Associated issued releases of Mortgages 1 and 2. On December 27, 2007, the \$750,000 note and mortgage given to MERS by the Grunstedts were assigned to Citi (the Citi mortgage).

¶7 Prior to commencing this action, Multicircuits sued the Grunstedts in Winnebago County circuit court case No. 2006CV1595, resulting in a February 2007 settlement agreement that required the Grunstedts to pay specified amounts to Multicircuits and to convey all right, title and interest in their mortgaged residence to Multicircuits. Prior to commencing this action, Multicircuits also asked Associated to foreclose on Mortgage 3 and to sell the property to reduce Multicircuits' debt to Associated. Associated did not do so because Multicircuits' debt to Associated was not in default and it had no right to foreclose. However, Associated assigned Mortgage 3 to Multicircuits on August 31, 2009. Associated assigned only the mortgage, not the underlying promissory note that it secured.

¶8 Multicircuits commenced this foreclosure action against the Grunstedts and Citi on September 9, 2009.³ In June 2010, Multicircuits and the Grunstedts entered into a settlement agreement in this action. The Grunstedts consented to entry of a non-deficiency judgment of foreclosure in favor of Multicircuits, and agreed to waive their redemption rights. Citi was not a party to the stipulation and agreement. Pursuant to the stipulation, the trial court entered a judgment of foreclosure in favor of Multicircuits and against the Grunstedts on July 22, 2010.

¶9 Although the Grunstedts consented to an immediate sheriff's sale of their property, cross-motions for summary judgment filed by Citi and Multicircuits remained pending when the July 22, 2010 judgment was entered. After extensions of time for additional discovery and supplemental briefing, the trial court held a hearing on the motions on November 3, 2010. The trial court determined that the mortgage held by Multicircuits had been recorded first and therefore had priority over the mortgage held by Citi based on WIS. STAT. § 706.11. It rejected Citi's claim that it was entitled to priority based on equitable subrogation, concluding that Citi did not have clean hands. For the reasons stated on the record, the trial court entered an order on December 10, 2010, granting summary judgment to Multicircuits and denying summary judgment to Citi.

¶10 A sheriff's sale of the Grunstedts' property was subsequently held. Citi was the high bidder at \$400,000. In an order entered on February 2, 2011, the trial court confirmed the sheriff's sale. However, before Citi could receive the

³ The Wisconsin Department of Revenue and the Internal Revenue Service were also named as defendants, but are not parties to these appeals.

deed to the property, it was required to pay Multicircuits \$275,914.84, which included principal of \$200,000, interest through January 27, 2011, in the amount of \$33,701.75, attorney fees, costs, and expenses.

¶11 We reverse the December 10, 2010 order in favor of Multicircuits on the ground that Multicircuits' mortgage is unenforceable, and therefore cannot have priority over Citi's mortgage.⁴ As argued by Citi in the trial court and this court, and as admitted by Multicircuits, Multicircuits is not the holder of the promissory note or letter of credit secured by Mortgage 3. The debt is held by Associated, not Multicircuits. Multicircuits is, in fact, the debtor on the loan secured by Mortgage 3, and the record indicates that it was not in default when it commenced this action.⁵

¶12 To have priority over the mortgage held by Citi, the mortgage held by Multicircuits must be enforceable. It is not. As discussed above, Associated assigned Mortgage 3 to Multicircuits, but did not assign the underlying note. **Only the holder of a note or underlying debt has the right to enforce the mortgage securing that debt. See 55 Am. Jur. 2d Mortgages § 584 (2011). An assignment of a mortgage, alone and separate from the note it is given to secure, does not transfer the note. *Tobin v. Tobin*, 139 Wis. 494, 499, 121 N.W. 144 (1909). See also RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 5.4 cmt. e (1997) (stating “a**

⁴ Based upon this disposition, we need not address the parties' arguments regarding equitable subrogation.

⁵ It is also noteworthy that, pursuant to the settlement agreement in Winnebago County circuit court case No. 2006CV1595, the Grunstedts were required to convey title to and their interest in the mortgaged residence to Multicircuits. Although this court has not located a copy of a deed conveying title in the record, if Multicircuits already held title to the property, it is unclear how it could foreclose on it.

mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation”).

¶13 A mortgage operates as security for a debt, and is incidental to the indebtedness or obligation secured thereby. *Glover v. Marine Bank of Beaver Dam*, 117 Wis. 2d 684, 692, 345 N.W.2d 449 (1984). The purpose of a foreclosure action is to enable the mortgagee, or lien holder, to apply the mortgaged property to the debt that it secures. *Id.* at 693. In order to foreclose on a mortgage, a mortgagee must prove the existence of the underlying debt that the mortgage secured, because the mortgage cannot exist without a debt. *Mitchell Bank v. Schanke*, 2004 WI 13, ¶¶32, 37, 268 Wis. 2d 571, 676 N.W.2d 849. “Where there is no debt—no relation of debtor and creditor—there can be no mortgage.” *Id.*, ¶37 (quoting *Doyon & Rayne Lumber Co. v. Nichols*, 196 Wis. 387, 390, 220 N.W. 181 (1928)).

¶14 It is undisputed that Associated assigned Multicircuits only Mortgage 3, not the underlying note and obligation, which was retained by Associated. Because Multicircuits is the holder only of the mortgage, and the debt secured by that mortgage is not held by or owed to Multicircuits, Multicircuits’ mortgage is not enforceable and cannot have priority over Citi’s mortgage. *Cf. Frick v. Howard*, 23 Wis. 2d 86, 96, 126 N.W.2d 619 (1964) (because the plaintiff was not a holder for value of the note which the mortgage secured, his foreclosure action was dismissed); *Doyon & Rayne Lumber*, 196 Wis. at 390-91 (mortgage that did not secure any debt at the time it was taken did not have priority over another mortgage taken after it). In fact, Multicircuits is the debtor on the obligation secured by Mortgage 3. The creditor on the obligation was Associated, which, as discussed above, chose not to institute foreclosure proceedings against

Multicircuits based on Mortgage 3, determining that Multicircuits was not in default on the debt secured by Mortgage 3. Because Multicircuits is not the holder of the note or underlying obligation secured by Mortgage 3, it had no right to foreclose on that mortgage and that mortgage does not have priority over the mortgage held by Citi.

¶15 In determining that the mortgage held by Multicircuits is unenforceable against Citi, we have considered Multicircuits' argument that the Grunstedts are liable to it under the terms of the settlement agreement in Winnebago County circuit court case No. 2006CV1595. However, the Grunstedts' obligation to Multicircuits under the settlement agreement has no effect on this case because it is not an obligation secured by Mortgage 3, the mortgage that is the subject of this action. As already discussed, Multicircuits does not hold the debt secured by Mortgage 3.

¶16 In concluding that the mortgage held by Multicircuits is unenforceable against Citi and does not have priority over Citi's mortgage, we have also considered Multicircuits' argument that Citi waived its right to challenge enforceability by failing to appeal from the July 22, 2010 judgment of foreclosure in favor of Multicircuits, and by failing to raise the issue with sufficient prominence in the trial court. We reject both arguments.

¶17 Multicircuits argues that Citi waived its right to challenge the enforceability of Multicircuits' mortgage when it did not appeal from the June 22, 2010 judgment of foreclosure, or move for relief from that judgment. Multicircuits relies upon *Shuput v. Lauer*, 109 Wis. 2d 164, 171-72, 325 N.W.2d 321 (1982) for the proposition that a judgment of foreclosure determines the

mortgagee's right to realize upon the security and is a final judgment appealable as of right.

¶18 Multicircuits' waiver argument ignores that the June 22, 2010 order was entered pursuant to a stipulated agreement between Multicircuits and the Grunstedts, to which Citi was not a party. The June 22, 2010 judgment did not resolve whether Citi's mortgage had priority over the mortgage held by Multicircuits or was enforceable as to Citi. It thus did not dispose of the entire matter in litigation between Citi and Multicircuits, as required before Citi could appeal under WIS. STAT. § 808.03(1). Citi's argument that Multicircuits' mortgage was unenforceable provided an alternative basis for its position that Multicircuits' mortgage was not entitled to priority over its mortgage. Citi could not have raised this issue on appeal before it was disposed of in the trial court by the December 10, 2010 order.⁶ Although the July 22, 2010 judgment disposed of the entire matter in litigation between Multicircuits and the Grunstedts and was final as to them, it was not final as to Citi and Citi therefore was not required to appeal from it.

¶19 We also reject Multicircuits' argument that Citi waived its right to challenge the enforceability of Multicircuits' mortgage by failing to raise the issue with sufficient prominence in the trial court. Citi raised this issue prior to the

⁶ We reject Multicircuits' argument that this court lacks jurisdiction to review the validity of its mortgage because the trial court did not address the issue of enforceability of the mortgage in its December 10, 2010 order. As previously noted, the trial court declined to address the issue at the November 3, 2010 hearing, concluding that it was irrelevant to the issue of whether Multicircuits' mortgage had priority over Citi's mortgage. We have jurisdiction to review that determination in this appeal and reject it, concluding that Multicircuits' mortgage cannot be given priority because it is unenforceable.

November 3, 2010 hearing addressing the priority of the mortgages, as evidenced by the fact that the trial court referred to Citi's arguments on the issue at the hearing, and Multicircuits addressed the issue in a letter brief filed on October 27, 2010.⁷

¶20 Based upon our reversal of the December 10, 2010 order, we also reverse the portion of the February 2, 2011 order requiring Citi to pay \$275,914.84 to Multicircuits. Multicircuits does not hold an enforceable mortgage with priority over the mortgage held by Citi. It therefore is not entitled to any of the proceeds of the sheriff's sale of the Grunsteds' property. While the portion of the February 2, 2011 order confirming the sale to Citi for \$400,000 is not disturbed by this court, the portion of the order requiring Citi to pay Multicircuits is reversed. The matter is remanded to the trial court with instructions to order Multicircuits to refund \$275,914.84 to Citi.

By the Court.— Orders reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁷ We also note that forfeiture or waiver of the right to raise an issue on appeal by failing to raise it with sufficient prominence in the trial court presents a question of judicial administration, and does not affect this court's jurisdiction. See *State v. Kaczmariski*, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702. The record indicates that the facts underlying the argument that Multicircuits' mortgage was unenforceable came to light during discovery in this case. Citi raised the enforceability issue shortly after the completion of discovery and before the November 3, 2010 hearing on the cross-motions for summary judgment. No basis therefore exists to conclude that Citi waived or forfeited its right to raise the issue on appeal by failing to raise it in its pleadings or arguments in the trial court, or failing to raise it with sufficient prominence.

