OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

August 23, 2016

To:

Hon. Todd W. Bjerke
Circuit Court Judge
La Crosse County Courthouse
333 Vine Street
La Crosse, WI 54601

Pamela Radtke
Clerk of Circuit Court
La Crosse County Courthouse
333 Vine Street, Room 1200
La Crosse, WI 54601

Russell J. Karnes
J Peterman Legal Group Ltd.
165 Bishops Way, Ste. 100
Brookfield, WI 53005-6235

Reed Peterson
Reed Peterson & Associates, LLC
6441 Enterprise Ln., Ste. 104
Madison, WI 53719

Thomas P. Wuensch
Heidi Wuensch
W7333 County Road Z
Onalaska, WI 54650

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

2015AP175 Deutsche Bank National Trust Company v. Thomas P. Wuensch (L.C. # 2009CV752)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

Thomas Wuensch appeals a foreclosure judgment, which the circuit court granted after a bench trial, in favor of the plaintiff, "Deutsche Bank National Trust Company as Trustee for American Home Mortgage Assets Trust 2007-2 Mortgage-Backed Pass-Through Certificates, Series 2007-2, by American Home Mortgage Servicing Inc., its attorney-in-fact." Wuensch raises several challenges to the judgment. After reviewing the record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] As explained below, we conclude that, after Wuensch unambiguously demanded proof at trial that the plaintiff *possessed* the original note at issue, the plaintiff failed to offer any evidence on the possession issue at trial.[2] Further, there is no suggestion that Wuensch at any point admitted, waived, stipulated, or forfeited the possession issue. Accordingly, we reverse the judgment of foreclosure in this action.[3]

The parties agree to the following facts. In December 2006 Wuensch signed an adjustable rate note promising to repay HLB Mortgage the principal sum of $301,500. The note was secured by a mortgage on property that Wuensch owned. The note contains two endorsements, one from HLB Mortgage to American Home Mortgage, and one from American Home Mortgage in blank. After Wuensch defaulted on the note, the plaintiff initiated this foreclosure action. In his answer, Wuensch denied the allegation in the complaint that "Plaintiff is the lawful holder of the note and mortgage." In addition, we see no suggestion in the record that, in advance of or at trial, Wuensch admitted or stipulated that the plaintiff possessed the original note.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Persons entitled to enforce a negotiable instrument include the "holder" of the original instrument. WIS. STAT. § 403.301. Generally speaking, a "holder" is the person in possession of the negotiable instrument, in this case the note. WIS. STAT. § 401.201(2)(km)1. "If endorsed in blank, an instrument becomes payable to bearer ...." WIS. STAT. § 403.205(2). "Bearer" means "a person ... in possession of an instrument ... payable to bearer or endorsed in blank." WIS. STAT. § 401.201(2)(cm). Thus, the plaintiff here is entitled to enforce the note that is endorsed in blank if the plaintiff possesses the original note. The plaintiff does not argue that its right to a judgment of foreclosure can be sustained based on any legal theory other than holder-in-possession.

[3] Wuensch also makes other arguments challenging the judgment. Because we conclude that the plaintiff's failure to offer evidence that the plaintiff possessed the note at the time of trial is dispositive, we do not address Wuensch's other arguments. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

At the start of the trial to the circuit court but before the first witness testified, the plaintiff's counsel identified to the court, over Wuensch's attorney's objection, two documents. The plaintiff's counsel described one document as being the original note and the other as a copy of the original note, with the copy having been marked as an exhibit. The plaintiff's counsel, appearing before the circuit court strictly as legal counsel and not having been sworn as a witness, stated, "Your Honor, I'm handing [Wuensch's attorney] a copy of the original note. I also have the original here today. I'm going to allow [Wuensch's attorney] to inspect the original document and compare it to the copy." Wuensch's attorney objected "on foundational grounds" and "to the plaintiff's counsel testifying." The circuit court noted that it had not "heard any testimony yet." The court stated that the purported original and the copy appeared to the court to be identical. The court stated that it was admitting the purported copy into evidence over Wuensch's attorney's repeated objection that the plaintiff had failed to produce a proper witness to testify about the purported original note.

Based on this record, the circuit court found that the plaintiff possessed the original note at the time of trial, and concluded that the plaintiff was the holder of the original note with the right to enforce it.

The sole witness called by the plaintiff was a loan analyst for the servicer of Wuensch's note. He testified only regarding the payment history and amounts owed by Wuensch on the note.

Wuensch testified primarily as to his difficulties in communicating with American Home Mortgage Servicing, Inc., and in obtaining accurate information about the status of his loan.

The circuit court granted judgment of foreclosure in favor of the plaintiff in the amount of $455,641.85. Wuensch appeals.

Wuensch's principal argument on appeal is that the circuit court erred in finding that the plaintiff was, at the time of trial, the holder of the original note, and therefore the court lacked a factual basis to grant judgment of foreclosure. This finding was error, Wuensch contends, because over Wuensch's explicit objection, the court did not require the plaintiff to present any *evidence* that the purported original note brought to trial by plaintiff's counsel was in fact the original note *that counsel had obtained from the plaintiff*. Rather, Wuensch contends, the court erroneously treated the plaintiff's counsel's assertions as proof that the plaintiff possessed the original note.

Upon initial conferencing of this case, this court determined that the parties' briefs did not adequately address what we identified as a "narrow proof-of-possession issue," namely, whether a plaintiff in a foreclosure action may, in the face of an express refusal to stipulate the possession issue, prove at trial that the plaintiff possesses the original note at the time of trial solely by having its counsel present to the circuit court a document that counsel represents is the original note. Therefore, we ordered the parties to file supplemental letter briefs addressing this issue.

Upon further conferencing after our receipt of the letter briefs, we resolve the "proof-of-possession issue" in this action in favor of Wuensch. As noted above, the pleadings placed possession of the original note in dispute, and there is no dispute that this was an issue that the plaintiff had to prove at trial. *See* Wis. Stat. § 401.201(2)(km)1. (defining "holder" as a legal term that means, in the context of this case, "[t]he person in possession of a [note] that is payable either to bearer or to an identified person that is the person in possession").

As summarized above, before witnesses were called at trial, the plaintiff's counsel presented a document that counsel represented was "the original note," over Wuensch's attorney's objection. Wuensch's attorney clearly stated his objection to any attempt by

the unsworn plaintiff's counsel to give what amounted to testimony that counsel had obtained the original note from its holder, the plaintiff. That is, by his objections, Wuensch's attorney clearly declined to stipulate that plaintiff possessed the original note and instead demanded a witness with personal knowledge to testify on the possession topic.

As we have noted, the plaintiff's sole witness at trial did not testify on the topic of the possession of the original note, nor did the witness give testimony from which a reasonable inference could be drawn on this topic. The same goes for the testimony of Wuensch, the only other witness.

In his letter brief filed in response to our request for supplemental briefing, Wuensch cites the following statutes: (1) WIS. STAT. § 906.03(1), which provides that a witness must take an oath before testifying; (2) WIS. STAT. § 906.02, which states, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter;" and (3) WIS. STAT. § 901.04, which provides that a judge is to make preliminary determinations on the qualifications of a person to be a witness. Wuensch also could have cited any of the extensive authority establishing the axiomatic point that "'unsworn statements'" have "'no proper place'" as substitutes for evidence in a trial. *See, e.g.*, ***Nelson v. State***, 35 Wis. 2d 797, 812, 151 N.W.2d 694 (1967) (quoted source omitted).

We agree that here, where the plaintiff's counsel did not take an oath and did not lay a foundation to establish personal knowledge about possession of the original note, the plaintiff's counsel was not acting as a witness on whose statements or implied statements the circuit court could rely to prove possession. We need not delve into the various difficulties that the plaintiff's counsel would likely have encountered had he attempted to testify at trial as a witness about the original note and its possession. It is

sufficient to observe that sworn testimony from someone with personal knowledge was necessary, given Wuensch's unambiguous objections at trial.

In its letter brief, filed in response to Wuensch's, the plaintiff does not address the statutes that Wuensch cited. Rather, the plaintiff makes two unavailing arguments. First, the plaintiff repeats the argument that it makes in its initial respondent's appellate brief, namely, that an original note is self-authenticating, and that the circuit court properly admitted the copy of the note after comparing it with the authenticated purported original note. However, self-authentication is not the issue here. *See* WIS. STAT. §§ 909.01, 901.04(2) (authentication is an issue of conditional relevancy, addressing whether there is sufficient evidence to support a finding that the matter is what the proponent claims). The plaintiff does not in its initial brief or its letter brief even attempt to explain how merely establishing self-authentication of a purported original note endorsed in blank could in itself stand as proof as to *what person or entity currently possessed* the original note.

Second, the plaintiff acknowledges that there are no reported Wisconsin cases that directly address the particular narrow "proof-of-possession" issue here, but points us to our decision in ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, 350 Wis. 2d 411, 838 N.W.2d 119, *aff'd*, 2014 WI 56, 354 Wis. 2d 796, 848 N.W.2d 728. The plaintiff notes that in that case we concluded that "[w]ithout the original note, or a properly authenticated copy, there is no factual showing that [the plaintiff] is entitled to enforce the note as the party in possession of a note endorsed in blank." ***Id.***, 350 Wis. 2d 411, ¶24. The plaintiff argues that here, in contrast, the plaintiff's counsel presented the self-authenticating original note and asked the circuit court to compare the original to the copy and to admit the copy into evidence. Accordingly, the plaintiff argues, it "proved possession by establishing the copy of the note was what it claimed to be—'a true and correct copy of an original note in [its] possession.'" However, the plaintiff here never

offered proof through any witness, as demanded by Wuensch, that the original note was in the plaintiff's possession.

We pause to make two observations relating to proof of possession of the original note. First, we observe that in foreclosure actions, the vast majority of which do not result in a trial, the defendant frequently admits, waives, or stipulates to the plaintiff's possession of the original note, or else the defendant in some manner forfeits the issue. In addition, in the somewhat rare foreclosure trial, we suspect that the plaintiff's current possession of the original note is shown or reasonably inferred from at least one and usually more than one source of testimony or documentary evidence. But our review of the record here reveals neither an admission, waiver, stipulation, or forfeiture by Wuensch, nor any evidence from which a reasonable inference of current possession could arise, and the plaintiff does not argue to the contrary on appeal, even after we highlighted the issue for supplemental briefing.

Second, the rules of evidence may not be sidestepped based on the common sense expectation that the particular entity seeking to enforce a note is generally going to be the entity legally entitled to enforce the note. Circuit courts might logically believe that the entities with the best claim of legal entitlement to enforce notes are the entities that bring foreclosure actions. So here, it would be expected that the plaintiff is the holder of the note, because otherwise a different entity would be litigating the matter. However, logic cannot substitute for the rules of evidence. And the likelihood that an attorney would be a reliable source of information in this context is irrelevant under the system of proof that parties are entitled to rely on at a trial. The plaintiff was obligated to prove, under the rules of evidence, that the document in the plaintiff's counsel's hands in fact came from his client and not from some other person or entity.

Significantly, the plaintiff does not attempt to persuade us that the circuit court could make a finding of possession-by-the-plaintiff based solely on the implied representation of current possession by the plaintiff's counsel as either an officer of the court or the plaintiff's agent. We recognize that the circuit court, as the fact-finder at a bench trial, had wide latitude to receive and weigh evidence, and that our mandate reversing the judgment of foreclosure in this action may appear at first blush to elevate form over substance and to produce a highly inefficient result. However, as we have explained, we see no shortcut in the law to the admission of necessary evidence at trial, whether jury or bench, when, as here, the opposing party appropriately preserves the issue and demands proof in the form of admissible evidence. The plaintiff does not provide us with any authority under which the circuit court could properly make a finding of possession by the plaintiff, given the lack of any evidence on this topic properly admitted at trial.

IT IS ORDERED that the foreclosure judgment in this action is summarily reversed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals