# STATE OF MICHIGAN

# COURT OF APPEALS

FLAGSTAR BANK, F.S.B.,

Plaintiff-Appellee,

v

517 MADISON MANAGEMENT, L.L.C. and HANNA KARCHO-POLSELLI,

Defendants-Appellants.

UNPUBLISHED
April 14, 2011

No. 296167
Oakland Circuit Court
LC No. 2009-101599-CK

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Hanna Karcho-Polselli and 517 Madison Management, LLC ("Madison") challenge the grant of summary disposition and entry of judgment in favor of Flagstar Bank, F.S.B. (Flagstar) following the default of Madison and Karcho-Polselli on commercial real estate loans and guaranties. We affirm.

The facts of this case are essentially undisputed. Flagstar made business loans to Madison and issued promissory notes. These loans were secured by mortgages on real property and an assignment of rents, which were recorded with the Oakland County Register of Deeds. Karcho-Polselli executed documents to serve as a guarantor of "any and all" existing and future indebtedness owed to Flagstar by Madison. Payments were not made and Flagstar initiated a lawsuit in the lower court seeking $2,481,694.38 on the loans due, along with unspecified amounts in interest, costs and attorney fees.

Flagstar filed a motion for summary disposition.[1] Madison and Karcho-Polselli challenged the amount of damages, but did not dispute the existence of the loan agreements, promissory notes and guaranty or their default. Finding no dispute regarding liability, the trial court granted the motion for summary disposition. Madison and Karcho-Polselli sought reconsideration. Concurrently, Flagstar filed a motion for entry of judgment. Attached to Flagstar's motion was an affidavit of Dennis Lutz, delineating the amounts owed, the payment

[1] MCR 2.116(C)(10).

history for the loans and an affidavit of counsel attesting to the amount of costs and attorney fees incurred, the rate charged and the reasonableness of the fees. Madison and Karcho-Polselli failed to respond to Flagstar's motion and did not appear for the hearing. The trial court provided a 24-hour grace period for Madison and Karcho-Polselli to respond, but they again failed to appear and the trial court entered judgment against them in the amount of $2,588,196.69, plus interest and fees accruing after December 2, 2009, until paid. Madison and Karcho-Polselli again sought reconsideration, arguing error by the trial court because questions of fact existed regarding the amount of Flagstar's damages and the failure of the trial court to consider their initial motion for reconsideration. The trial court denied the motion based on the arguments having been previously raised and decided and the failure to "provide specific challenges to the amounts sought" by Flagstar.

Madison and Karcho-Polselli contend that the trial court erred in entering summary disposition in favor of Flagstar because questions of fact existed regarding the amount of damages. We review a trial court's decision to grant or deny a motion for summary disposition de novo.[2] Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the non-moving party[3], "that party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case."[4]

Contrary to the assertions of Madison and Karcho-Polselli, the trial court did not err in granting summary disposition to Flagstar as there was no question of fact with regard to liability. In accordance with the relevant court rule, a motion may be brought when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[5] Even if questions existed regarding the amount of damages, because there was no question of liability the trial court properly granted the motion.

Madison and Karcho-Polselli also argue that the trial court erred in entering the judgment based on Flagstar's failure to prove the amount of their damages. They contend that by disputing Lutz's personal knowledge in making his affidavit that they sufficiently raised specific challenges to the amount of damages and created a question of fact on that issue. Madison and Karcho-Polselli further contend that Flagstar did not provide sufficient evidence to demonstrate the reasonableness of their attorney fees, which should have precluded the trial court's entry of an award.

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[2] *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[3] *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

[4] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[5] MCR 2.116(C)(10).

Flagstar provided the loan histories, which were admissible as business records.[6] There is no requirement that the proponent of a business record must establish the technical aspects of how the record was made. To establish a sufficient foundation for the admission of a business record it need only by shown that the record was maintained "in the course of a regularly conducted business activity" and that it was the routine practice of the business to keep such a record. Knowledge of the business involved and its regular practices are necessary.[7] The materials submitted by Flagstar were admissible as business records "unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness."[8] Madison and Karcho-Polselli only argued that the records *might* be inaccurate. Because they provided no facts to support their implication the records lacked trustworthiness or to actually challenge the amounts delineated by Flagstar, the trial court did not err in its award.

The burden was on Flagstar to establish the reasonableness of the attorney fees requested.[9] In determining whether attorney fees are reasonable, a trial court must examine:

> (1) the professional standing and experience of the attorney; (2) the skill, time, and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.[10]

The fee applicant must "produce satisfactory evidence—*in addition to the attorney's own affidavits*—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'"[11]

Although Flagstar failed to produce evidence demonstrating the reasonableness of the fees, it did delineate the amount sought in its pleadings filed in support of the entry of judgment. Madison and Karcho-Polselli failed to respond to these pleadings or appear for the hearing and only raised this issue in their second motion for reconsideration after entry of the judgment. Because the issue was raised for the first time on a motion for reconsideration, it was not properly preserved[12] and, therefore, we decline to review the issue directly.[13]

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[6] MRE 803(6).

[7] *Merrow v Bofferding*, 458 Mich 617, 626-627; 581 NW2d 696 (1998).

[8] *Price v Long Realty, Inc*, 199 Mich App 461, 468; 502 NW2d 337 (1993).

[9] *Smith v Khouri*, 481 Mich 519, 531-532; 751 NW2d 472 (2008).

[10] *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 171-172; 712 NW2d 731 (2005).

[11] *Smith*, 481 Mich at 531, quoting *Blum v Stenson*, 465 US 886; 104 S Ct 1541; 79 L Ed 2d 891, 895 n 11 (1984) (emphasis added).

[12] *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

Instead, we consider the arguments proffered by Madison and Karcho-Polselli regarding the attorney fee award as part of their assertion that the trial court erred in denying their motion for reconsideration, which we review for an abuse of discretion.[14] Based on this standard of review it cannot be concluded that the trial court erred in denying reconsideration. The contention that Lutz's affidavit was insufficient based on his lack of knowledge regarding how the information contained in the affidavit was compiled is specious. We also conclude that the $250 an hour fee charged and the number of hours billed by Flagstar's counsel was reasonable. Because the fee charged was reasonable, the trial court's ruling fell within the range of principled outcomes[15] and denial of reconsideration did not comprise error.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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[13] See *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 361-362; 771 NW2d 411 (2009).

[14] *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

[15] *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).