STATE OF WISCONSIN COURT OF APPEALS DISTRICT III

Aaron Carmody,

Plaintiff-Appellant,

v.

Byline Bank

Defendant-Third-Party
Plaintiff-Respondent,

Dylan Esterling,

Defendant-Respondent,

v.

Nicole Elizabeth Carmody

Third-Party Defendant-
Appellant.

Case No. 2022AP001660

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF PENDING APPEAL

INTRODUCTION

Respondents, Byline Bank, an Illinois banking corporation, successor-by-merger with Ridgestone Bank ("Byline"), and Dylan Esterling (collectively, "Respondents"), hereby submit this Brief in opposition of the motion for relief pending appeal ("Motion"), filed by Appellants, Aaron Carmody and Nicole Elizabeth Carmody (collectively, "Appellants").

Appellants' Motion entirely fails to provide a valid basis for the Court of Appeals to further stay Byline's right to collect on the loan that Appellant, Aaron Carmody obtained and has failed to repay. Appellants' *pro se* appeal of the Court's findings, made after four years of litigation and after twelve (12) days of trial is highly unlikely to be successful, as is it nothing more than Appellants' ongoing efforts to stall and delay Byline's right to collect, including foreclosing on

mortgages granted by Appellants.

Further, Appellants' post-trial filings highlight their unrelenting efforts to abuse the judicial system to avoid Byline's right to collect. Through unsolicited, post-trial submissions, Appellant, Nicole Carmody has either committed perjury in hundreds of discovery responses, her depositions, and during trial, or she is committing perjury now, by filing an Affidavit and letter that directly, explicitly, and purposefully contradict her prior testimony. Facing foreclosure, it is far more likely that Appellant, Nicole Carmody is lying now—in an effort to avoid foreclosure. There is no reason to mince words; Appellants actions are wholly improper, and such behavior should not be condoned.

Byline is entitled to pursue collection on the well-over $3,000,000 obligation owed by Appellant, Aaron Carmody. Appellants are not entitled to the issuance of a stay pending the appeal, as they have wholly failed to meet their burden. The Court must therefore deny the Motion.

LEGAL ARGUMENT

I. APPELLANTS FAIL TO SATISFY THE REQUIREMENTS TO OBTAIN A STAY PENDING APPEAL.

Is it well established that an appeal does not stay the execution or enforcement of the judgment or order appealed. Wis. Stat. § 808.07(1). The trial or appellate court does, however, have the power to:

1. Stay execution or enforcement of a judgment or order;
2. Suspend, modify, restore or grant an injunction; or
3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

Wis. Stat. § 808.08(2). The court of appeals may consider a motion for relief pending appeal in instances when it is impractical to seek relief in the trial court or if the motion has been filed in the trial court, the party gives the reasons given by the trial court for its actions. *See* Wis. Stat. § 809.12.

Whether a stay of execution may be granted is an exercise of discretion subject to the four-factor test of *Scullion v. Wisconsin Power & Light Co*., 237 Wis.2d 498, 614 N.W.2d 565:

> (1) the issues appealed and likelihood of success on the issues;
> (2) the need to ensure the collectability of the judgment and accumulated interest if the appellant is unsuccessful on appeal;
> (3) the interest of the appellant; and
> (4) potential harm to the respondent if the judgment is not paid until completion of the appeal,

as recognized in *Weber v. White*, 2004 WI 63, ¶ 35, 272 Wis.2d 121, 681 N.W.2d 137.

As they failed to do in their motion seeking a stay filed with the Circuit Court, Appellants do not meet their burden to obtain a stay of enforcement of the judgment, pending appeal.

A. There is no likelihood of success with respect to the issues appealed.

Weighing the *Scullion* factors, it is apparent that Appellants are not entitled to an Order to stay enforcement of the judgment and the matters determined therein. First, with respect to prong one, the likelihood that Appellants will succeed on appeal is highly unlikely. The Order on appeal results from a lawsuit commenced in May 2018, culminating in a twelve-day judge trial. Prior to trial, the parties engaged in extensive discovery and motion practice. At trial, over four hundred (400) exhibits were introduced, compromising thousands of pages. As Appellants readily point out, Judge Weber acknowledged that this case was "one of the most difficult cases I've ever been involved in, both as a lawyer and judge." *See* Oral Ruling April 18, 2022, 4:13-15.

What Appellants gloss over is part of the reason why this case was so difficult and complex; Judge Weber noted, "[b]ut the problem is – as I saw it is it just seemed like [Appellants'] theories of liability continued shifted in the case. And even at the time of trial there were theories being advanced that I certainly hadn't heard of before." *Id.* at 4:20-24.

These continually shifting theories of liability were being espoused by Appellants, not Respondents. Now, in the most spectacular fashion, Appellants have decided to throw another

curveball—all in a ditch effort to avoid a final ruling on this matter and drag out a nearly five-year old case.

After years of litigation, after quite possibly thousands of denials, Appellant, Nicole Carmody filed an unsolicited letter with Circuit Court, suddenly claiming that she signed "Aaron Carmody" on the loan documents at issue ("Nicole Carmody Letter"). *See* Doc. No. 784. The Nicole Carmody Letter was not testified to under oath, and it was not signed.

In reliance on the Nicole Carmody Letter, Appellant, Aaron Carmody filed a belated Motion for a New Trial (*see* Doc. No. 787) and a Motion for Reconsideration of Relief Pending Appeal (*see* Doc. No. 788). Unsurprisingly, Judge Weber denied both motions, concluding that the Nicole Carmody Letter was not competent evidence to be considered and that he did not find the allegations in the Nicole Carmody Letter to be credible, given the volume of evidence and weight of years of denials by Appellant, Nicole Carmody Nicole Carmody Letter. *See* Doc. Nos. 789 and 790.

Presumably in an attempt to "fix" Judge Weber's reasons for finding the Nicole Carmody Letter not to be credible, Appellant, Nicole Carmody then filed an Affidavit containing her notarized signature, stating she signed "Aaron Carmody" on the loan documents at issue. *See* Doc. No. 791. It is evident that this "admission" is a Hail Mary by Appellants to try to manipulate the facts admitted into the record during the 12-day trial and place the findings of Judge Weber in purported jeopardy. At best, this is an abhorrent abuse of the legal system.

The underlying issue of this case, on its face, was not complex; as Judge Weber stated, "Who signed the documents in question was the single most important issue in this case since 2018 when it was filed." *See* Doc. No. 789 at p. 1. Appellant, Nicole Carmody testified under oath in response to numerous Requests for Admission that she did not sign her husband's s name on the documents at issue. She repeatedly testified during her deposition that she did not sign her

husband's name on the documents at issue. Then, Appellant, Nicole Carmody testified at trial, which testimony took over a day, repeatedly stating that she did not sign her husband's name on the loan documents.

As set forth in the Order on appeal, the Circuit Court, as the factfinder chosen by Appellants, concluded that Appellant, Aaron Carmody affixed his signature to the documents at issue. *See* Doc No. 718.

After the Order on appeal was issued, Byline commenced a foreclosure to begin collecting on the judgment granted in Byline's favor. Only after the foreclosure was initiated did Appellant, Nicole Carmody completely change her story and allege that she signed "Aaron Carmody" on the documents.

Appellants efforts to thwart the Order through post-trial submissions does not change the outcome that success on appeal is highly unlikely. Rather, it illuminates that Appellants have no qualms in wasting judicial resources and time. This "admission" is nothing more than a desperate attempt to avoid foreclosure.

In addition, Appellants argue that they will succeed on appeal because of statements made with respect to expert testimony. In particular, Appellants make much ado over statements said during opening arguments with respect to anticipated expert testimony. It is a black letter principle that a lawyer's argument is not evidence. *See* Wis J I—Civil 110 and Criminal 157 ("Remarks of the attorneys are not evidence"). The statements made by Respondents' counsel are taken out of context, but in any event, are inconsequential and do not support any likelihood of success on appeal.

Similarly, Appellants claim that they will be successful on appeal because the trial court did not adopt the expert opinion of either expert. Appellants fail to recognize that, "the trier of fact is not bound by the opinion of an expert; rather, it can accept or reject the expert's opinion." *In re*

Commitment of Kienitz, 597 N.W.2d 712, 719 (Wis. 1999). The fact that an expert passes through the gateway of Wis Stat. § 907.02 does not mean a trier of fact is bound by the expert testimony. Indeed, the trial court had no obligation to accept or reject any expert's opinion.

Accordingly, Appellants have proffered no sufficient showing of a likelihood of success on appeal. As a result, granting a stay of collection efforts, including any foreclosure actions, pending the appeal is not warranted.

B. The need to ensure the collectability is high due to the prolonged history of this litigation.

With respect to collectability, as determined at trial, the loan documents at issue are enforceable against Appellants, including the Shiloh Mortgage[1] and the Vermont Mortgage. It was further concluded that, as of September 15, 2021, there was due and owing under the Note the total amount of $3,023,480.62, which does not factor in additional accrued but unpaid interest and substantial attorneys' fees and costs, which Appellant, Aaron Carmody, is obligated to pay.

Byline has commenced an action to foreclose the Shiloh Mortgage, which will barely make a dent in the amounts owed by Appellant, Aaron Carmody, who has no ability to pay the judgment and further delay will only serve to prejudice Byline. Due the reality that this lawsuit was commenced nearly five (5) years ago, the need for Byline to collect at this time is high and further delay will only serve to further prejudice Byline.

C. Appellants' interests do not warrant a stay of the enforcement of the Order pending appeal.

Further, Appellants' interests do not warrant the award of a stay. Appellant, Aaron Carmody obtained the SBA Loan in July 2016; the loan went into default in August 2017; and Appellant, Aaron Carmody commenced this lawsuit in May 2018. Over five (5) years have elapsed

[1] Any capitalized defined terms, unless defined herein, shall have the same meanings as those set forth in the Amended Trial Order (Doc. No. 718).

the loan default, the delay in payment of which has certainly benefitted Appellant, Aaron Carmody, and harmed Byline. Appellant, Aaron Carmody has received a five (5) year stay already and is entitled to no additional time, beyond the period of redemption that Appellants will be entitled to.

Moreover, Appellants own two (2) properties in Sturgeon Bay, Wisconsin, the Shiloh Property and the Vermont Property. Byline holds valid and enforceable mortgages against each property. However, Byline is only seeking the foreclosure of the Shiloh Mortgage. To the extent Appellants choose not to redeem from the foreclosure of the Shiloh Mortgage, Appellants can certainly reside in the Vermont Property, which is not presently being foreclosed upon.

D. Byline will be unfairly prejudiced by a stay of the Order.

Lastly, as addressed relative to the four *Scullion* factor, Byline is owed well over $3,000,000, which Appellant, Aaron Carmody has avoided repaying for over five (5) years. Byline only recently commenced foreclosure of the Shiloh Mortgage, and Appellants will be entitled to a six-month period of redemption after judgment for foreclosure is entered. The transcripts of proceedings herein have been completed, and Appellants' deadline to file their appellate brief is due in short order. Thus, a stay is likely unnecessary and would simply give Appellants yet more time before a foreclosure order can be pursued, harming Byline's ability to obtain a small portion of repayment.

Given Appellants' failure to present any facts, evidence, or legal argument to support their Motion, as well as their plain inability to satisfy the *Scullion* four-factor test, the Motion should be denied.

CONCLUSION

Based in the foregoing arguments, there can be no dispute that the Court must deny Appellants' Motion. Appellants fail to submit any valid legal or factual basis to support a stay and all of the factors in *Scullion* all weigh against Appellants. The Motion should be denied.

JELLUM LAW, P.A.

Dated: February 7, 2023.

Electronically signed by Garth G. Gavenda
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