

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 25, 2014

Diane M. Fremgen
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 No. 2013AP1015

Cir. Ct. No. 2010CV1124

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PNC BANK,

PLAINTIFF-RESPONDENT,

V.

BARBARA L. GARDEN AND JOHN W. GARDEN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for St. Croix County:
EDWARD F. VLACK III, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Barbara and John Garden (collectively “the Gardens”) appeal a summary judgment dismissing their counterclaims in a foreclosure action. We affirm.

¶2 On August 7, 2007, Barbara Garden obtained a \$403,500 loan from National City Mortgage, a division of National City Bank. PNC Bank is the successor by merger to National City Bank.

¶3 In 2009, the United States Secretary of the Treasury implemented the Home Affordable Modification Program (“HAMP”) to help homeowners avoid foreclosure during the sharp decline in the nation’s housing market. The modification process consisted of two phases. If the servicer determined a borrower was eligible for loan modification, it could offer a trial period under a Trial Period Plan (“TPP”) that allowed a homeowner to make reduced payments for a specified term. After the trial period, if the borrower complied with all the terms of the TPP, including making all payments and providing all required documentation, and if the borrower’s representations remained true and correct, the servicer had to offer a permanent modification.

¶4 The Gardens made no payments on the loan from July through October 2009. On November 1, 2009, the Gardens sent PNC a signed TPP document, allowing the Gardens to make temporary reduced monthly payments that would be credited to the amounts owed under the loan. The Gardens made partial payments from November 2009 through July 2010, and then made no payments from August 2010 through October 2010.

¶5 On July 26, 2010, the Gardens were notified the loan would not be modified under HAMP because of their failure to provide all required documentation. PNC offered the Gardens a non-HAMP loan modification that incorporated the delinquency into a new monthly payment. The offer was rejected by the Gardens.

¶6 PNC then commenced a foreclosure action. The Gardens filed counterclaims, alleging breach of contract, breach of the duty of good faith and fair dealing, and promissory estoppel based upon the TPP. The circuit court granted PNC’s summary judgment motion dismissing the counterclaims. The Gardens now appeal.

¶7 We review the grant of summary judgment using the same methodology as the circuit court. *See City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). The controlling principle of the well-known methodology is that “summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*; *see also* WIS. STAT. § 802.08(2).¹

¶8 The Gardens argue the TPP was an enforceable contract that required a permanent loan modification. However, the circuit court correctly observed the Gardens failed to provide evidence that they complied with all the terms of the TPP. As the circuit court noted, the TPP contained plain and unambiguous language providing “‘the [TPP] is not a modification of the [Loan]’ and that the Loan ‘will not be modified unless and until (i) [Borrowers] meet all qualifications required for modification, (ii) [Borrowers] receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed.’”

¶9 Here, it is undisputed the Gardens never received a TPP signed by PNC or a loan modification agreement. Moreover, the Gardens did not fully

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

comply with their obligations under the TPP, as they failed to provide all the requested financial documents.² The lack of evidence that the Gardens complied with all the terms of the TPP is fatal to their breach of contract claim.

¶10 Contrary to their perception, the Gardens' failure is not ameliorated by the Seventh Circuit decision in *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012). That case was at the pleading stage under FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6). The court was therefore required to assume the truth of the allegations in the complaint, including allegations that Wigod had made all payments and provided all required financial information, thus satisfying her obligations under the TPP. *See Wigod*, 673 F.3d at 555, 559 n.3. Conversely, the present case was before the court on a motion for summary judgment, and the Gardens could not rest upon the mere allegations or denials of the pleadings. *See* WIS. STAT. § 802.08(3). Here, the Gardens failed to present evidence raising a genuine issue of material fact as to their compliance with all TPP conditions.

¶11 The Gardens insist PNC accepted performance under the TPP. They argue:

PNC concedes that it acceptable [sic] the TPP payments made by the Gardens pursuant to the TPP. Thus, the Gardens signed the TPP agreement offered by PNC and returned it to PNC. Then PNC began accepting the payments under the [TPP]. How could a reasonable person believe that an agreement was not reached when they began performing their end of the contract[,] i.e.[,] making

² In their brief to this court, PNC points to specific financial documents that PNC requested. PNC also provides record citations that purportedly show the Gardens failed to fully comply with those requests. The Gardens do not specifically reply to these representations other than in conclusory fashion insisting that they met the requirements of the TPP. We deem the issue conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

payments and providing documentation, and the other party accepts their performance?

As mentioned, the language of the TPP itself conditioned approval of a loan modification on PNC's determination that the Gardens complied with all requisite conditions. PNC acknowledges the Gardens provided some documentation. However, the Gardens failed to provide evidence that they fully complied with the TPP conditions. Therefore, the trial period was never successfully completed.

¶12 The Gardens also argue there is a material issue of fact as to whether PNC breached a duty of good faith. However, the Gardens failed to provide evidence of bad faith in the circuit court. Following the failure of the Gardens to fulfill their responsibilities, PNC notified the Gardens the HAMP modification request was denied due to their failure to provide all requested documents. PNC nevertheless attempted to work out a non-HAMP modification with the Gardens, but the parties were not successful. As the circuit court properly emphasized, “[w]hile it may be good business practice to work with a consumer who has fallen behind on their payments, a lender is not required to do so.”

¶13 Finally, the Gardens contend they relied to their detriment on “PNC Bank’s promises under the TPP agreement.” However, as the circuit court properly found, “[t]he promissory estoppel claim fails as a matter of law ... as insufficient evidence was presented ... that the Gardens detrimentally relied upon any promises or overtures made by PNC.” Furthermore, the TPP expressly states that it “is not a modification of the [Loan]” Quite simply, PNC had no obligation to offer the Gardens a permanent loan modification.

By the Court.—Judgment affirmed.

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

