

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 29, 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. 2013AP955**

**Cir. Ct. No. 2010CV424**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**NEKOOSA PORT EDWARDS STATE BANK,**

**PLAINTIFF-RESPONDENT,**

**V.**

**VERONIKA MCCARTHY A/K/A VERONICA MCCARTHY,**

**DEFENDANT-APPELLANT,**

**ESTATE OF TIMOTHY D. MCCARTHY, M&I BANK OF MADISON,  
ST. JOSEPH'S HOSPITAL, CAPITAL ONE BANK (USA) NA  
AND DISCOVER BANK,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Adams County:  
W. ANDREW VOIGT, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Veronika McCarthy,<sup>1</sup> pro se, appeals a circuit court order that dismissed her counterclaims against Nekoosa Port Edwards State Bank in this foreclosure action. Veronika contends that: (1) the circuit court erred by resolving competing summary judgment motions without holding a hearing; and (2) Veronika, rather than the Bank, is entitled to summary judgment on Veronika's counterclaims. We reject these contentions, and affirm.

### *Background*

¶2 The Bank initiated this foreclosure action against Veronika in November 2010. Veronika answered the complaint, raising affirmative defenses and asserting counterclaims against the Bank. The circuit court granted foreclosure to the Bank on summary judgment. By permissive appeal, we affirmed the judgment of foreclosure, and remanded to the circuit court to address Veronika's counterclaims. *See Nekoosa Port Edwards State Bank v. McCarthy*, No. 2011AP668, unpublished slip op. (WI App March 1, 2012).

¶3 After remand, both Veronika and the Bank moved for summary judgment. The circuit court denied summary judgment to Veronika and granted summary judgment to the Bank, dismissing all of Veronika's counterclaims. Veronika appeals.

### *Standard of Review*

¶4 We review a circuit court's decision on summary judgment do novo, applying the same methodology as the circuit court. *Green Spring Farms v.*

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<sup>1</sup> Because this case involves multiple individuals with the same last name, we refer to those individuals by their first names.

*Kersten*, 136 Wis. 2d 304, 314–15, 401 N.W.2d 816 (1987). Summary judgment is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).<sup>2</sup>

### *Discussion*

¶5 Veronika argues first that the circuit court erred by resolving the summary judgment motions without holding a hearing. She argues that WIS. STAT. § 802.08(2) contemplates a summary judgment hearing. She also cites WIS. STAT. § 801.15(4) for the proposition that “[a]ll written motions shall be heard on notice unless a statute or rule permits the motion to be heard *ex parte*.” Veronika contends that the circuit court did not follow proper summary judgment procedure when it issued its decision without holding a summary judgment hearing. We disagree.

¶6 We conclude that, assuming without deciding that Veronika has identified a right to a summary judgment hearing, the record plainly establishes that Veronika waived that right. The circuit court set the schedule for the parties to file dispositive motions during a hearing on August 31, 2012. At the August 31 hearing, the following exchange occurred:

THE COURT: Ms. McCarthy, do you have any request to have oral argument in addition to what you’re submitting in writing?

MS. MCCARTHY: No, not right now. I think it can be all in writing.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

....

[COUNSEL FOR THE BANK]: Will the court, after [briefing], then, inform the parties of a date for its ruling?

THE COURT: Either that, or I will issue a written decision. One or the other.

¶7 Veronika concedes that she never requested a summary judgment hearing. She argues, however, that the circuit court was required to schedule a hearing even if the parties did not request one because WIS. STAT. § 802.08(2) contemplates a hearing on a summary judgment motion.

¶8 Even assuming a circuit court is required to schedule a summary judgment hearing in the absence of a request for a hearing, that is simply not what occurred here. Veronika did not fail to request a hearing; she affirmatively stated that she did not want one, and informed the court her arguments could be made entirely in writing. Additionally, the court stated that it intended to issue either an oral or written decision, and Veronika did not object to that procedure. Because Veronika agreed that the summary judgment motions could be resolved without a hearing, she cannot now complain that the circuit court erred by failing to hold a hearing. *See Atkinson v. Mentzel*, 211 Wis. 2d 628, 642–43, 566 N.W.2d 158 (Ct. App. 1997) (we do not review invited error).

¶9 Next, Veronika argues that the circuit court erred by granting summary judgment to the Bank rather than to Veronika on Veronika’s counterclaims. Veronika contends that she was entitled to summary judgment for her counterclaims for damages based on: (1) a Bank notary falsely notarizing an Affidavit of Support that Veronika used for immigration purposes; (2) the Bank allowing Veronika’s sister-in-law, Phyllis McCarthy, to withdraw funds from an account; and (3) the Bank’s refusal to modify Veronika’s mortgage prior to

initiating foreclosure proceedings. We will address, in turn, Veronika's arguments as to each of her counterclaims.

*Counterclaim 1: Negligence by a Bank Notary Public*

¶10 Veronika contends that the summary judgment materials establish that a Bank employee falsely notarized an Affidavit of Support that Veronika filed in conjunction with her immigration to the United States, preventing Veronika from enforcing the Affidavit of Support against her sponsor. Our review of the summary judgment materials establishes that the Bank was properly granted summary judgment on this counterclaim.

¶11 The summary judgment material establishes the following undisputed facts. A Bank employee notarized an affidavit of support, signed by Phyllis McCarthy, that Veronika submitted in connection with her immigration to the United States. Veronika sued Phyllis for financial support under the contract. After Veronika obtained a summary judgment against Phyllis, Phyllis moved to vacate the judgment. Phyllis filed an affidavit stating that her counsel had been ineffective by failing to discover or assert Phyllis' viable defenses to enforcement of the contract. Phyllis averred that she signed the Affidavit of Support under pressure by Veronika and Timothy McCarthy, who was Veronika's husband and Phyllis' brother; that Timothy told Phyllis that she would not be required to do anything for Veronika and that the Affidavit of Support would only be in force for a few months; that Phyllis was never made aware of the conditions or purpose of the Affidavit of Support; and that Phyllis signed the document at home, without a notary. The circuit court vacated the judgment.

¶12 Veronika asserts that, on these facts, the Bank is liable for the actions of its notary in notarizing the Affidavit of Support without Phyllis being

present. So far as we can tell, Veronika is arguing that if the notary had required Phyllis to be present when the affidavit of support was notarized, Veronika would have been able to enforce the Affidavit of Support against Phyllis. However, there are no facts in the record to support an inference that Phyllis would have signed the Affidavit of Support before a notary public. Indeed, the only reasonable inference from the facts in the record is that Phyllis would not have done so. Phyllis' affidavit asserts that Phyllis signed the Affidavit of Support between 10:00 and 11:00 at night, at her home, and that she only signed the Affidavit of Support because she felt pressured by Timothy and Veronika and she did not understand what she was signing. Because the undisputed facts establish that any wrongful conduct by the Bank in notarizing the Affidavit of Support outside Phyllis' presence did not prevent Veronika from enforcing the contract against Phyllis, summary judgment was properly granted to the Bank on this counterclaim.

*Counterclaim 2: Payment of Funds from a Joint Bank Account*

¶13 Next, Veronika contends that she is entitled to summary judgment on her counterclaim against the Bank for allowing Phyllis to withdraw funds from Timothy and Phyllis' joint account following Timothy's death. We conclude that the circuit court properly granted summary judgment to the Bank on this claim.

¶14 Veronika claimed damages based on the Bank allowing Phyllis to withdraw funds from an account that held Timothy's disability benefits. Veronika asserted the Bank acted wrongfully by allowing Phyllis to withdraw the funds and close the account following Timothy's death and prior to the Bank receiving a death certificate.

¶15 The summary judgment materials establish that the account was a joint account with right of survivorship, held by Timothy and Phyllis. Veronika argues that she, rather than Phyllis, had a right to the funds in the account. However, Veronika does not develop an argument as to why the Bank would be liable to Veronika for Phyllis withdrawing funds out of Phyllis' own joint account with Timothy. *See* WIS. STAT. §§ 705.01(4) (defining joint accounts); 705.04(1) (explaining the right to survivorship of a joint account); 705.06(2) (explaining that payment of funds to an owner of a joint account discharges the financial institution from claims for the amounts withdrawn). As a matter of law, the Bank was entitled to summary judgment on this counterclaim.

*Counterclaim 3: Breach of Duty of Good Faith/Improper Conduct*

¶16 Finally, Veronika argues that she is entitled to summary judgment on her counterclaim for breach of the duty of good faith and improper conduct by the Bank in failing to modify her mortgage. We conclude that the circuit court properly granted summary judgment to the Bank on this counterclaim as well.

¶17 Veronika claimed that the Bank refused to engage in good faith negotiations and acted improperly by refusing Veronika's request for a mortgage modification. In support of her motion for summary judgment, Veronika provided correspondence between Veronika and the Bank in which Veronika acknowledged that her real estate taxes and mortgage payments were delinquent, and requested a loan modification; and the Bank offered Veronika a temporary reduction in the interest on her loan if she paid the amount of interest past due. The following month, the Bank sent Veronika a notice of right to cure default, followed by a final notice before this foreclosure action was initiated.

¶18 Veronika complains that the Bank should have offered to modify her loan before initiating foreclosure proceedings, but she has not asserted that the Bank was required to modify Veronika’s loan or that the Bank violated any terms of the mortgage contract. *See M & I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521 (explaining that a party does not breach its obligation of good faith by exercising a right that is specifically authorized under the contract). Rather, Veronika argues only that the Bank should have modified Veronika’s mortgage, and that its failure to do so violated its duty of good faith and constituted “improper, fraudulent or dishonest dealing” under WIS. STAT. § 224.77(1)(m). Because Veronika has not identified any action by the Bank that was in violation of the mortgage contract or otherwise improper, the Bank was entitled to summary judgment on this claim.

¶19 In sum, we conclude that Veronika affirmatively waived any right she had to a summary judgment hearing, and that the summary judgment materials establish that the Bank is entitled to judgment as a matter of law on Veronika’s counterclaims. To the extent Veronika raises other arguments not addressed above, we deem those arguments insufficiently developed to warrant a response. *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992). Accordingly, we affirm.

*By the Court.*—Order affirmed.

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



