

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2015

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. 2013AP2770

Cir. Ct. No. 2012CV398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARK JOHNSON CONSTRUCTION, INC.,

PLAINTIFF-RESPONDENT,

v.

GAYLE M. GENERAL,

DEFENDANT-APPELLANT,

DOUGLAS COUNTY, WISCONSIN,

DEFENDANT.

APPEAL from orders of the circuit court for Douglas County:
KELLY J. THIMM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gayle General appeals two orders: (1) an October 29, 2013 order confirming a judgment of strict foreclosure in favor of

Mark Johnson Construction, Inc. (Johnson) and terminating the redemption period; and (2) a December 3, 2013 writ of assistance authorizing the sheriff to remove General from the premises.¹ General failed to file any affidavits opposing Johnson's summary judgment motion, and she conceded at the motion hearing that she breached the land contract at issue. We affirm the orders.

BACKGROUND²

¶2 General owned real property in Douglas County. In April 2011, Johnson submitted a proposal to rebuild General's house located on that property after a fire destroyed the house. The estimated cost of the project was \$156,400, payable in three equal installments, with the last due at the end of construction.³ Although not material to our resolution of this appeal, we note the parties dispute how much was actually paid toward the contract. Johnson asserted that, as of September 27, 2011, it received \$95,000 toward the construction, while General asserted she paid more than \$114,000 by that date.

¹ Mark Johnson is the president of Johnson Construction, Inc., and we will use his first name when referring to him as an individual.

² General improperly cites only to her appendix; the facts section of her brief does not include citations to the record. Moreover, in many instances in which facts are stated in her briefs, General fails to provide any citations, even to her appendix. These are violations of the Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.19(1)(d) (requiring "appropriate references to the record"); *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis.2d 245, 733 N.W.2d 322 (failure to include record citations is a violation of 809.19(1)(d)). We admonish counsel that future violations of the Rules of Appellate Procedure may result in sanctions that include dismissal of the appeal, summary reversal, striking of the brief, imposition of a penalty or costs, or other action this court deems appropriate. *See* WIS. STAT. RULE 809.83(2).

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ A January 22, 2013 document separately identifying all building expenses indicated the total construction cost was \$171,850.

¶3 The parties disagree over what, precisely, happened after General accepted Johnson’s proposal, although the dispute is, again, immaterial to our decision. Johnson asserts General ran out of money and could not pay the third draw required under the construction contract, even though, by Johnson’s own admission, the house had not been completed. Mark Johnson told General she would have to get a loan, which General could not obtain because she had bad credit. Mark then approached his bank, which told him he could receive a loan if the property was in his business’s name. General asserts that, in November 2011, Mark told her “the only way that [she] would ever get to go back home would be if [she] would go to Pioneer Title and sign paperwork that would allow him to take out a loan on my home.”⁴ General stated she ultimately signed several documents, but was unaware of their contents.

¶4 There is no dispute that General did ultimately convey title to her property to Johnson. Specifically, on November 22, 2011, General signed an estoppel affidavit acknowledging her default on the construction contract and affirming that Johnson had a valid claim against her. General simultaneously executed and delivered a deed in lieu of foreclosure assigning title to Johnson. General averred that the deed “is intended to be and is an absolute conveyance of title ... and was not and is not now intended as a mortgage or security of any kind and that possession of the Property has been surrendered to the grantee.” General also represented the conveyance was not “made under duress or as a result of

⁴ Mark Johnson claimed during an evidentiary hearing that his bank and General’s attorney drafted the documents, and that he “didn’t have nothing to do with it.” Mark also asserted he never pressured General to sign the documents.

undue influence” With the property in hand, Johnson took out a \$70,000 loan to complete the construction.

¶5 The parties then executed the land contract at issue in this appeal. General agreed to repurchase the property for \$70,000, payable in monthly installments of \$489.45 terminating on December 5, 2013. Prepayment was allowed, but would “not delay the due dates or change the amount of the remaining payments until the unpaid balance of principal and interest is paid in full.” Further, General was responsible for paying prior to delinquency all taxes and assessments during the term of the land contract.

¶6 Johnson filed the present lawsuit in November 2012.⁵ Johnson alleged that the 2011 real estate taxes were delinquent in the amount of \$1,910.12, and that General failed to make monthly payments after May 5, 2012. Johnson requested payment of the remaining amount due under the land contract or, in the alternative, strict foreclosure. General, then represented by counsel, answered and raised numerous defenses, and also asserted counterclaims for breach of contract, negligence and breach of warranty. General later requested that her counsel withdraw due to her inability to pay. General’s request was granted and she proceeded pro se.

¶7 Johnson filed a motion for summary judgment on its claim for strict foreclosure based on the land contract. The motion was supported by an affidavit from Mark Johnson, who averred that General failed to pay the 2011 and 2012 property taxes and that she did not make scheduled monthly payments. General

⁵ Douglas County was also named as a defendant by virtue of a judgment lien against the property in the amount of \$5,772.95. The County is not a party to this appeal.

did not file any affidavits or other documents in opposition to Johnson's motion, but she did appear at an August 26, 2013 hearing on the motion.

¶8 At the hearing, General largely advanced arguments based on her counterclaims. The court asked if General had filed an affidavit containing her evidentiary assertions. General responded that she was unaware an affidavit from her was required, and she asked the court to postpone the hearing so she could prepare one. The court declined to order a postponement, citing fairness to opposing counsel and the rapidly approaching trial date. General then admitted she refused to make required monthly payments and did not pay the property taxes.

¶9 The circuit court concluded that without any opposing evidentiary submissions, and given General's admissions, it had no choice but to grant Johnson summary judgment on its strict foreclosure claim. However, the court noted Johnson had not sought summary judgment on General's counterclaims, which could move forward. At Johnson's behest, the court set a sixty-day redemption period to allow the parties time to resolve any remaining disputes before the property was sold.⁶ General agreed the deadline was reasonable.

¶10 At the conclusion of the hearing, and in General's presence, the court stated it would inquire as to the parties' progress at the pretrial conference on September 16, 2013. General failed to appear at the September 16 hearing, and the court entered an order dismissing General's counterclaims without prejudice

⁶ The redemption period set by the circuit court in this case was much longer than the minimum of seven working days required by WIS. STAT. § 846.30.

for nonprosecution. In early October, Johnson completed work on the house such that an occupancy permit could be issued.

¶11 On October 29, 2013, Johnson’s counsel notified the court by affidavit that General had not redeemed the property. The court signed an order the same day terminating the redemption period and confirming the foreclosure. Johnson petitioned for a writ of assistance approximately one month later, on the ground that General refused to vacate the premises. The court signed an order granting the writ of assistance following a hearing on December 3; twelve days later General vacated the property voluntarily, taking some house fixtures with her. General appeals.

DISCUSSION

¶12 “The purpose of summary judgment is to avoid trial when there are no issues to be tried.” *Ixonia State Bank v. Schuelke*, 171 Wis. 2d 89, 94, 491 N.W.2d 772 (Ct. App. 1992). A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). We review a grant of summary judgment de novo. *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425.

¶13 We need not engage in a lengthy recitation of the well-known methodology governing a motion for summary judgment. It is sufficient to note that, because General failed to submit any evidence opposing General’s motion, the evidentiary facts before the court undisputedly established General’s breach of the land contract, entitling Johnson to strict foreclosure. “When a land contract vendee defaults under the terms of the contract, the vendor can select from a

number of remedies[,]” including strict foreclosure. *Republic Bank of Chicago v. Lichosyt*, 2007 WI App 150, ¶18, 303 Wis. 2d 474, 736 N.W.2d 153. “Strict foreclosure is a long-standing common law equitable remedy[,]” and the one most frequently used by land contract vendors. *Id.*, ¶19. The vendor “foregoes his or her right to collect the amount remaining on the debt and instead recovers the property.” *Id.* (quoting *Steiner v. Wisconsin Am. Mut. Ins. Co.*, 2005 WI 72, ¶26, 281 Wis. 2d 395, 697 N.W.2d 452).

¶14 General asserts Johnson’s summary judgment motion was legally insufficient, observing it was “rather *thin*” and was supported by only Mark Johnson’s affidavit. These observations alone, however, are insufficient to establish that the motion should have been denied. General cites no authority requiring multiple or lengthy affidavits in support of a motion for summary judgment. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”).

¶15 General also asserts the summary judgment motion was insufficient because it “failed to address, let alone to negative, any of the affirmative defenses that General had pled.” General cites *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751, and *Kraemer Bros. v. U.S. Fire Insurance Co.*, 89 Wis. 2d 555, 278 N.W.2d 857 (1979), for the proposition that a plaintiff movant must present evidence countering the defendant’s affirmative defenses. To the contrary, these cases merely establish that “[i]f the *defendant* is the moving party[,], the defendant must establish a defense that defeats the plaintiff’s cause of action.” *See Lambrecht*, 241 Wis. 2d 804, ¶22 (emphasis added); *Kraemer Bros.*, 89 Wis. 2d at 566-67.

¶16 Here, Johnson established a prima facie case for summary judgment. Its motion was supported by an affidavit that supplied a factual basis sufficient to establish the elements of its claim if the case were to go to trial.⁷ When a motion for summary judgment is made and properly supported by affidavit, “the adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response ... must set forth specific facts showing that there is a genuine issue for trial.” WIS. STAT. § 802.08(3). General failed to file any response to the motion. The evidentiary matters in Mark Johnson’s affidavit were therefore properly deemed uncontroverted, *see Jones v. Perkins*, 75 Wis. 2d 18, 24, 248 N.W.2d 468 (1977), and summary judgment was properly granted, *see* § 802.08(3) (“If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.”).

¶17 General also challenges the circuit court’s refusal to allow her an extension of time to file an affidavit. An adverse party is required to serve opposing affidavits at least five days before the time fixed for the hearing. WIS. STAT. § 802.08(2). “[W]hether to refuse a motion for summary judgment in order to give an opposing party additional time to obtain essential facts to defeat summary judgment is a highly discretionary ruling.” *Kinnick v. Schierl, Inc.*, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (Ct. App. 1995). We will not find an erroneous exercise of discretion if there was a reasonable basis for the court’s determination. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2006 WI App

⁷ General also asserts, without citation to authority, that Mark Johnson’s affidavit was insufficient because it was “simply cut-and-paste” from portions of the pleadings. This argument will not be considered. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“Arguments unsupported by references to legal authority will not be considered.”).

248, ¶151, 297 Wis. 2d 70, 727 N.W.2d 857. Here, the circuit court cited fairness and scheduling concerns. These were reasonable reasons for rejecting General’s request for additional time. Moreover, at the hearing where General first requested additional time to file an affidavit, she admitted the facts essential to granting the foreclosure—namely, her default on the land contract.

¶18 General, noting that strict foreclosure is an equitable remedy, next asserts the circuit court erred in balancing the equities. She argues the equities overwhelmingly favored her position. General cites the following to support her position: she paid more than the contract price for the house; Johnson took too long to build the house; the transactions amounted to construction financing, for which strict foreclosure is not an available remedy; although General failed to make monthly payments, she did make one lump sum payment of at least \$23,000 toward the land contract, which Johnson could have applied to her monthly payments; and the court’s grant of summary judgment was essentially a default judgment, which are not favored in the law.

¶19 A circuit court’s decision to award an equitable remedy is reviewed for an erroneous exercise of discretion. *See Mulder v. Mittelstadt*, 120 Wis. 2d 103, 115, 352 N.W.2d 233 (Ct. App. 1984). “An appeal to equity requires a weighing of the factors or equities that affect the judgment” *Id.* Whatever merit General’s arguments may have had, General failed to provide the circuit court with any evidentiary support or legal argument for them. Further, Johnson was not granted a default judgment and, to the extent General alleges violations of the construction contract, her counterclaims were dismissed for nonprosecution.

¶20 We cannot conclude the circuit court erred when it ordered strict foreclosure under the circumstances of this case. General conceded at the

summary judgment hearing she had not made required monthly payments or paid property taxes. Although General made a lump-sum payment toward the land contract, she does not assert the land contract had been paid off so as to relieve her of any further obligation to pay. The contract specifically stated that prepayment would not delay due dates or change the amount of any remaining payments.

¶21 Nor did the court err when it granted Johnson’s petition for a writ of assistance. A writ of assistance is a “writ to enforce a court’s decree transferring real property, the title of which has been previously adjudicated.” BLACK’S LAW DICTIONARY 1846 (10th ed. 2014). “When any order or judgment is for the delivery of possession of property real or personal the party in whose favor it is entered is entitled to a writ of ... assistance upon application to the clerk.” WIS. STAT. § 815.11. The court’s October 29, 2013 order confirmed the strict foreclosure and terminated any rights General had in the property. The court therefore properly granted Johnson’s petition for a writ of assistance.

¶22 General separately argues it was error to terminate the redemption period and issue a writ of assistance when Johnson’s evidence showed that it received more money than it was actually owed under the construction contract. This argument is based on mistaken accounting. General incorrectly attributes the loan proceeds Johnson obtained from the bank as a “payment” from her. General was not the recipient of the loan, and Johnson was responsible for repaying it.

¶23 The remainder of General’s arguments are best characterized as arguments in support of her counterclaims, which were dismissed without prejudice. General acknowledges her counterclaims were dismissed and are not at issue in this appeal. General remains free to file a new lawsuit, provided her claims are still procedurally viable.

By the Court.—Orders affirmed.

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

