COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2016

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. 2015AP1015 **Cir. Ct. No. 2012CV900**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

GREEN TREE SERVICING, LLC P/K/A COUNTRYWIDE HOME LOANS SERVICING, LP,

PLAINTIFF,

V.

MARCIA M. LORANG AND JAMES A. LORANG,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

JOHN DOE LORANG, JANE DOE LORANG AND ANCHORBANK FSB,

DEFENDANTS,

V.

BANK OF AMERICA, N.A.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Marcia and James Lorang appeal an order granting summary judgment dismissing their third party claims against Bank of America, N.A.[1] The Lorangs claim breach of contract, promissory and equitable estoppel, and violation of WIS. STAT. § 224.77 (2013-14).[2] The Bank argues that it is entitled to summary judgment on all claims. For the reasons set forth below, we agree and affirm.

BACKGROUND

¶2 The following facts are not contested for purposes of summary judgment. The Lorangs obtained a note and mortgage in August 2004. During the pertinent time periods, that loan was serviced by Bank of America. The Lorangs failed to make their monthly payment in September 2009. The Bank sent them a notice of intent to accelerate the loan, which indicated that they must pay $5,413.54 by November 18, 2009, in order to cure the default. The Bank sent a separate letter soliciting the Lorangs' interest in the "Home Affordable

[1] For ease of discussion, we refer to Marcia and James Lorang collectively as the Lorangs and individually as Marcia and James.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Modification Program" (HAMP), a loan modification program, which could lower their monthly payments and help them avoid foreclosure.[3]

¶3 On November 24, 2009, the Lorangs called the Bank regarding their eligibility for and potential enrollment in the HAMP program. The Lorangs made a $2,640.75 payment by phone that day, but did not see the amount of the phone payment withdrawn from their account. The Lorangs made a separate internet payment on December 2, 2009, for that same amount. The earlier phone payment was returned for insufficient funds.

¶4 In December 2009, the Bank sent the Lorangs a second notice of intent to accelerate the loan. Between December 2009 and February 2010, the Lorangs spoke to various Bank representatives regarding their application for and enrollment in the HAMP program. On January 15, 2010, a Bank representative told the Lorangs over the phone that "everything has been approved" and that they should "start making payments in the amount of $1,859.99, and after making payments for 60-90 days, they would receive documentation on the [HAMP] program." The Lorangs made one payment totaling $1,834.99 on February 9, 2010. The Lorangs did not make any additional payment that was accepted by the Bank until May 2011.

¶5 In December 2012, the Bank filed this foreclosure action against the Lorangs. The Lorangs made several counterclaims, including three pertinent to this appeal: breach of contract, promissory and equitable estoppel, and violation

[3] The record sometimes refers to the HAMP program as the MHA (Making Homes Affordable) program. We understand both terms to refer to the same program. In this opinion, we refer to it as the HAMP program.

of WIS. STAT. § 224.77, which addresses prohibited acts and practices by mortgage bankers.[4]

¶6 In August 2013, the Bank assigned its interest in the Lorangs' mortgage to Green Tree Servicing LLC. Thereafter, Green Tree substituted as the plaintiff in this case and the Bank became a third party defendant with respect to the Lorangs' counterclaims.

¶7 In December 2014, the Bank moved for summary judgment. The circuit court granted summary judgment, dismissing all of the Lorangs' claims against the Bank.

DISCUSSION

¶8 The Lorangs claim breach of contract, promissory and equitable estoppel, and violation of WIS. STAT. § 224.77. The Bank argues that it is entitled to summary judgment dismissing all of the Lorangs' claims. We address the parties' arguments in the sections below and conclude that the Bank is entitled to summary judgment dismissing all of the Lorangs' claims.

A. Standard of Review

¶9 Our review of a circuit court's grant of summary judgment is de novo. ***Chapman v. B.C. Ziegler and Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. We review a motion for summary judgment using the same methodology as the circuit court. ***United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.***, 2013 WI 72, ¶12, 349 Wis. 2d 587, 836 N.W.2d 807.

[4] Other counterclaims were withdrawn or not pursued on appeal.

¶10 Summary judgment analysis is a two-step process. ***Chapman***, 351 Wis. 2d 123, ¶2. "The first step focuses on the complaint's claim—to see whether it asserts 'a proper claim for relief' and whether the answer disputes the facts that purport to underlie that claim." ***Id.*** (quoted source omitted). "If the pleadings join issue on a proper claim for relief, the second step is whether there are any genuine issues of disputed facts that are material to the complaint's claim." ***Id.*** "Thus, a party is entitled to summary judgment if the undisputed facts require it, even though the parties may dispute some facts in the case that have no bearing on the proper summary-judgment analysis." ***Id.*** "Finally, we search the [r]ecord to see if the evidentiary material that the parties set out in support or in opposition to summary judgment supports reasonable inferences that require the grant or denial of summary judgment, giving every reasonable inference to the party opposing summary judgment." ***Id.***

¶11 Consistent with these well-established principles, we review the Bank's motion for summary judgment as the circuit court would, drawing all reasonable inferences from the evidence in favor of the Lorangs as the nonmoving party. *See* ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781 (we draw all reasonable inferences from the summary judgment materials in the light most favorable to the nonmoving party).

B. Breach of Contract

¶12 The Lorangs' breach of contract claim has evolved throughout the course of this case. In their counterclaim, the Lorangs claimed that the Bank breached its contractual duty of good faith by failing to accept payments from them, and failing to *evaluate* them for a loan modification despite representing that it would. Then, in their circuit court brief opposing summary judgment, the

Lorangs changed their position and claimed that the Bank "entered into a modification agreement with the Lorangs, or promised to do so" and breached that contract by "failing to honor the modification," although the Lorangs did not specify how. Now, on appeal, the Lorangs repeat their position from the time of summary judgment briefing—that the Bank "agreed to modify the loan" and that the Bank breached that contract—and clarify that the Bank did so when it "failed to properly process the phone payment made in November 2009 by James Lorang" and when it "sent a [second] notice of intent to accelerate the loan dated December 24, 2009."

¶13 "In evaluating a breach of contract claim, we must determine whether a valid contract exists. If a valid contract exists, we then must determine whether a party has violated its terms, and whether any such violation is material such that it has resulted in damages." ***Riegleman v. Krieg***, 2004 WI App 85, ¶20, 271 Wis. 2d 798, 679 N.W.2d 857 (citation omitted). "In contract law, a material breach of a contract releases the non-breaching party from performance of the contract." ***State v. Deilke***, 2004 WI 104, ¶13 n.9, 274 Wis. 2d 595, 682 N.W.2d 945. As we proceed to explain, both versions of the Lorangs' breach of contract claim fail, because they fail to state a claim either based on the allegations of their counterclaim or based on the undisputed facts on summary judgment.[5]

1. Breach for Failure to Accept Payments and Failure to Evaluate for Loan Modification

¶14 In their counterclaim, the Lorangs allege that the contract at issue is the original loan contract, and claim that the Bank breached that contract when it

[5] The Bank also argues that the breach of contract claim is barred by the statute of frauds. Because we affirm on other grounds, we do not address this argument.

"fail[ed] [to] accept payments from [them]" and "fail[ed] to *evaluate* [them] for a modification despite representing that [it] would." (Emphasis added.) Assuming without deciding that the original loan contract, or some other contract, imposed upon the Bank a duty to accept payments from the Lorangs and a duty to evaluate them for a loan modification, the Lorangs' claim nevertheless fails because they do not allege any facts that the Bank breached either duty.

¶15 We first address the Lorangs' claim that the Bank "fail[ed]" to accept payments in breach of their contract. We discern two failed payment attempts alleged by the Lorangs: November 24, 2009, by phone, and February 4, 2010, by internet.

¶16 It is not contested that the November 24, 2009 phone payment was returned due to insufficient funds after the Lorangs made a separate internet payment on December 2, 2009. Thus, the Bank did not, ultimately, "fail to accept" the November payment in breach of the original contract.

¶17 The Lorangs attempted to make a second payment on February 4, 2010, by internet, but according to the Lorangs, the "online program would not permit this payment to be submitted and accepted by the [Bank]." However, the Lorangs do not allege that the Bank had a duty to accept payments through only the internet. Indeed, the Lorangs stated that they were able to make a payment by

phone on February 9, 2010. Thus, the Bank did not "fail to accept" this second payment in breach of its contract with the Lorangs.[6]

¶18 We next address the Lorangs' claim in their counterclaim that the Bank failed to evaluate them for a loan modification. Assuming without deciding that the original contract, or some other contract, imposed upon the Bank a duty to evaluate the Lorangs for a loan modification, the Lorangs' allegations do not support the Lorangs' claim, and therefore they fail to state a claim for breach of contract based on this theory.

¶19 According to the Lorangs' counterclaim, the timeline of events is as follows:

- On November 24, 2009, the Lorangs made their first phone call to the Bank regarding their potential eligibility for the HAMP program; a bank representative "[took] the[ir] application for the [HAMP] program over the phone" and told them that "they were eligible."
- On December 18, 2009, the Lorangs called "to see if their [HAMP] application had been processed and accepted" and were told that "this was a 45[-]day long process."
- On January 6, 2010, the Lorangs called "for an update on the application" and were told that the application has been accepted but not yet processed.
- On January 15, 2010, the Lorangs called again and were told that "everything has been approved" and that they should "start making payments in the amount of $1,859.99, and after making payments

[6] We note that a third payment in March 2010, which was not alleged in the Lorangs' counterclaim but was testified to by James Lorang during his deposition, was made by check mailed to the Bank, but the check was returned because it was not in the form of "certified funds." However, the Lorangs fail to point to any evidence that the Bank had a duty, under any contract, to accept non-certified funds. Moreover, the Lorangs did not thereafter attempt to use any of their previously successful methods of payment (internet in December 2009, phone in February 2010). Thus, there is no evidence that the Bank failed to accept the March 2010 payment in breach of any contract with the Lorangs.

> for 60-90 days, they would receive documentation on the [HAMP] program."

The Lorangs' claim for breach of contract due to a failure to "evaluate" them for modification fails under the first step of the summary judgment methodology, because the Lorangs fail to allege any facts supporting this claim.

2. Breach for Failure to Honor Loan Modification Agreement

¶20 In their circuit court brief opposing the Bank's motion for summary judgment, the Lorangs argued that the Bank breached their contract by failing to "honor" the loan modification agreement. The Lorangs asserted that, under the terms of the loan modification agreement, if they paid $2,640.75 in November 2009, then they would be enrolled in the HAMP program and their monthly payments would be indefinitely reduced to $1,859.99. The Lorangs did not specify what action by the Bank constituted failure to "honor" this loan modification agreement. As stated above, on appeal, the Lorangs clarify their position to be that the Bank breached that agreement when it "failed to properly process the phone payment made in November 2009 by James Lorang" and when it "sent a [second] notice of intent to accelerate the loan dated December 24, 2009." The Bank counters that even if the parties did enter into a loan modification agreement as alleged by the Lorangs, the Bank is entitled to summary judgment because the undisputed evidence shows that it was the Lorangs who failed to perform under the terms of the asserted modification agreement, relieving the Bank of any obligation it could have had to perform. We agree.

¶21 Viewing the evidence submitted on summary judgment in the light most favorable to the Lorangs, we conclude that the Lorangs failed to perform under the asserted modification agreement and, therefore, the Bank is entitled to

summary judgment. James Lorang testified that he spoke to the Bank on January 15, 2010, and was told to "start making payments in the amount of $1,859.99. Thus, by James's own account, the Lorangs were required to, at the very least, make full payments starting in February.

¶22 The Lorangs failed to perform under the asserted loan modification agreement because they failed to make the required February and March payments. As for the February payment, the Lorangs do not dispute that their February 2010 payment totaled $1,834.99, which is less than the $1,859.99 reduced monthly payment under the terms of the asserted loan modification agreement. As for the March payment, the Lorangs attempted to make a payment by mailing the Bank a check, but that check was, according to the Lorangs, returned because it was not in the form of "certified funds." The Lorangs point to no evidence submitted on summary judgment that the Bank had a duty to accept non-certified funds from them. Moreover, upon receiving the returned check, the Lorangs could have made payment using certified funds or any of the methods of payment they had successfully used before, but they did not do so. Thus, the Lorangs' breach of contract claim based on the Bank's failure to "honor" the asserted loan modification agreement fails because it was the Lorangs who failed to perform under that agreement, relieving the Bank of any obligation it might have had under a modification agreement.

¶23 In sum, we conclude that none of the Lorangs' asserted versions of their breach of contract claim are valid and, therefore, the Bank is entitled to summary judgment dismissing the breach of contract claim.

C. Promissory Estoppel and Equitable Estoppel

¶24 The Lorangs also claim that promissory estoppel and equitable estoppel require the Bank to honor the asserted loan modification agreement. The Bank argues that both claims fail because the Lorangs did not perform under the asserted loan modification agreement. We agree with the Bank.

1. Promissory Estoppel

¶25 Promissory estoppel involves three elements:

> (1) Was the promise one which the promisor [the Bank] should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee [the Lorangs]?
>
> (2) Did the promise induce such action or forbearance?
>
> (3) Can injustice be avoided only by enforcement of the promise?

Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). "The purpose of promissory estoppel is to enforce promises where the failure to do so is unjust." ***Skebba v. Kasch***, 2006 WI App 232, ¶8, 297 Wis. 2d 401, 724 N.W.2d 408.

¶26 The Lorangs assert that the Bank "promised that if they paid $2,640, the bank would permanently modify their loan," and that that promise induced them to "scrape[] together that money." Again, assuming without deciding that the Bank promised to permanently modify the Lorangs' loan, and that that promise induced the Lorangs to make the $2,640 payment in November 2009, the Lorangs fail to explain how injustice can be avoided only by enforcement of this promise. Enforcing this promise, and drawing all reasonable inferences in favor of the

Lorangs, would mean that the Lorangs were required to make monthly payments in the reduced amount of $1,859.99 starting in February 2010—after the Lorangs were told by the Bank in January 2010 that "everything has been approved" and that they should start making payments. As explained above, the Lorangs did not make the required payments. The Lorangs fail to explain how injustice can be avoided only by enforcing the promise here.

2. Equitable Estoppel

¶27 Equitable estoppel requires proof of three elements: "(1) an action or an inaction that induces; (2) reliance by another; and (3) to his or her detriment." ***Wendy M. v. Helen E. K.***, 2010 WI App 90, ¶13, 327 Wis. 2d 749, 787 N.W.2d 848. The Lorangs argue that the Bank promised to enroll them in the HAMP program, and that they relied on this promise to their detriment by making the $2,640 payment, only to receive a "new [December 2009] notice of default and intent to accelerate the note."

¶28 However, the Lorangs fail to point to evidence showing that they detrimentally relied upon the Bank's promise to enroll them in the HAMP program. According to the Lorangs, they were in fact enrolled in some version of the HAMP program. Although the Lorangs received a notice of intent to accelerate the loan in December 2009, the Bank did not accelerate the loan at that time. Rather, the Lorangs spoke to the Bank in January 2010 and were told that "everything has been approved" for the HAMP program and that they should start making the reduced monthly payments. However, the Lorangs did not make the required reduced monthly payments and, eventually, the Bank filed this foreclosure action. The Lorangs fail to point to any evidence that shows that they

detrimentally relied upon the Bank's promise to enroll them in the HAMP program, and, therefore, their equitable estoppel claim fails.

D. Violation of WIS. STAT. § 224.77

¶29 The Lorangs contend that the Bank violated the following provisions of WIS. STAT. § 224.77:

> (1) PROHIBITED ACTS AND PRACTICES. No mortgage banker, mortgage loan originator, mortgage broker ... may do any of the following:
>
> ….
>
> (b) Make, in any manner, any materially false or deceptive statement or representation, including engaging in bait and switch advertising or falsely representing residential mortgage loan rates, points, or other financing terms or conditions.
>
> ….
>
> (k) Violate any provision of this subchapter, ch. 138, or any federal or state statute, rule, or regulation that relates to practice as a mortgage banker, mortgage loan originator, or mortgage broker.
>
> ….
>
> (m) Engage in conduct, whether of the same or a different character than specified elsewhere in this section, that constitutes improper, fraudulent, or dishonest dealing.

The Lorangs claim that they are entitled to damages under WIS. STAT. § 224.80, which creates a private cause of action for a "person who is aggrieved by an act which is committed by a mortgage banker, mortgage loan originator, or mortgage broker in violation of [WIS. STAT. § 224.77]" to recover actual damages.

¶30 The Bank argues that it is entitled to summary judgment because even if the Bank did violate the regulations, the Lorangs do not have standing to

bring this claim. More specifically, the Bank argues that the Lorangs have not pointed to evidence of injury or damage and, therefore, there is no proof to support a claim that they are an "aggrieved" party under WIS. STAT. § 224.80. We agree.

¶31 Contrary to the Lorangs' broad assertion in their brief on appeal, it is unclear what conduct by the Bank allegedly violated WIS. STAT. § 224.77. The Lorangs' summary judgment brief in the circuit court suggested that it was the repeated assurances from the Bank—"that if [James] just made a payment, or another payment, or another payment, [then the Bank] would definitely finish up the modification"—that constituted a violation of the statute. That contention presumes that there was no loan modification agreement, in direct contravention of the Lorangs' position now on appeal that the parties agreed to a loan modification and that the Bank breached that modification agreement.

¶32 Moreover, even if we assume that the Bank did violate WIS. STAT. § 224.77, the Lorangs fail to point to any facts supporting their claim that they were aggrieved by any such violation. "[A] person is aggrieved pursuant to WIS. STAT. § 224.80(2) only if he or she can show some injury or damage." ***Avudria v. McGlone Mortgage Co., Inc.***, 2011 WI App 95, ¶31, 334 Wis. 2d 480, 802 N.W.2d 524.

¶33 The Lorangs' counterclaim is completely devoid of any factual allegations of injury or damage caused by a violation of WIS. STAT. § 224.77. In their appellate brief, the Lorangs assert that the Bank's violations caused them to make "payments of at least $532 more in their chapter 13 bankruptcy" and caused them to suffer "a ton of stress." However, the Lorangs fail to point to evidence in the record supporting an inference that the alleged violations caused them to pay more in their bankruptcy proceeding, and they similarly fail to cite to any part of

the record containing facts supporting their asserted "ton of stress." While we weigh all inferences from the evidence in favor of the Lorangs as the parties opposing summary judgment, the Lorangs' assertion that they were damaged by the Bank's repeated assurances that the Lorangs would be, or were, enrolled in the HAMP program, has no factual starting point. It is not based on any evidence submitted on summary judgment.

CONCLUSION

¶34 For the reasons set forth above, the Bank is entitled to summary judgment on the claims of breach of contract, promissory and equitable estoppel, and violation of WIS. STAT. § 224.77.

By the Court.—Order affirmed.

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