COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP970 **Cir. Ct. No. 2012CV195**

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

ANCHORBANK, FSB,

PLAINTIFF-RESPONDENT,

V.

FRED R. KLEINHEINZ AND MICHAEL R. KLEINHEINZ,

DEFENDANTS-APPELLANTS,

AGSTAR FINANCIAL SERVICES, FLCA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Rusk County: STEVEN P. ANDERSON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Fred and Michael Kleinheinz appeal a summary judgment of foreclosure granted in favor of AnchorBank, fsb. The Kleinheinzes

argue summary judgment was inappropriate because there are genuine issues of material fact with respect to whether: (1) AnchorBank breached the terms of the parties' contract; (2) AnchorBank breached the implied duty of good faith and fair dealing; (3) AnchorBank converted funds belonging to the Kleinheinzes; and (4) the Kleinheinzes are entitled to punitive damages. We reject these arguments and affirm.

BACKGROUND

¶2 On March 1, 2006, the Kleinheinzes refinanced a commercial mortgage loan from Royal Credit Union with AnchorBank. In connection with the refinancing, the Kleinheinzes signed a commercial loan agreement, a promissory note, and two mortgages. The commercial loan agreement described the loan as a "single advance loan." The promissory note similarly described the loan as "Commercial—Single Advance." The loan documents reflected a "note amount" of $500,000, which the parties refer to as the "commitment amount." The loan had a variable interest rate, with interest-only payments until the maturity date of March 1, 2008. On March 1, 2008, the parties modified the loan, extending the maturity date to March 1, 2010.

¶3 On the date of the refinancing in March 2006, AnchorBank established a Loan-in-Process (LIP) account and disbursed the entire $500,000 commitment amount into that account. According to an affidavit of Timothy Nemec, AnchorBank's first vice president—special assets, a LIP account is an "internal escrow-type account[] established and used by [AnchorBank] to administer commercial loans." Nemec further averred that: (1) the funds in a LIP account are the bank's property; (2) the borrower does not own the funds and is not charged interest on the funds; (3) a borrower may request that the funds in a

LIP account be transferred into an account of his or her choice at any time during the loan term, provided the loan is not in default; (4) once funds are transferred from the LIP account to a source specified by the borrower, the funds become part of the loan's outstanding principal balance and the borrower is charged interest on them; and (5) as of March 1, 2006, the Kleinheinzes had the ability to request that some or all of the $500,000 in the LIP account be transferred for their use.

¶4 The settlement statement prepared in connection with the March 2006 refinancing indicates that, of the $500,000 AnchorBank loaned to the Kleinheinzes, about $398,000 were used to pay off the Royal Credit Union loan and pay taxes, appraisal fees, attorney fees, and other closing costs. Between March 20 and July 10, 2006, the Kleinheinzes requested and received three transfers of funds from the LIP account into their deposit account, totaling $100,000. Following these transfers, $1,708.65 remained in the LIP account. The Kleinheinzes never asked AnchorBank to transfer the remaining amount to them. According to Nemec, AnchorBank would have transferred the remaining money to the Kleinheinzes upon request, provided the loan was not in default. On January 14, 2009, after two-and-one-half years of inactivity, AnchorBank removed the remaining funds and closed the LIP account. Nemec averred that, even after the LIP account was closed, AnchorBank would have transferred the remaining $1,708.65 to the Kleinheinzes, had they requested it.

¶5 The Kleinheinzes' monthly payments on the loan were paid automatically from their deposit account. The payment amount differed from month to month. The Kleinheinzes assert AnchorBank "put in place a system in which the only way … [they] could obtain information as to the amount of their monthly payment obligation was to obtain that information directly from their primary lending officer," Andris Arians. Fred Kleinheinz testified at his

deposition, "The normal method for finding out what our payment was supposed to be every month … was the vice president of commercial loans, [Arians], insisted that he would call us every month with a payment figure." However, the record reflects that, beginning in January 2009, AnchorBank mailed commercial loan account statements to the Kleinheinzes at a Florida address. Each of these statements indicated the amount due on the first day of the next month. The Kleinheinzes assert they never received these statements.

¶6 The February 2009 account statement indicated that $618.15 would be due on the Kleinheinzes' loan on March 1, 2009. As of February 17, 2009, the Kleinheinzes' deposit account had a balance of $132.04. On February 26, 2009, the Kleinheinzes withdrew $132 from the account, leaving a balance of four cents. The account therefore contained insufficient funds to cover the March 2009 loan payment.

¶7 Michael Kleinheinz testified at his deposition that Arians did not contact him to tell him the amount of the March 2009 payment. Michael further testified he attempted to contact Arians in early March to determine the payment amount, but he was informed Arians was unavailable. On March 9, 2009, Arians emailed Fred Kleinheinz, stating, "I just found out that there is not enough $ in your checking account for your loan payment. Please advise ASAP." The Kleinheinzes did not deposit any additional funds in their account after receiving this email. Instead, Michael testified he unsuccessfully attempted to contact Arians three more times during March and April 2009 to find out the payment

amount.[1] On or about March 16, 2009, the Kleinheinzes' loan was transferred to AnchorBank's collections department. The Kleinheinzes subsequently failed to make the loan payment that was due on April 1, 2009. An acceleration notice was then mailed to them at their Florida address on April 17, 2009.

¶8 AnchorBank commenced the instant foreclosure action on October 19, 2012. The Kleinheinzes answered the complaint and alleged as affirmative defenses that AnchorBank had breached the parties' contract and AnchorBank's implied duty of good faith and fair dealing. The Kleinheinzes also asserted counterclaims for breach of contract, breach of the duty of good faith and fair dealing, conversion, and punitive damages. AnchorBank then moved for summary judgment, which the circuit court granted in an oral ruling on December 18, 2014. An Order for Summary Judgment, Judgment of Foreclosure and Judgment was entered on April 2, 2015. The Kleinheinzes now appeal.

DISCUSSION

¶9 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Malzewski v. Rapkin***, 2006 WI App 183, ¶11, 296 Wis. 2d 98, 723 N.W.2d 156. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2] When applying this

[1] The Kleinheinzes assert that, unbeknownst to them, Arians had left AnchorBank sometime in March 2009. However, they provide no record citation in support of this assertion. Arians testified he remained employed by AnchorBank, and continued actively working there, until April 3, 2009.

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

standard, we construe all facts and reasonable inferences in the light most favorable to the nonmoving party. ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523. However, "the 'mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Id.*** (quoting ***Anderson***, 477 U.S. at 248).

I. Breach of contract

¶10 The Kleinheinzes first argue the circuit court erred by concluding their breach of contract counterclaim and affirmative defense failed as a matter of law.[3] A breach of contract claim requires proof of three elements: (1) the existence of an enforceable contract; (2) a breach of that contract; and

[3] AnchorBank contends the Kleinheinzes "do not appeal summary judgment for AnchorBank on their counterclaim for Breach of Contract" but "appeal only as to their affirmative defense for Breach of Contract." AnchorBank makes an identical argument with respect to the Kleinheinzes' counterclaim for breach of the implied duty of good faith and fair dealing. In support of these arguments, AnchorBank notes that, in the introduction to the argument section of their brief-in-chief, the Kleinheinzes expressly refer to their affirmative defenses, but not their counterclaims.

We reject AnchorBank's assertion that the Kleinheinzes are not appealing the dismissal of their counterclaims. The circuit court's decision granted summary judgment to AnchorBank on its foreclosure claim and against the Kleinheinzes on their counterclaims. The Kleinheinzes filed a notice of appeal from that decision, and, as such, they may raise arguments regarding both their affirmative defenses and counterclaims. Moreover, despite the Kleinheinzes' failure to mention the counterclaims expressly in the introduction to the argument section of their brief-in-chief, it is clear when considering the brief in its entirety that the Kleinheinzes intended their arguments regarding breach of contract and breach of the implied duty of good faith and fair dealing to apply to both their counterclaims and affirmative defenses.

(3) damages. *See* ***Brew City Redevelopment Grp., LLC v. Ferchill Grp.***, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582, *aff'd* 2006 WI 128, 297 Wis. 2d 606, 724 N.W.2d 879. Here, the parties agree the loan documents constitute an enforceable contract. However, they dispute whether AnchorBank breached that contract, and whether the Kleinheinzes were damaged by the alleged breach.

¶11 Specifically, the Kleinheinzes contend the loan documents required AnchorBank to pay them the full commitment amount of $500,000 on March 1, 2006, instead of depositing that money in a LIP account for their use upon request. Assuming for argument's sake that AnchorBank breached the parties' contract by failing to remit the full $500,000 to the Kleinheinzes in a single payment, the undisputed facts show that the Kleinheinzes were not damaged by the breach. AnchorBank's decision to place the loan proceeds in a LIP account did not harm the Kleinheinzes because the full commitment amount was available to them upon request. The undisputed evidence shows that the Kleinheinzes could, and did, request transfers of the vast majority of these funds. Further, the Kleinheinzes were not charged interest on the funds in the LIP account. As a result, AnchorBank's use of a LIP account actually saved the Kleinheinzes $3,119.29 in interest over the life of the loan.

¶12 The undisputed evidence also shows the Kleinheinzes were not damaged by AnchorBank's decision to close the LIP account in January 2009. Even after the LIP account was closed, the undisputed evidence is that AnchorBank would have transferred the remaining $1,708.65 to the Kleinheinzes upon request, and they had no reason to believe the funds were unavailable.

¶13 The Kleinheinzes argue they were damaged because AnchorBank accelerated their debt and commenced foreclosure proceedings. However, there is

no evidence in the record that the acceleration and foreclosure proceedings were *caused* by AnchorBank's alleged breaches of the parties' contract—that is, its placement of the commitment amount in a LIP account and its decision to close that account in January 2009. Although the $1,708.65 remaining from the commitment amount would have been sufficient to cover the March and April 2009 payments, the Kleinheinzes conceded in the circuit court that they did not need that money to make those payments. In addition, the Kleinheinzes' failure to make the March and April 2009 payments was not the only basis for the acceleration and foreclosure proceedings. Rather, it is undisputed that the Kleinheinzes also defaulted on their obligations under the loan documents by failing to pay property taxes and declaring bankruptcy. Under these circumstances, there is simply no connection between AnchorBank's conduct with respect to the LIP account and its subsequent acts of accelerating the Kleinheinzes' debt and foreclosing their mortgages.

II. Breach of the implied duty of good faith and fair dealing

¶14 The Kleinheinzes next argue genuine issues of material fact exist with respect to whether AnchorBank breached its implied duty of good faith and fair dealing. The duty of good faith and fair dealing "is an implied condition in every contract[.]" ***Chayka v. Santini***, 47 Wis. 2d 102, 108, 176 N.W.2d 561 (1970). In essence, by entering into the contract, each party implicitly promises "that he [or she] will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58 (quoted source omitted; alterations in ***Metropolitan Ventures***), *opinion clarified on denial of*

reconsideration, 2007 WI 23, 299 Wis. 2d 174, 727 N.W.2d 502. When the facts are undisputed, whether a party breached the implied duty of good faith and fair dealing is a question of law. *See* ***Wisconsin Nat. Gas Co. v. Gabe's Constr. Co.***, 220 Wis. 2d 14, 24 & n.6, 528 N.W.2d 118 (Ct. App. 1998); *see also* ***Schaller v. Marine Nat'l Bank of Neenah***, 131 Wis. 2d 389, 402, 388 N.W.2d 645 (Ct. App. 1986) ("The issue of good faith is generally for the jury but may in a proper case be decided as a matter of law.").

¶15 The Kleinheinzes assert AnchorBank's duty of good faith and fair dealing required it to timely inform them of the amount due on their loan each month. The Kleinheinzes contend AnchorBank created a system in which the Kleinheinzes had to contact Arians directly each month in order to find out how much they owed. According to the Kleinheinzes, Arians failed to inform them of the monthly payment amounts for either March or April 2009. The Kleinheinzes therefore assert AnchorBank's actions prevented them from making payments required by the loan documents and, consequently, caused them to default.

¶16 There are two problems with the Kleinheinzes' argument. First, even if the Kleinheinzes are correct that, prior to January 2009, the only way they could find out the monthly payment amounts for their loan was by contacting Arians, the record conclusively shows that AnchorBank mailed them commercial loan account statements in January, February, March, and April 2009, each of which showed the amount due on the first day of the next month. Thus, with respect to the months in which the Kleinheinzes failed to pay, it is undisputed that AnchorBank sent them statements informing them of the amounts due.

¶17 Although the Kleinheinzes contend they never received these statements, what matters for purposes of determining whether AnchorBank met its

obligation to provide the Kleinheinzes with monthly payment amounts is that the statements were sent. The Kleinheinzes do not argue on appeal that the Florida address to which AnchorBank sent the statements was incorrect. Indeed, it is undisputed that Fred Kleinheinz received AnchorBank's acceleration notice, dated April 17, 2009, which was sent to the same address. Moreover, if the Florida address was no longer correct, the Kleinheinzes were contractually obligated to provide AnchorBank with an updated address. They do not cite any evidence in the record indicating they did so.[4]

¶18 Second, borrowers "must exercise reasonable diligence for their own protection." ***Production Credit Ass'n of Lancaster v. Croft***, 143 Wis. 2d 746, 760, 423 N.W.2d 544 (Ct. App. 1988). "It is not a breach of the duty of good faith if a course of action available to [the borrower] could have avoided the harm and this course was not followed." WIS JI—CIVIL 3044 (2007). In ***Schaller***, for instance, we concluded a bank did not breach its duty of good faith and fair dealing by failing to notify a customer it would no longer honor overdrafts because the customer "was not at the bank's mercy[,]" and all it "needed to do to avoid possible loss resulting from returned checks was to monitor the status of its own account." ***Schaller***, 131 Wis. 2d at 403.

[4] The Kleinheinzes observe that collections department employee Roger Becker testified a late notice sent to the Kleinheinzes' Florida address was returned by the post office on May 8, 2009. This does not, however, create a genuine issue of material fact regarding whether the account statements mailed before the loan was accelerated on April 17, 2009, were sent to the correct address. Again, it is undisputed Fred Kleinheinz received the acceleration notice, which was sent to the Florida address on April 17, 2009. Moreover, there is no evidence AnchorBank had any reason to believe the mail it sent to the Florida address was not being received before the late notice was returned on May 8, 2009.

¶19 The Kleinheinzes assert they did not make the March and April 2009 payments because Arians never notified them of the amounts due, as they claim he had done in prior months. However, even without obtaining this information from Arians, the Kleinheinzes could have taken steps to make the March and April payments. For instance, to make the March payment, they could have simply deposited the amount of the February payment in the account from which their monthly loan payments were automatically withdrawn. The record shows that, with one exception, the Kleinheinzes' monthly payments had been steadily decreasing since May 2008. By depositing the amount of the February 2009 payment in their account, the Kleinheinzes could have been reasonably certain the March 2009 payment would be covered.[5] Alternatively, the Kleinheinzes could have estimated the amount of the March 2009 payment using the published prime rate and the number of days in the month.[6]

¶20 The Kleinheinzes did not follow either of these methods. Instead, during the month of February 2009, they made only a single deposit of $550.02 into their account. As of February 17, their account had a balance of only $132.04. Then, on February 26, 2009, they withdrew all but four cents from the account. They did not deposit any additional funds in the account until May 19, 2009, when a deposit of $14.81 was made to cover an overdraft in order to close the account. Regardless of whether Arians told the Kleinheinzes the amounts of

[5] In fact, the February 2009 payment was $842.31, while the March 2009 payment was only $618.15.

[6] Following the 2008 loan modification, the Kleinheinzes' variable interest rate was equal to the prime rate.

the March and April 2009 payments, they should have known the four cents remaining in their account would be insufficient to cover those payments.

¶21 The Kleinheinzes argue a jury could conclude they made reasonable efforts to obtain the payment information from Arians during March and April 2009. Specifically, Michael Kleinheinz testified in deposition that he attempted to contact Arians four times during that period to ascertain the correct payment amounts. However, under the circumstances, we conclude the Kleinheinzes' efforts to obtain the correct payment amounts were unreasonable, as a matter of law.

¶22 Michael testified he made the first call to Arians in early March 2009. He did not know what phone number he called. He testified a woman answered the phone and informed him Arians was not available. In response, Michael "did leave a message with her to have [Arians] call [him] or [his] brother[.]" He did not leave a voicemail message for Arians. He did not request the payment amount or state he was trying to make a payment.

¶23 Michael testified he attempted to contact Arians in the same way "days" later. Again, he spoke to a woman who informed him Arians was unavailable, and he asked her to have Arians return his call. Once again, he did not request the payment amount or indicate he was trying to make a payment.

¶24 Michael later called an 800 number and "got into the commercial loan department tree[.]" He spoke to a woman and told her he needed to know how much he owed on his commercial loan. She responded he did not have a commercial loan at AnchorBank. Finally, Michael testified he called AnchorBank in early April 2009 and asked for Arians. He was put on hold and transferred to collections department employee Roger Becker.

¶25 Under these circumstances, no reasonable jury could conclude the Kleinheinzes exercised reasonable diligence to obtain the March and April 2009 payment amounts. During his first two attempts to contact Arians, Michael failed to request the payment amount and did not inform the person to whom he spoke that he was attempting to make a payment. During the third call, after Michael was incorrectly informed he did not have a commercial loan with AnchorBank, he made no attempt to clarify the situation. During the fourth call, Michael was transferred to Becker, the collections employee assigned to the Kleinheinzes' loan. It appears self-evident that Becker would have been able to tell Michael how much the Kleinheinzes owed. However, Michael did not testify that he asked Becker for that information.

¶26 The Kleinheinzes further suggest AnchorBank had a duty to inform them that Arians was leaving AnchorBank's employment. However, the undisputed evidence shows that Arians remained employed by AnchorBank, and continued actively working there, until April 3, 2009. Thus, the Kleinheinzes had already defaulted before Arians left AnchorBank. Accordingly, assuming AnchorBank had such a duty, the Kleinheinzes cannot show that they sustained any damages as a result of AnchorBank's failure to inform them Arians was leaving.

¶27 Moreover, although the Kleinheinzes suggest AnchorBank had a duty to "put another lender in charge of Arians' accounts," the record shows the Kleinheinzes' loan had already been assigned to Becker in the collections department by the time Arians left. The Kleinheinzes' claim that AnchorBank breached its implied duty of good faith and fair dealing by failing to assign another employee to their loan therefore fails.

III. Conversion

¶28 The Kleinheinzes next argue the circuit court improperly determined their conversion counterclaim failed as a matter of law. The elements of conversion are: (1) intentionally controlling/taking property belonging to another; (2) without the owner's consent; (3) resulting in serious interference with the owner's rights to possess the property. ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999).

¶29 The Kleinheinzes contend AnchorBank committed conversion by closing the LIP account in January 2009 without paying them the remaining balance of $1,708.65. However, it is undisputed that the Kleinheinzes did not own the funds in the LIP account; that money belonged to AnchorBank, unless and until the Kleinheinzes requested it. The Kleinheinzes admitted in the circuit court that they did not own these funds, and it is undisputed they never requested them. Accordingly, the Kleinheinzes cannot establish that AnchorBank intentionally took property belonging to them without their consent.

¶30 Furthermore, the Kleinheinzes cannot establish the third element of conversion because the undisputed facts show that AnchorBank did not interfere with their right to possess the remainder of the commitment amount. Again, the Kleinheinzes could have requested the remaining $1,708.65 at any time before they defaulted, even after the LIP account was closed. As a result, the circuit court properly granted AnchorBank summary judgment on the Kleinheinzes' conversion counterclaim.

IV. Punitive damages

¶31 Finally, the Kleinheinzes argue the circuit court erred by determining, as a matter of law, that they could not recover punitive damages. A plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the plaintiff's rights. WIS. STAT. § 895.043(3). With respect to the second option, a defendant "acts with intentional disregard if he or she: (1) 'acts with a purpose to cause the result or consequence,' or (2) 'is aware that the result or consequence is substantially certain to occur from the person's conduct.'" ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶64, 312 Wis. 2d 251, 752 N.W.2d 800 (quoting ***Strenke v. Hogner***, 2005 WI 25, ¶36, 279 Wis. 2d 52, 694 N.W.2d 296). Further, the defendant's conduct must be "(1) deliberate, (2) in actual disregard of the rights of another, and (3) 'sufficiently aggravated to warrant punishment by punitive damages.'" ***Id.*** (quoting ***Strenke***, 279 Wis. 2d 52, ¶38).

¶32 The Kleinheinzes argue they are entitled to punitive damages because AnchorBank failed to disburse the entire commitment amount to them in a single advance, created and closed the LIP account without their knowledge or authorization, and "misinterpreted and misled [them] as to the outstanding balance of their loan obligation." However, we have already determined the Kleinheinzes' claims for breach of contract, breach of the implied duty of good faith and fair dealing, and conversion fail on their merits. Moreover, the Kleinheinzes do not explain why they believe AnchorBank's acts were malicious or were done in intentional disregard of their rights. Their argument that the circuit court erred by determining they were not entitled to punitive damages is therefore undeveloped, and we need not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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