

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2010

A. John Voelker
Acting 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 Nos. 2009AP642
2009AP643
2009AP644**

**Cir. Ct. Nos. 2007CV761
2007CV1001
2007CV259**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 2009AP642

**EUGENE ROSENTHAL AND RIVERPLACE MARINA AND
YACHT CLUB, INC.,**

PLAINTIFFS-RESPONDENTS,

v.

ASHWAUBENON BOARDWALK, LLC,

DEFENDANT-APPELLANT.

No. 2009AP643

ASHWAUBENON BOARDWALK, LLC,

PLAINTIFF-APPELLANT,

v.

EUGENE ROSENTHAL AND RIVERPLACE MARINA AND

YACHT CLUB, INC.,

DEFENDANTS-RESPONDENTS.

NO. 2009AP644

ASHWAUBENON BOARDWALK, LLC,

PLAINTIFF-APPELLANT,

V.

EUGENE ROSENTHAL AND ROSENTHAL INDUSTRIES, INC.

DEFENDANTS-RESPONDENTS.

APPEALS from a judgment of the circuit courts for Brown and Manitowoc Counties: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ashwaubenon Boardwalk, LLC, (Boardwalk) appeals a judgment (1) awarding Eugene Rosenthal, Rosenthal Industries, Inc., and Riverplace Marina and Yacht Club, Inc., (Rosenthal) damages for Boardwalk's breach of a land contract, (2) reforming the contract, and (3) denying Boardwalk's request for foreclosure. We affirm.

BACKGROUND

¶2 In February 2005, Rosenthal purchased a marina from Boardwalk for \$1,000,000. He paid \$300,000 at closing and contracted to pay Boardwalk the remaining amount in two installments, along with an additional \$156,000 for improvements Boardwalk agreed to make to the property. Boardwalk agreed to

“repair all utilities to the boat slips,” and promised it would obtain and transfer adjacent land for additional parking.

¶3 Rosenthal paid the first installment, but refused to pay the final installment or the \$156,000 because Boardwalk neither repaired the utilities to the boat slips nor obtained land for parking. When Boardwalk notified Rosenthal he was in default, Rosenthal sued Boardwalk alleging, as relevant here, breach of contract and intentional misrepresentation. Boardwalk responded by initiating two foreclosure actions against Rosenthal—one each in two different counties—alleging it was entitled to either payment in full or foreclosure on the property.

¶4 The circuit court consolidated the three suits. It submitted the breach of contract and misrepresentation claims to a jury. It independently decided the foreclosure claims. The jury rejected Rosenthal’s misrepresentation claims, but agreed Boardwalk breached the contract by not repairing the utilities and awarded Rosenthal \$185,000 in damages.

¶5 The court did not ask the jury to determine whether Boardwalk had any obligation to provide additional parking. Instead, it considered the issue when evaluating Boardwalk’s foreclosure claims. It found that Boardwalk’s failure to obtain the promised parking was an act of bad faith, which, when coupled with its contract breach, permitted Rosenthal to withhold payment. It therefore denied Boardwalk’s request for foreclosure. Instead, it reformed the contract to provide that Rosenthal’s payments were due only after Boardwalk provided the promised parking and paid Rosenthal his contract damages.

DISCUSSION

¶6 The primary issue Boardwalk presents on appeal is whether the circuit court erred when it reformed the contract instead of granting foreclosure. The essence of Boardwalk’s argument is that the court had no choice but to grant foreclosure because Rosenthal failed to make payments required under the contract. It contends the court had no authority to instead reform the contract to condition Rosenthal’s payments on Boardwalk rectifying its breach and act of bad faith.¹

¶7 We reject Boardwalk’s argument, however, because Boardwalk fails to provide any legal authority for what a circuit court may do in a foreclosure proceeding. Boardwalk contends that “foreclosure is a statutory right,” but nowhere identifies what statute provides that right or explains how that statute applies to this case. We decline Boardwalk’s implicit invitation to ferret out statutory, or any other, authority to support its argument. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we will not abandon our neutrality to develop arguments). Nor does Boardwalk provide any legal authority for its argument a court may not reform a land contract instead of granting foreclosure. Because Boardwalk has provided no legal authority for what

¹ Boardwalk also argues the circuit court erred by reforming the contract because Rosenthal elected to pursue contract damages, which, it contends, precluded Rosenthal from also seeking contract reformation. This argument, however, conflates the breach of contract and foreclosure suits. In the former suit, Rosenthal sought damages for Boardwalk’s contract breach. In the latter suit, *Boardwalk* sought foreclosure as a result of Rosenthal’s failure to make payments. Rosenthal argued he properly withheld the payments because Boardwalk breached the contract and acted in bad faith. The court agreed and concluded Boardwalk was not entitled to payment until it remedied its breach and act of bad faith. This judgment, however, required the contract be reformed.

courts must do in foreclosure proceedings—much less that it exceeded that authority here—we do not address its argument the court erred when it reformed the contract rather than granting foreclosure. *See Bettendorf v. Microsoft Corp.*, 2010 WI App 13, ¶62, 323 Wis. 2d 137, 779 N.W.2d 34 (we will not consider arguments unsupported by legal authority).

OTHER ISSUES

¶8 Boardwalk argues the circuit court made three additional errors during the foreclosure proceeding. It contends the court erred when it: (1) concluded Rosenthal’s misrepresentation claims were not barred by the economic loss doctrine; (2) permitted evidence Boardwalk breached another contract; and (3) rejected Boardwalk’s request to offset the damages it owed Rosenthal against the payments Rosenthal owed it. We reject all three arguments.

¶9 Boardwalk argues Rosenthal’s misrepresentation claims were tort claims and therefore barred by the economic loss doctrine. The economic loss doctrine requires transacting parties “to pursue only their contractual remedies when asserting an economic loss claim” *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶34, 262 Wis. 2d 32, 662 N.W.2d 652. The circuit court concluded Rosenthal’s misrepresentation claims were not barred by the doctrine. We need not resolve whether this conclusion was correct because Rosenthal was not awarded any tort damages. The issue is moot.

¶10 We likewise reject Boardwalk’s argument the circuit court improperly permitted evidence it breached another contract. Boardwalk concedes that Rosenthal offered the testimony to support its tort claims, not to prove Boardwalk’s prior breach was evidence it breached the contract here. As discussed above, Rosenthal did not prevail on his tort claims. The issue of

whether evidence offered to support those claims was properly admitted is also moot.

¶11 Finally, Boardwalk argues that the court should have permitted it to offset the \$185,000 judgment it owes Rosenthal against the contract payments Rosenthal owes Boardwalk. Boardwalk contends it is entitled to an offset, because “it is the Supreme Court of Wisconsin’s longstanding policy to offset mutual judgments against each other.” The very language of Boardwalk’s argument belies the merit of its claim. Boardwalk did not receive any judgment against Rosenthal; therefore, there were no “mutual judgments against each other” to offset.

By the Court.—Judgment affirmed.

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

