

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2013

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. 2012AP2349

Cir. Ct. No. 2010CV2400

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DANIEL WILLIAMSON AND WESTWIND HOLDINGS, LLC,

PLAINTIFFS-APPELLANTS,

v.

STEPHEN C. MILLS AND BEAR REALTY OF KENOSHA, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Westwind Holdings, LLC, and Daniel Williamson, Westwind's sole member (together, "appellants"), alleged that Bear Realty of Kenosha, Inc., Stephen Mills, as a part-owner of Bear Realty, and Mills

individually, breached contractual and fiduciary duties. The circuit court granted summary judgment in favor of Mills and Bear Realty. We affirm.

¶2 Mills loaned appellants \$300,000 secured by two second mortgages, one on a commercial property Westwind owned, the other on Williamson's residence. The loan was made through the bank that was the trustee of Mills' and his former wife's individual retirement accounts. Williamson listed the Westwind property for sale. Mills rejected his request to consider a payment arrangement in the event of a "short sale." Mills also told Williamson that he would foreclose on the property if he was not paid because he had a fiduciary responsibility to his IRAs. The property did not sell, the note came due and, even with the one-year extension Mills granted them, appellants defaulted.

¶3 In February 2008, the bank commenced a foreclosure action against the Westwind property. Appellants again sought to sell the property and listed it with Bear Realty listing agents Sheri and Joe Clark. Besides being a realtor, Joe was the CPA for Williamson's business and for Bear Realty and Mills and had arranged the meeting between Williamson and Mills that led to the loan. Williamson entered into the listing contract with Bear Realty understanding Mills' relationship to Bear Realty and that Mills was in an adverse position to him and Westwind. To market the property, Carla Bisher, Bear Realty's commercial brokerage coordinator, prepared and submitted promotional materials to online real estate listing services.

¶4 The bank was granted a judgment of foreclosure in May 2008. In November 2008, Jon Lin made an Offer to Purchase the Westwind property for \$1.65 million. The offer was contingent upon written approval of all lien holders, one of which was Mills. Williamson acknowledged four recorded notes on the

property totaling \$2.2 million. Joe Clark told Mills that, despite being highly motivated to purchase the property, Lin's offer was firm. Mills refused to approve the short sale.

¶5 A sheriff's sale was scheduled for January 5, 2009. Mills rejected appellants' demand that he approve the Lin sale and adjourn the sheriff's sale for six weeks. Upon learning that Williamson had ceased paying insurance on the Westwind property but was keeping the rents, Mills arranged to pay the insurance and decided to purchase the property at the sheriff's sale, hoping, in the absence of competitive bidding, to buy it at a low price and collect the rents himself.

¶6 Lin made the winning bid at the January 5 sheriff's sale but failed to post the required deposit. He did not appear when the property was reauctioned a week later and Mills submitted a winning bid of \$1,000. Appellants challenged the bid. The circuit court declined confirmation and set a \$240,000 minimum bid. Given the property's \$1.5 million first mortgage and delinquent taxes, Mills abandoned his efforts to foreclose on it.

¶7 On February 17, 2009, the day before the listing agreement was set to expire, real estate broker Paula Johnson telephoned Bear Realty asking whether the Westwind property was available for showing. An unidentified man returned Johnson's call, gave her additional details about the property, and told her he would check on its availability. A "couple of days to a week" later, the man informed Johnson the property was unavailable for showing.

¶8 Williamson and Westwind filed suit against Mills and Bear Realty alleging, as is relevant to this appeal, a contract claim and a broker duty claim. They alleged, in part, that Mills' and Bear Realty's actions were part of a scheme to thwart the legitimate sale of the Westwind property so that Mills could purchase

it at a submarket price, then “flip” it, perhaps to Lin, for \$1.65 million. The circuit court denied Mills’ and Bear Realty’s motions for summary judgment seeking dismissal of all claims. After a second round of briefing, the circuit court concluded that Mills did not violate the terms of the contract, making his motivation in withholding consent to the Lin offer irrelevant, and that there was no breach of a fiduciary duty. The court granted summary judgment to Mills and Bear Realty. This appeal followed.

¶9 “We review the grant of a motion for summary judgment de novo, and apply the methodology specified in WIS. STAT. § 802.08 [(2011-12)¹]. That is, we determine whether there is any genuine issue as to any material fact, and if not, which party is entitled to judgment as a matter of law.” *Borek Cranberry Marsh, Inc. v. Jackson Cnty.*, 2010 WI 95, ¶11, 328 Wis. 2d 613, 785 N.W.2d 615 (citation omitted).

Breach-of-contract claim

¶10 Appellants concede that Mills had the contractual right to withhold consent to the Lin offer. They contend, however, that because compliance only in form, rather than substance, breaches the duty of good faith, Mills’ subjective intent in refusing to accept a short sale and to delay the sheriff’s sale is material to a determination of whether he acted in good faith.

¶11 “Every contract implies good faith and fair dealing between the parties to it.” *Bozzacchi v. O’Malley*, 211 Wis. 2d 622, 626, 566 N.W.2d 494 (Ct. App. 1997) (citation omitted). A contracting party can breach its duty of good

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

faith even if it does not violate any express term of the contract. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995). The duty of good faith obliges each party not to intentionally do anything to prevent the other party either from carrying out his or her part of the agreement or from receiving the fruits of the contract. *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶41, 301 Wis. 2d 752, 734 N.W.2d 169. The proper inquiries are what benefits did the parties reasonably expect to receive and was there was an injury to the right or ability to receive them. *See* WIS JI—CIVIL 3044.

¶12 Under the secured loan agreement here, appellants expected to receive \$300,000 from Mills, loaned at a specified interest rate, and to have the full amount of time to repay it. Mills expected timely repayment and that he would be able to recoup his money should appellants default on the loan. Appellants do not dispute that they did default, despite Mills extending the repayment period. They also do not dispute that Mills was clear from the outset that he would not agree to a short sale and was not contractually bound to do so. A contracting party cannot complain that acts specifically contemplated by the contract constitute bad-faith conduct. *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988).

¶13 The touchstones of good faith are honesty and reasonableness. *Schaller v. Marine Nat'l Bank of Neenah*, 131 Wis. 2d 389, 403, 388 N.W.2d 645 (Ct. App. 1986). It was not reasonable for appellants to demand that Mills acquiesce to a short sale or in bad faith for Mills not to consent. We agree with the circuit court that Mills' motivation for standing on the contract is immaterial because the law does not impose on a lender an obligation not found in the contract to modify or extend a loan.

Broker-duty claim

¶14 It is undisputed that Mills is a real estate broker. Although he was a lender in this matter, appellants assert that material factual issues remain as to whether Mills also rendered brokerage services by overseeing Bisher's and the Clarks' activities and through his Bear Realty ownership interest. Appellants assert that he did and that he breached his fiduciary duty as a broker when he subordinated their rights as a listing client of Bear Realty to his rights as a lender. They appear to suggest that even if Mills performed no broker services, he owed them a broker's duty simply because he is one. We disagree.

¶15 “The elements of a claim for breach of fiduciary duty are: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach of duty caused the plaintiff's damage.” *Berner Cheese Corp. v. Krug*, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800. A broker's fiduciary duties arise when “providing brokerage services ... in a transaction.” WIS. STAT. § 452.133(1).

¶16 We agree with the circuit court that no material factual issues remain as to whether Mills actually provided brokerage services through his role and relationships at Bear Realty or that he conspired to acquire the Westwind property. Merely alleging a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). Mills was appellants' lender. A “transaction” does not include mortgage lending. See WIS. STAT. § 452.01(10). Appellants were aware of and did not object to Mills' dual roles as lender and Bear Realty principal when they entered the listing contract.

We reject the notion that Mills owed a broker's fiduciary duty when acting in the scope of his contractual rights as a lender.

¶17 Appellants also have not demonstrated what damages they suffered as a result of Mills' \$1000 bid. Nothing came of it. Indeed, they contested the bid and the court refused to confirm it. We already have concluded that Mills was within his contractual rights to withhold his consent to the short sale. Had Mills submitted no bid at all, the primary mortgage holder still would have foreclosed and appellants still would have received nothing.

¶18 We also conclude that the circuit court properly granted summary judgment on the claims against Bear Realty, which stemmed from the allegation that an unidentified Bear Realty person fed realtor Paula Johnson false information to derail a possible sale. The evidence shows that, on the day before the listing contract expired, Johnson called Bear Realty on behalf of a client and spoke to Sheri Clark regarding the Westwind property. Sheri told Johnson she would have someone call her back. Some days later, an unidentified man called Johnson and informed her that the property was unavailable for viewing. Johnson testified that despite that information, the property remained posted on online listing services. She also testified, however, that properties may remain listed for a time after they no longer are available.

¶19 The circuit court noted that Bear Realty's obligation to market the property expired when the contract did.² That Johnson was deliberately misled is

² The amicus brief submitted by the Wisconsin Realtors® Association is in accord:

(continued)

pure speculation. Appellants have not raised sufficient questions to defeat summary judgment.

By the Court.—Judgment affirmed.

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

Once a listing has expired ... the broker no longer has the contractual authority from the seller to market the property. Upon expiration of a listing contract[,] all marketing of the property shall cease. Therefore, if a consumer or another agent called to inquire about a property after expiration of a listing contract, a proper response by the agent would be[: “T]he property is no longer available for showing.[”]

