COURT OF APPEALS
DECISION
DATED AND RELEASED

April 30, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1068

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

LENNART E. IVARSON,

PLAINTIFF-RESPONDENT,

V.

WILLIAM V. SAMATAS, A/K/A VASIL SAMATAS, A/K/A VASIL W. SAMATAS, A/K/A WILLIAM V. SAMATAS, AND EAGLE POINTE OF DELBROOK ESTATES, INC.,

DEFENDANTS-APPELLANTS,

JANE DOE SAMATAS, UNKNOWN WIFE, B.R. AMON & SONS, INC., CONSIGNY, ANDREWS, HEMMING & GRANT, S.C., LYCON, INC., BURDICK TRUCKING & EXCAVATING, INC., LAKES AREA EXCAVATING, INC., R & R CONCRETE, INC., R & R EXCAVATING, INC., RON WEIDNER, INC., D/B/A WEIDNER CONCRETE, MARK H. BEAUBIEN, JR., MITCHELL F. ASHER, PETER BLOOM, D/B/A PRIDE CONSTRUCTION COMPANY, FIXTURES & FRAMES, INC., GARCZYNSKI & BRENNAN LAW OFFICES, S.C., HOIDA, INC., RICHARD P. VANDELLO, MARY J. VANDELLO, JOHN M. AND NANCY J. BAILEY, AND TITLE UNDERWRITERS OF WAUKESHA, INC.,

DEFENDANTS,

PETER BLOOM,

**DEFENDANT-
THIRD PARTY PLAINTIFF,**

V.

STONEBRIDGE GATE DEVELOPMENT & CONSTRUCTION COMPANY,

THIRD PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Lennart E. Ivarson loaned William V. Samatas and Eagle Pointe of Delbrook Estates, Inc. (collectively, Eagle Pointe), money to complete buildings in a condominium project. When Eagle Pointe defaulted, Ivarson obtained a judgment of foreclosure. Eagle Pointe appeals from a judgment dismissing its counterclaim for Ivarson's alleged bad faith in failing to make additional construction loans. It argues that the claim could not be disposed of by summary judgment because issues of fact exist as to Ivarson's conduct. We affirm the judgment and conclude that the appeal is frivolous. RULE 809.25(3), STATS. We remand for a determination of reasonable appellate attorney's fees and costs to be awarded against Eagle Pointe and its appellate counsel.

Ivarson agreed to provide Eagle Pointe with a line of credit note for a one-year term whereby Eagle Pointe could borrow up to $575,000. At the closing held on September 3, 1993, $168,400 of the loan proceeds were distributed as costs: $50,000 to Ivarson as "points," $25,000 finder's fee, $20,000 to an interest reserve escrow account, $10,000 to Eagle Pointe for operating capital, and

$56,000 to the City of Delavan for prior assessments, fees and property taxes. The parties' contract provided the following allocation of the remaining balance available on the line of credit: up to $31,600 for operating capital and marketing costs, up to $155,000 for construction of the four-unit condominium building #6, and $220,000 reserved for construction costs of a second condominium building #7 provided that Eagle Pointe sold two units before seeking to draw against this amount. Between September 1993 and February 1994, four draw requests were funded by Ivarson in the total amount of $187,563. On September 2, 1994, Eagle Pointe submitted a fifth draw request for $50,814. Ivarson refused to fund the request.

After negotiations to extend the line of credit note failed, Ivarson commenced a foreclosure action. Eagle Pointe's counterclaim against Ivarson alleges that it was damaged by Ivarson's "failure to act in good faith with respect to disbursement of loan proceeds to pay for completed work and to permit completion of the project construction." Ivarson's allegedly bad faith conduct was his refusal to honor the fifth draw request, obstruction, interference and delay by Ivarson's agent in reviewing and approving draw requests, and his refusal to conclude good faith negotiations for an extension or renewal of the note. Eagle Pointe's counterclaim was severed from the foreclosure proceeding.

When reviewing a trial court's grant of summary judgment, we apply the standards set forth in § 802.08, STATS., in the same manner as the trial court. *See* ***Williams v. State Farm Fire and Cas. Co.***, 180 Wis.2d 221, 226, 509 N.W.2d 294, 296 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. *See* ***Crowbridge v. Village of Egg Harbor***, 179 Wis.2d 565, 568, 508 N.W.2d 15, 17 (Ct. App. 1993). If so, the inquiry shifts to whether any factual issues exist. *See* ***id.***

Whether a complaint properly pleads a cause of action upon which relief may be granted is a question of law which we review without deference to the trial court. *See* ***Heinritz v. Lawrence Univ.***, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). To determine whether a complaint states a claim, the facts pled are taken as admitted and inferences are drawn in favor of the party against whom the motion is brought. *See* ***id.*** A complaint should be dismissed as legally insufficient if, based on the facts and inferences alleged, it is clear that under no conditions can the plaintiff recover. *See* ***Bartley v. Thompson***, 198 Wis.2d 323, 332, 542 N.W.2d 227, 230 (Ct. App. 1995), *cert. denied*, 116 S. Ct. 1829 (1996).

Eagle Pointe's counterclaim alleges that Ivarson failed to act in good faith with respect to disbursements and negotiating for an extension of the line of credit. It argues here that Ivarson knew early on that new requirements imposed by the City of Delavan increased the construction costs and adversely affected completion dates. It claims that Ivarson had a duty to fund the final draw request and that his decision to withhold funds was unconscionable in light of his knowledge that only a short period of time was needed to complete building #6 and produce a marketable product. It suggests that Ivarson's apparent willingness to consider an extension of the note was a "sham" and Ivarson knowingly precipitated Eagle Pointe's financial ruin. It summarizes its counterclaim as one "brought in equity and grounded in tort."

Wisconsin has not recognized a cause of action in tort for lack of good faith or tortious breach of contract. *See* ***Hauer v. Union State Bank***, 192 Wis.2d 576, 595, 532 N.W.2d 456, 463 (Ct. App. 1995). A cause of action for the tort of bad faith is limited to an insurance setting. *See* ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 423, 405 N.W.2d 354, 365 (Ct. App. 1987). "Where a contract is involved, in order for a claim in tort to exist, a duty must exist independently of the

duty to perform under the contract, such as a fiduciary relationship." ***Hauer***, 192 Wis.2d at 594, 532 N.W.2d at 463.

There is no allegation that a fiduciary relationship existed between Ivarson and Eagle Pointe. Such a relationship does not arise simply because Ivarson is intimately knowledgeable about Eagle Pointe's financial affairs. *See* ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck***, 127 Wis.2d 127, 136, 377 N.W.2d 605, 609 (1985) ("[a] fiduciary relationship arises from a formal commitment to act for the benefit of another"). Nor is there any allegation of any unique inequality, dependence or difference in business intelligence between Ivarson and Eagle Pointe which transforms the lender-borrower relationship into a fiduciary relationship. *See* ***Production Credit Ass'n v. Croft***, 143 Wis.2d 746, 755-56, 423 N.W.2d 544, 547 (Ct. App. 1988). Eagle Pointe's counterclaim fails to state a cause of action for bad faith.

Even if the counterclaim is characterized as alleging breach of contract for bad faith performance under the contract, it fails. The implied covenant of good faith conduct in contracts is intended as a guarantee against "arbitrary or unreasonable conduct." ***Foseid v. State Bank***, 197 Wis.2d 772, 796, 541 N.W.2d 203, 213 (Ct. App. 1995). A variety of conduct could violate the obligation of good faith, including "'subterfuges and evasions'" or "'interference with or failure to cooperate in the other party's performance.'" ***Id.*** at 796-97, 541 N.W.2d at 213 (quoted source omitted). However, there can be no breach of the covenant of good faith when the allegedly offending conduct is specifically authorized by the terms of the contract. *See* ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).

The parties' agreement provided that no draw request would be made for building #7 until there was evidence of two sales. It also provided that costs associated with the erection of building #6 would not exceed $155,000. The record establishes that Ivarson funded draw requests for construction costs for building #6 in excess of $155,000 and that the fifth draw request which Ivarson denied included additional excess costs for construction of building #6. Also, portions of funds disbursed related to building #7, but there was never proof of two sales with the required ten percent down payment. Thus, Ivarson was within his rights under the contract to refuse to fund the fifth draw request.

Eagle Pointe argues that the contract was modified to reallocate the available funding by increasing the budget amount for building #6 to $205,000 and to authorize a draw up to $5500 for revision of plans, plan approval and government fees with respect to building #7. It claims this revision is evidenced by a letter to Ivarson on February 22, 1994. However, that letter was not signed by Ivarson. Eagle Pointe suggests that Ivarson consented to the modification of the contract with respect to increasing the budget amount for building #6 when on February 24, 1994, Ivarson funded the fourth draw which included costs for building #6 in excess of the original $155,000 budgeted amount. Eagle Pointe also points to oral promises Ivarson made to continue to fund completion of building #6. Even if Ivarson is deemed to have waived the $155,000 limit in funding the fourth draw, he was not obligated under the terms of the contract to continue to do so. "'A man may allow credit to another, if he see fit to do so, but this does not oblige him to extend that credit at any and all times thereafter.'" ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 396, 388 N.W.2d 645, 648 (Ct. App. 1986) (quoted source omitted).

When the fifth draw was submitted, Eagle Pointe had defaulted on the contract by its failure to pay interest. Ivarson's duty of good faith under the contract

does not require that he continue to bail Eagle Pointe out of its financial predicament. Ivarson did not have the obligation to modify the contract to suit Eagle Pointe's needs or engage in negotiations to extend the loan. A party is "not required to spend money bailing out a contract partner who has gotten into trouble." ***Market St. Assocs. Ltd. Partnership v. Frey***, 941 F.2d 588, 594 (7th Cir. 1991), *aff'd*, 21 F.3d 782 (7th Cir. 1994). This is particularly true where, as here, the default under the contract was not an unforeseen problem. *Cf.* ***id.*** at 595. Eagle Pointe sought financing from Ivarson because it was already in a precarious financial position. Contrary to Eagle Pointe's suggestion, the premium Eagle Pointe paid for such financing—the $50,000 for "points," the $25,000 finder's fee, and the interest escrow—is not prima facie evidence of Ivarson's bad faith attempt to profit at Eagle Point's expense. Rather, the financing inducements to Ivarson reflect the parties' concern over the financial viability of the condominium project.

Ivarson's conduct was in accordance with the terms of the parties' contract. We conclude that summary judgment was properly granted dismissing Eagle Pointe's counterclaim for alleged bad faith dealing by Ivarson.

Ivarson moves under RULE 809.25(3), STATS., to have Eagle Pointe's appeal declared frivolous. We decide as a matter of law whether an appeal is frivolous. ***NBZ, Inc. v. Pilarski***, 185 Wis.2d 827, 841, 520 N.W.2d 93, 98 (Ct. App. 1994). The law employs an objective standard when determining whether an action is frivolous. *See* ***Sommer v. Carr***, 99 Wis.2d 789, 797, 299 N.W.2d 856, 860 (1981). The focus of the inquiry is not "whether a party can or will prevail, but rather is that party's position so indefensible that it is frivolous and should that party or its attorney have known it." ***Id.*** at 797, 299 N.W.2d at 859.

Eagle Pointe's appeal is premised on the concept that Ivarson refused to modify the contract or extend the loan. There is no basis in law that a contract party is obligated to make a new contract to prevent the default of the other contracting party. In the trial court and here, Ivarson cited legal authorities indicating that he did not breach any duty of good faith. Eagle Pointe's appellate brief did not attempt to distinguish those authorities and merely reasserted the claims made in the trial court. Nor did Eagle Pointe file a reply brief or response to the motion to have the appeal declared frivolous.

We conclude that the appeal is frivolous. A reasonable attorney would have or should have known that under these circumstances the position taken was frivolous. *See* ***id.*** at 799, 299 N.W.2d at 860. On remand, the trial court shall determine the reasonable attorney's fees and costs incurred by Ivarson for this appeal and enter judgment against the appellants, jointly and severally, for one-half the determination and against the appellants' attorney for one-half the determination.

By the Court.—Judgment affirmed and cause remanded with directions.

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