COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP771 **Cir. Ct. No. 2013CV266**

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

KNA FAMILY LLC,

PLAINTIFF-RESPONDENT,

V.

PETER FAZIO AND SHARI FAZIO,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Reversed and cause remanded for further proceedings*.

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

¶1 PER CURIAM. Peter and Shari Fazio appeal a judgment of foreclosure involving commercial real property located in Barron County. The circuit court granted KNA Family LLC's motion for summary judgment,

concluding KNA Family was entitled to a foreclosure judgment as a matter of law and there were no genuine issues of material fact regarding any of the Fazios' affirmative defenses. In particular, the court rejected the Fazios' affirmative defense based on an alleged violation of CAL. CIVIL CODE § 2943,[1] concluding California law did not apply in any manner to this foreclosure action. The court also rejected the Fazios' affirmative defense based on an alleged breach of the duty of good faith and fair dealing, concluding there was no competent evidence that KNA Family or its predecessors engaged in unfair conduct. The court entered a judgment of foreclosure and directed that, at a future time, rental income from the property being held in receivership would be applied to reduce the amount of the judgment.

¶2 We reverse and remand for further proceedings. We conclude the Fazios have stated and adequately supported a valid affirmative defense for a violation of CAL. CIVIL CODE § 2943, which, if proved at trial, could reduce the amount of the foreclosure judgment. Likewise, we conclude the Fazios have stated and adequately supported a valid affirmative defense for a breach of the duty of good faith and fair dealing. On remand, should a judgment of foreclosure be entered, the circuit court is directed to exercise its equitable discretion with respect to the application of the receivership funds to the amount of the judgment.

[1] All references to CAL. CIVIL CODE § 2943 are to the version that was in effect from January 1, 2010 through December 31, 2013, which is the relevant time period for purposes of this lawsuit.

BACKGROUND

¶3 We summarized the background facts concerning this foreclosure in a prior appeal:

> On October 25, 2000, the Fazios acquired a commercial property located at 2500 Pioneer Avenue in Rice Lake. As part of the transaction to acquire the property, the Fazios executed a promissory note in favor of Wells Fargo Bank, National Association, in the amount of $1,100,000. The note was secured by a mortgage on the Pioneer Avenue property. The note and mortgage were subsequently assigned to U.S. Bank.

KNA Family LLC v. Fazio, No. 2014AP2971-FT, unpublished slip op. ¶2 (WI App May 19, 2015) (footnote omitted) (hereafter ***KNA Family I***). The above-referenced note was originally scheduled to mature on November 1, 2010, but, by the parties' agreement, the term was extended until July 1, 2012. ***Id.***, ¶3.

¶4 U.S. Bank commenced the present foreclosure action on June 17, 2013. In addition to the remaining $869,695.02 of principal due on the note, U.S. Bank sought interest accrued at both default and non-default rates, servicer expenses, and administrative fees. U.S. Bank also filed an ex parte emergency motion seeking the appointment of a receiver to collect income produced by rental activity on the Pioneer Avenue property, which property consisted of a commercial building leased to OfficeMax, Inc., for use as a retail store. The circuit court ultimately ordered the appointment of a receiver in October 2013.

¶5 The Fazios answered the complaint, denying they were in default on the note. They also raised numerous affirmative defenses, including that U.S. Bank was "barred from [obtaining] relief due to its conduct in preventing or interfering with defendants' performance of their obligations under the agreements" and that U.S. Bank had violated CAL. CIVIL CODE § 2943. The

Fazios reasoned that § 2943 required U.S. Bank to prepare and deliver a beneficiary statement and payoff demand statement, which it had failed to timely do in response to the Fazios' written requests. *See* ***KNA Family I***, unpublished slip op. ¶4. These allegations also formed the basis for the Fazios' counterclaim against U.S. Bank.

¶6 On February 6, 2014, U.S. Bank assigned its rights and interests under the note and mortgage to KNA Family. ***Id.***, ¶5. KNA Family was substituted as plaintiff in the foreclosure action, but U.S. Bank remained a party for purposes of the Fazios' counterclaim. ***Id.***

¶7 The previous appeal addressed whether the circuit court properly dismissed the Fazios' counterclaim against U.S. Bank for failure to state a claim. The circuit court concluded that, under the mortgage's governing law provision, Wisconsin, not California, law applied. ***Id.***, ¶¶6-7. The court therefore held CAL. CIVIL CODE § 2943 was inapplicable. ***Id.*** In an opinion issued on May 19, 2015, we reversed, concluding California law applied to the counterclaim pursuant to the governing law provision, because U.S. Bank's alleged failure to timely provide beneficiary and payoff demand statements "clearly relate[d] to the Fazios' performance of their obligations under the loan documents—without knowing the amount due, the Fazios could not satisfy their obligation to pay off the remaining balance of the note." ***Id.***, ¶13.

¶8 Moreover, we rejected U.S. Bank's argument that Wisconsin law applied due to an exception in the governing law provision for "enforcement of Mortgagee's STATUTORY POWER OF SALE and all other remedies granted hereunder and the creation, perfection and enforcement of all mortgage liens and security interests created pursuant to the Loan Documents." ***Id.***, ¶14. We

observed that the Fazios' counterclaim did not "relate in any way" to any of the matters addressed by the exception and that "even if U.S. Bank had never commenced the instant foreclosure action, the Fazios would still have had a claim against U.S. Bank for its alleged violations of CAL. CIVIL CODE § 2943." ***Id.***

¶9 Meanwhile, KNA Family filed a motion for summary judgment in the foreclosure proceedings, which the circuit court orally granted at a motion hearing on January 16, 2015, later memorialized in a written order. It is undisputed that the Fazios' last payment occurred on April 20, 2012, and that the Fazios failed to pay the interest and principal due on the note's maturity date of July 1, 2012. The court subsequently entered a judgment of foreclosure in favor of KNA Family.

¶10 The circuit court rejected the Fazios' affirmative defenses as a matter of law. First, it observed at the motion hearing it had "previously ruled that California law requiring a payoff statement as a condition precedent to a foreclosure does not apply"—an apparent reference to the court's determination regarding the law governing the Fazios' counterclaim, which was subsequently reversed on appeal. *See supra* ¶¶7-8. Second, the court, in its written order, rejected the Fazios' affirmative defense alleging breach of the duty of good faith and fair dealing, concluding there was no evidence of any inequitable or unfair conduct on the part of KNA Family or its predecessors in interest.

¶11 The circuit court also determined the Fazios failed to substantiate their allegation that U.S. Bank's failure to timely provide a payoff statement scuttled a potential sale of the property to Torrey Realty Holdings, Inc., prior to the note's maturity. Rather, the admissible evidence showed Torrey declined to complete the purchase because its principal officer found the terms of the

OfficeMax lease unacceptable. Although Peter Fazio and his son, Joe Fazio, averred the sale could not be completed due to U.S. Bank's failure to timely provide a payoff statement, the circuit court determined those averments did not create a genuine issue of material fact because they were not made with the requisite personal knowledge. The Fazios appeal.

DISCUSSION

¶12 We review a grant of summary judgment de novo. ***Burgraff v. Menard, Inc.***, 2016 WI 11, ¶20, 367 Wis. 2d 50, 875 N.W.2d 596. The summary judgment methodology is one of long standing and need not be repeated in its entirety here. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860. It is sufficient to note that summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Burgraff***, 367 Wis. 2d 50, ¶20; *see also* WIS. STAT. § 802.08(2).[2] "The inferences to be drawn from the underlying facts contained in the moving party's material must be viewed in the light most favorable to the party opposing the motion." ***Kraemer Bros. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

¶13 Here, there is no dispute that KNA Family has made a prima facie case for summary judgment. At a minimum, and as KNA Family alleged, the Fazios breached the note by failing to pay the principal and interest due on the extended maturity date. However, the parties dispute: (1) whether the Fazios have stated an affirmative defense under California law for a violation of CAL.

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

CIVIL CODE § 2943; and (2) whether there is a genuine issue of material fact that precludes summary judgment on the Fazios' affirmative defense for breach of the duty of good faith and fair dealing. In addition, and regardless of the outcomes involving the Fazios' affirmative defenses, the Fazios argue the circuit court erred by failing to apply rents collected by the receiver to the principal amount of the note before calculating interest.

I. Applicability of CALIFORNIA CIVIL CODE § 2943

¶14 In the prior appeal, we discussed certain requirements of CAL. CIVIL CODE § 2943, as that statute pertained to the Fazios' counterclaim against U.S. Bank. *See* ***KNA Family I***, unpublished slip op. ¶¶9-10. The Fazios argue they have stated an affirmative defense against KNA Family in the foreclosure action based on violations of the same statutory provisions at issue in the prior appeal regarding a lender's obligation to timely provide payoff and beneficiary statements. *See* § 2943(b)(1), (c). Under the statute, an "entitled person" may recover damages resulting from the beneficiary's—i.e., the bank's—willful failure to timely prepare and deliver a beneficiary or payoff demand statement. Para. 2943(e)(4).

¶15 KNA Family argues, just as U.S. Bank did in the prior appeal, that the circuit court correctly determined the Fazios' affirmative defenses are governed by Wisconsin law, not California law. As a result, KNA Family asserts CAL. CIVIL CODE § 2943 is inapplicable and cannot provide a basis to "nullify a $1.2 million debt." Conversely, the Fazios argue the resolution of the issue of which law applies vis-à-vis their affirmative defense is essentially dictated by ***KNA Family I***.

¶16 Both parties rely on the governing law provision of the mortgage, which states that California law applies except under limited circumstances:

> **GOVERNING LAW.** This mortgage was accepted by Mortgagee in the State of California and the proceeds of the Note were disbursed from the State of California, which state the parties agree has a substantial relationship to the parties and the Loan. Accordingly, in all respects, including, without limitation, matters of construction, validity, enforceability and performance, all Loan Documents shall be governed by, and construed in accordance with, the laws of the State of California applicable to contracts made and performed in such state and any applicable law of the United States of America, except that at all times the provisions for enforcement of Mortgagee's STATUTORY POWER OF SALE and all other remedies granted hereunder and the creation, perfection and enforcement of all mortgage liens and security interests created pursuant to the Loan Documents shall be governed by and construed in accordance with, the laws of the state where the Property is located.

As previously noted, in ***KNA Family I*** we concluded U.S. Bank's failure to timely provide beneficiary and payoff demand statements "clearly relate[d] to the Fazios' performance of their obligations under the loan documents," as the Fazios needed to know the balance of the note to pay it off. ***Id.***, ¶13. As a result, we rejected U.S. Bank's argument, which is similar to KNA Family's argument in this appeal, that the Fazios' counterclaim was governed by Wisconsin law pursuant to the exception in the governing law provision. ***Id.***, ¶¶14-15. We determined the Fazios stated a valid counterclaim for the alleged violation of California law. ***Id.***, ¶¶20-22.

¶17 The same logic that dictated that outcome controls here. In the previous appeal, we held the Fazios' counterclaim "does not relate in any w ay to U.S. Bank's statutory power of sale or any other remedy granted by the loan documents, nor does it relate to the creation, perfection, or enforcement of a

mortgage lien or security interest." ***Id.***, ¶14. As a general matter, the same can be said of the Fazios' affirmative defense alleging a violation of CAL. CIVIL CODE § 2943. By its plain terms, the statute allows an entitled person to recover damages for the beneficiary's failure to timely provide payoff or beneficiary statements. It does not forbid, restrain, or in any other way relate to a mortgagee's exercise of its statutory power of sale or other remedies available to it. Nor does the statute regulate the "creation, perfection, or enforcement of a mortgage lien or security interest." Accordingly, enforcement of the statute is not precluded by the governing law provision's narrow exception to the general applicability of California law.[3]

¶18 KNA Family attempts to thwart this reasoning in the context of this appeal with two arguments. First, it claims the Fazios "may not allege a violation of California law in an attempt to state an affirmative defense against a foreclosure action properly filed in Wisconsin." Second, KNA Family argues there is significance to the fact that the prior appeal was decided under the standards relating to a motion to dismiss, while the present appeal concerns a motion for summary judgment. We reject these arguments.

¶19 KNA Family's first argument distinguishes between a counterclaim and an affirmative defense. In KNA Family's view, the fact that CAL. CIVIL CODE § 2943 has been raised as an affirmative defense to foreclosure, as opposed to a

[3] We reach this conclusion without applying principles of res judicata under ***A.B.C.G. Enterprises., Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 515 N.W.2d 904 (1994), the applicability of which is disputed by the parties. However, we note that in the transaction with U.S. Bank, KNA Family assumed all of U.S. Bank's liabilities, duties, and obligations under the loan documents, so KNA Family's argument that U.S. Bank's alleged violation of CAL. CIVIL CODE § 2943 has no effect on the foreclosure judgment is unavailing.

counterclaim, transforms it into a provision governing the enforcement of KNA Family's mortgage lien, thereby rendering California law inapplicable. This distinction does not withstand scrutiny.

¶20 A counterclaim, like an affirmative defense, may "diminish or defeat the recovery sought by the opposing party." *See* WIS. STAT. § 802.07(1). Thus, a counterclaim can, in certain contexts, function much like an affirmative defense. Moreover, KNA Family's understanding of the governing law provision does not make sense, as its interpretation effectively obligates a mortgagee to follow the dictates of California law, but then prevents a mortgagor from ever raising the mortgagee's failure to do so as a defense to foreclosure. To obtain relief, KNA Family apparently believes the mortgagor would be *required* to file either a counterclaim or a separate action. Under these circumstances, we do not find the artificial distinction KNA Family seeks to draw between a counterclaim and an affirmative defense compelling.

¶21 Moreover, a successful affirmative defense based upon a violation of CAL. CIVIL CODE § 2943 would not necessarily preclude KNA Family from obtaining a judgment of foreclosure under Wisconsin law. This provides further justification for treating the California statute as one relating only to the performance of the mortgagee's obligations, from which any damages caused by the mortgagee violating the statute are offset against the foreclosure judgment. Under Wisconsin law,

> [a] judgment on foreclosure does little more than determine that the mortgager is in default, the amount of principal and interest due and unpaid, the amount due the plaintiff mortgagee for taxes, etc., which he has been compelled to pay and which he is entitled to have added to the amount of principal and interest, and to determine the amount of the attorney's fee. The judgment does not destroy the lien of

> the mortgage but rather judicially determines the amount thereof.

Marshall & Ilsley Bank v. Greene, 227 Wis. 155, 164, 278 N.W. 425 (1938); *see also* ***In re Madison Hotel Assocs.***, 749 F.2d 410, 422 (7th Cir. 1984). With certain limited exceptions, the amount designated in the judgment of foreclosure is the amount the mortgagor must pay to redeem the property. *See* WIS. STAT. § 846.13.

¶22 Because foreclosure proceedings are equitable in nature, *see* ***GMAC Mortgage Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998), the Fazios, upon proving damages for a violation of CAL. CIVIL CODE § 2943, are entitled to a corresponding reduction in the redemption amount, in the nature of an equitable setoff or recoupment, *see* ***O'Brien v. Freiley***, 130 Wis. 2d 174, 180 n.4, 387 N.W.2d 85 (Ct. App. 1986); *see also* ***Zweck v. D P Way Corp.***, 70 Wis. 2d 426, 433-34, 234 N.W.2d 921 (1975). Accordingly, we recognize a violation of the California statute may have a secondary effect upon the foreclosure judgment. However, the California statute does not operate to preclude KNA Family from enforcing its security interest, which would create a more difficult question as to whether the statute is inapplicable by virtue of the exception contained in the governing law provision.

¶23 We are also not persuaded by the distinction KNA Family attempts to draw between the procedural posture of the present appeal and that in ***KNA Family I***. It is true that the factual record is more fully developed in this appeal than it was when ***KNA Family I*** was decided. That development does not, however, inure to KNA Family's benefit. KNA Family does not dispute that the Fazios, by their son Joe, made repeated attempts to obtain a payoff amount, all of

which went unanswered until after the loan had matured. Joe Fazio described these efforts in his affidavit:

> 12. Affiant states that he made a written request to Berkadia, the servicing agent, for a pay off [sic] amount.[4]
>
> 13. Affiant states that he was notified on or about May 11, 2012, that Berkadia would no longer be the servicer effective May 15, 2012. Berkadia informed affiant that they could not respond to his pay off [sic] demand since they had forwarded all their records to the new servicer[,] CW Capital. Berkadia did continue to act as a special servicer for CW Capital into July of 2012. They were unable to get the pay off [sic] information for affiant even then. … Affiant made numerous attempts to contact CW Capital from May through October 2012. The only response affiant received was that they were busy with too many [payoff] demands ….
>
> 14. Affiant states he was able to find a buyer for the property and entered into a contract for $1,350,000 (one million three hundred fifty thousand dollars) on June 4, 2012.
>
> 15. Affiant states that their broker, Barry Silver, also began making attempts to contact CW Capital to obtain a pay off all to no avail.
>
> 16. Affiant states that on July 1, 2012, the forbearance agreement expired and the loan was deemed by the Bank to be in default.
>
> 17. Affiant states that it was not until October 25, 2012, that he finally received a written pay off from CW Capital.

These averments, if testified to at trial and accepted by the factfinder, are sufficient to establish a violation of CAL. CIVIL CODE § 2943(c), relating to a

[4] There is no dispute in this case that the note holder is liable for the actions (or inactions) of the various loan servicers.

beneficiary's obligation to timely provide a payoff demand statement upon request. Although the averments relate only to requests for a loan payoff amount, these requests may also constitute a request for a beneficiary statement, which must also include the amount of the unpaid obligation and the applicable interest rate. *See* § 2943(a)(5), (b)(1).

¶24 If the factfinder concludes that either or both CAL. CIVIL CODE § 2943(b)(1) or (c) was violated, and the violation was willful, the factfinder shall award "all damages which [an entitled person] may sustain by reason of the refusal and, whether or not actual damages are sustained, [the beneficiary] shall forfeit to the entitled person the sum of three hundred dollars ($300)."[5] CAL. CIVIL CODE § 2943(e)(4). A "willful" violation consists of "an intentional failure to comply with the requirements of [§ 2943] without just cause or excuse." ***Id.*** Thus, if the Fazios prove a willful violation of either subsection at trial, they are entitled to no less than a $300 reduction in the amount of the judgment of foreclosure, with the potential for additional reductions based on actual damages proven.[6]

[5] CALIFORNIA CIVIL CODE § 2943(e)(4) also provides that each failure to prepare and deliver a statement constitutes a separate cause of action, but a judgment awarding damages and/or a forfeiture for any failure "bars recovery of damages and forfeiture for any other failure to prepare and deliver a statement, with respect to the same obligation, in compliance with a demand therefor made within six months before or after the demand as to which the award was made."

[6] KNA Family's arguments are directed solely toward disputing the applicability of CAL. CIVIL CODE § 2943. It does not argue in the alternative that, should the statute apply, the Fazios have failed to create a genuine issue of material fact regarding the alleged violation, including on grounds that the violation was "willful." In any event, our independent review of the record confirms that the Fazios have presented sufficient evidence to create a triable issue regarding whether the alleged statutory violation was "willful" as defined in § 2943(e)(4).

¶25 Citing ***Harbor Credit Union v. Samp***, 2011 WI App 40, 332 Wis. 2d 214, 796 N.W.2d 813, KNA Family argues a lender's failure to comply with a procedural requirement provides no relief to the borrower unless that failure affects the borrower's substantial rights. The "procedural requirement" in ***Samp***, however, related to the foreclosure proceeding itself; the mortgagee, which had prevailed at the sheriff's sale of the property in that case, failed to pay to the court clerk, within ten days of the sale, that portion of the successful bid in excess of the amount of the foreclosure judgment, contrary to WIS. STAT. §§ 846.16 and 846.17 (2009-10). *See* ***Samp***, 332 Wis. 2d 214, ¶58. The court cited WIS. STAT. § 805.18(1) (2009-10), which relates to errors or defects in the "pleadings or proceedings." ***Samp***, 332 Wis. 2d 214, ¶62. Because the procedural defect in this case predated the foreclosure proceeding, ***Samp*** and WIS. STAT. § 805.18(1) are inapplicable. Moreover, it belies reason to claim the Fazios' substantial rights were unaffected by KNA Family's predecessors' failure to timely provide a loan payoff statement; without it, it would be difficult for the Fazios to have known the amount due on the note's maturity date. *See* ***KNA Family I***, unpublished slip op. ¶13.

¶26 We agree with the circuit court and KNA Family, however, that the Fazios have failed to demonstrate a genuine issue of material fact with respect to any damages they allegedly sustained from the scuttled sale of the Pioneer Avenue property to Torrey Realty Holdings. Peter Fazio averred that the sale "could not be closed given the inability to obtain a payoff demand statement associated with the loan at issue in this matter." Joe Fazio likewise averred that "the sale of the property fell through due to the inability to get a proper pay off [sic] demand in a timely manner." Neither Peter nor Joe Fazio articulated the basis for their assertions. It is undisputed that it was Torrey Realty's decision not to complete

the purchase, and Peter and Joe could only have known of Torrey Realty's reasons for doing so if they were given that information by someone with knowledge of the matter.

¶27 WISCONSIN STAT. § 802.08(3) requires that affidavits in opposition to summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." We agree with the circuit court that Peter and Joe Fazio's assertions regarding the reason Torrey Realty declined to complete the purchase of the property fail to satisfy these requirements. Peter and Joe's failure to identify the source of their belief is particularly notable because KNA Family submitted an affidavit from John Rooney, the chairman and chief executive officer of Torrey Realty, who stated the firm declined to complete the purchase because "preliminary due diligence review showed that the lease terms were not acceptable to Torrey." In addition, the record contains an email from Barry Silver, the Fazios' broker, informing the Fazios that Rooney would not be purchasing the property because of OfficeMax's refusal to modify the lease terms.

¶28 Accordingly, we conclude there is no genuine issue of material fact regarding the availability of damages under CAL. CIVIL CODE § 2943(e)(4) arising from the failed sale of the property to Torrey Realty. There is no competent evidence the Fazios sustained any damages in that regard as a result of U.S. Bank's failure to timely provide a beneficiary or loan payoff statement. However,

as explained previously, *see supra* ¶24, they may be able to prove other damages arising from the violation of § 2943.[7]

[7] The parties have not discussed any additional issues that might arise should the Fazios prevail on their counterclaim against U.S. Bank for damages and also successfully reduce the amount of the foreclosure judgment in favor of KNA Family.

II. Factual issues regarding the duty of good faith and fair dealing

¶29 Mortgages are treated and construed as contracts. *See* ***Mutual Fed. S & L Ass'n v. Wisconsin Wire Works***, 58 Wis. 2d 99, 104, 205 N.W.2d 762 (1973). Like Wisconsin law, *see* ***M&I Marshall & Ilsley Bank v. Schlueter***, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521, California law states that "all contracts impose a duty of good faith and fair dealing," *see* ***Steiner v. Thexton***, 226 P.3d 359, 365 (Cal. 2010).[8] Such a duty is

> a guarantee by each party 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."

Tang v. C.A.R.S. Prot. Plus, Inc., 2007 WI App 134, ¶41, 301 Wis. 2d 752, 734 N.W.2d 169 (quoting ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58). Lack of good faith includes a party's attempts to evade the spirit of the bargain, "lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." ***Id.*** (quoting ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 797, 541 N.W.2d 203 (Ct. App. 1995)). Whether a party has breached the implied duty of good faith is a question of fact. ***Id.***

[8] The parties' briefing discusses the duty of good faith and fair dealing under Wisconsin law only. However, because the duty "exists in the performance of the contract," *see* ***LDC-728 Milwaukee, LLC v. Raettig***, 2006 WI App 258, ¶11, 297 Wis. 2d 794, 727 N.W.2d 82, it appears the scope of the duty, too, should be defined by California law under the governing law provision. Nonetheless, because the parties rely exclusively on Wisconsin law, for purposes of this appeal we presume the scope and nature of the duty of good faith and fair dealing under Wisconsin law is commensurate with those aspects of the duty under California law.

¶30 This court has previously concluded, in an authored decision, that a bank's failure to timely provide a payoff statement can constitute a breach of the implied duty of good faith and fair dealing. *See* ***Deutsche Bank Nat. Trust Co v. Pauk***, No. 2010AP1583, unpublished slip op. ¶44 (WI App May 31, 2012). In ***Deutsche Bank***, the mortgagor needed to obtain a payoff statement to complete a sale of the mortgaged property, which statement was not forthcoming from the various loan servicers despite repeated requests over the course of approximately one month. *See* ***id.***, ¶¶9-29. We observed that the facts as found by the circuit court demonstrated

> that the Bank engaged in a pattern of inaction and a lack of diligence by failing to timely provide [the mortgagor] with a document that only the Bank could provide, that the Bank knew or should have known that the document would be essential for [the mortgagor] to close the sale of her mortgaged property, and that the length of the delay was unreasonable and well outside industry standards.

Id., ¶51. Based on these facts, we concluded the bank in that case breached its duty of good faith and fair dealing. ***Id.*** Although ***Deutsche Bank*** is not a published opinion, we find its analysis persuasive. *See* WIS. STAT. RULE 809.23(3)(b) (authored but unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value).

¶31 KNA Family argues ***Deutsche Bank*** is a "fact-specific outlier that should be narrowly construed." KNA Family asserts this case is distinguishable from ***Deutsche Bank*** because, unlike the mortgagor in that case, here the Fazios have failed to present any admissible evidence that the failure to timely obtain a payoff statement caused the loss of the sale of the property to Torrey Realty. While we agree with this specific argument, *see supra* ¶¶26-28, we do not agree the Fazios have failed to create a genuine issue of material fact regarding damages.

Contrary to KNA Family's assertions, it is entirely possible that a factfinder could conclude, on this record, that the Fazios would have paid the balance of the note on or before its maturity date had KNA Family provided a timely payoff statement, as the Fazios repeatedly requested. As the Fazios observe, such payment would have prevented additional interest, penalties, and costs from accruing on the note.

III. Application to principal of rents paid to receiver

¶32 In the order granting KNA Family a judgment of foreclosure, the circuit court concluded KNA Family was entitled to $232,156.34 in interest accrued at the non-default percentage rate between May 1, 2012, and January 1, 2015, plus $130,613.10 in interest accrued at the default percentage rate between August 1, 2012, and January 1, 2015. The interest amounts were calculated based on the unpaid principal amount of $869,695.02 as of January 1, 2015. The order noted the receivership account had a balance of $276,876.98 as of April 8, 2014, which amount consisted of rents collected by the receiver following her appointment in October 2013. The circuit court ordered that "at a time to be determined by the Court, said rents collected by the Receiver, past and future, are to be paid over to Plaintiff and applied to the Note balance."

¶33 The Fazios argue the circuit court erred by failing to apply the net rental proceeds to the principal and interest owed under the note as of the date those rents were collected. Doing so would have reduced the total amount of principal and interest awarded by the judgment of foreclosure. Citing ***Manlick v. Loppnow***, 2011 WI App 132, ¶19, 337 Wis. 2d 92, 804 N.W.2d 712, the Fazios assert the circuit court's decision to apply the rents collected *after* it determined

the total amount owed on the note is "at odds with the principals of foreclosure actions requiring the court to find what is fair and right."[9]

¶34 KNA Family's primary responses are that the Fazios never asked the circuit court to disburse receivership funds and "[e]quity does not compel … that payments held in the receivership account should be artificially applied as payments to the lender." We perceive KNA Family's first argument to be one of forfeiture; however, this argument is undeveloped, and, in any event, it does not appear the Fazios anticipated how the circuit court would handle the receivership proceeds until the circuit court issued its written decision. With respect to the second argument, KNA Family does not dispute that the decision of how to apply receivership funds to the balance of the note is an equitable determination. As a result, we review such matters for an erroneous exercise of discretion. *See* ***Forest Cty. v. Goode***, 219 Wis. 2d 654, 680-81, 579 N.W.2d 715 (1998).

¶35 Here, there is no indication the circuit court in fact exercised its equitable authority when determining how the receivership proceeds were to be applied to the foreclosure judgment. The court appears to have adopted wholesale the recommendation of KNA Family, as set forth in an affidavit by its managing member, that the receivership proceeds should be disbursed and applied "to reduce the debt owing under the Loan Documents, substantially decreasing any future interest accrual on the remaining balance, and reducing the amount necessary for the Borrowers to redeem the Mortgaged Premises before sale." On remand,

[9] We note that ***Manlick v. Loppnow***, 2011 WI App 132, 337 Wis. 2d 92, 804 N.W.2d 712, involved a dispute regarding riparian rights, not a foreclosure. However, as stated in that opinion, issues regarding fairness are founded in equity. ***Id.***, ¶19. As previously noted, foreclosure proceedings are equitable in nature.

should a foreclosure judgment be entered, the court shall exercise its equitable authority on the record to determine how the receivership account funds should be disbursed—i.e., whether, as the Fazios argue, the funds should be applied to reduce the amount of principal and interest due on the note as of the date of their receipt by the receiver; or whether, as KNA Family argues, the funds should be applied as a post-judgment reduction in the amount of the foreclosure judgment.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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