

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 20, 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. 2011AP2380**

**Cir. Ct. No. 2010CV709**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**MARINE BANK N/K/A CIBM BANK,**

**PLAINTIFF-RESPONDENT,**

**V.**

**SILVER OAK HOMES, LLC AND WHITETAIL WOODS, LLC,**

**DEFENDANTS-APPELLANTS,**

**DANIEL HALLORAN, KARI HALLORAN, LANNON STONE PRODUCTS, INC., ADAIR SEWER AND WATER, INC., RENNHACK CONSTRUCTION COMPANY, INC., PREMIER EXCAVATING & TRUCKING, LLC, PAYNE & DOLAN, INC., HOMESTEAD INSULATION, INC., HOMESTEAD DRYWALL, INC., HERR DIRECTIONAL DRILLING, LLC, CENTRAL READY MIXED LIMITED PARTNERSHIP AND RIEDEL EXTERIORS,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. The trial court granted Marine Bank n/k/a CIBM Bank a judgment of foreclosure against Silver Oak Homes, LLC, and Whitetail Woods, LLC, (“Silver/Woods,” where used collectively) and dismissed Silver/Woods’ counterclaims. We reject Silver/Woods’ arguments that the Bank failed to establish a prima facie case for foreclosure, that the dismissal of their counterclaims should be reversed and remanded for trial, and that the court erred in denying their motion to compel discovery. We affirm.

¶2 Silver Oak executed and delivered to the Bank a promissory note with an original balance of \$726,160.00. The note was secured by a duly recorded construction mortgage on a partially constructed single-family home. Title to the subject real estate was vested in Whitetail Woods. The note later was increased to \$754,160.00; the amended mortgage also was recorded. Silver Oak agreed to make monthly interest installments from February 23, 2008, until January 23, 2010, when all outstanding principal and accrued unpaid interest would be due.

¶3 The City of Mequon granted Silver Oak conditional approval to develop a seven-lot subdivision. Silver Oak entered into a contract with Daniel and Kari Halloran for the construction of a house on one of the lots. Due to various cost overruns, Silver Oak was unable to complete the construction within budget. Silver Oak approached the Bank in late 2009 to seek a renewal of the note and an increase of funds. The Bank was interested and, per its usual procedure before making a new loan, requested an updated title search. That search revealed three clouds on title—two construction liens and an Affidavit of Equitable

Ownership filed by the Hallorans. The title company informed the Bank that it could not insure first-lien position on future advances under the loan if the two liens and the Affidavit remained. When the Hallorans declined to execute a subordination agreement, the note was not renewed and the Bank did not advance additional funds. Silver Oak defaulted and the Bank commenced foreclosure proceedings.

¶4 Silver Oak admitted conveying the mortgaged premises to Whitetail Woods by quitclaim deed and that the note stated a maturity date of January 23, 2010, but denied that it was obligated in any amount above the original mortgage. It also counterclaimed, alleging breach of contract, misrepresentation under WIS. STAT. § 100.18 (2011-12),<sup>1</sup> strict responsibility and negligent misrepresentation, unjust enrichment, and breach of fiduciary duties.

¶5 The Bank moved for summary judgment seeking a judgment of foreclosure, dismissal of the counterclaims, and a declaration that the Bank's interest in the foreclosed property was superior to any interests asserted by additional defendants. Silver Oak vigorously opposed the Bank's motion, asserting that a "vast number" of material facts remained at issue. Calling it a "garden variety foreclosure action," the trial court granted the Bank's motion. Silver/Woods appeals.

¶6 Summary judgment is proper when there are no issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We review the grant of summary judgment de novo, employing the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). If the undisputed facts allow for more than one reasonable inference, the competing inferences may constitute a genuine issue of material fact. See *Hennekens v. Hoerl*, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. See *id.* A determination of whether a mortgage contract is ambiguous also is a question of law that we consider de novo. See *Lamb v. Manning*, 145 Wis. 2d 619, 627, 427 N.W.2d 437 (Ct. App. 1988).

¶7 The Bank's motion for summary judgment was supported by a Bank officer's affidavit establishing that Silver Oak executed the note and mortgage, that the Bank is the current holder of both, and that Silver Oak defaulted by failing to make scheduled installment payments and to make a final full payment on or before the maturity date. This constituted proof of the existence of the debt, note, and mortgage for purposes of summary judgment, and of the Bank's right to foreclosure.

¶8 Silver/Woods denies in its answer that it defaulted, but it did not file evidentiary affidavits putting in dispute facts regarding the execution of the note and mortgage, assignment of the mortgage and note, or their default. The opponent of a summary judgment motion may not rest on mere denials but must affirmatively counter with evidentiary materials demonstrating a factual dispute. *Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. When the party opposing summary judgment fails to respond or raise an issue of material fact, summary judgment can be rendered on that basis alone. See *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983).

¶9 The terms of the note and mortgage are unambiguous and must be enforced as written. *See Borchart v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Silver/Woods contends that, even if unambiguous, the mortgage is not enforceable because it is with Silver Oak and title to the real estate is with Whitetail Woods. As this is the first time Silver/Woods raised this argument, we reject it as forfeited. *See Gruber v. Village of N. Fond du Lac*, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692 (“Although this court engages in summary judgment review de novo, we nonetheless may apply waiver to arguments presented for the first time on appeal.”). Beyond that, the argument fails on the merits. We reject the unsupported notion that transferring title by a quitclaim deed extinguishes a mortgage. Indeed, Silver/Woods admitted in its Requests for Admissions that, while Silver Oak conveyed the mortgaged property to Whitetail Woods, Whitetail Woods’ ownership is subject to the mortgage.

¶10 Silver/Woods next contends that its bad-faith counterclaims create issues of fact that preclude summary judgment. We disagree. When Silver Oak defaulted, the Bank called the note due and commenced foreclosure proceedings under the mortgage, just as those contracts allowed. Where, as here, a contracting party complains that the other party acts in a manner specifically authorized by their agreement, a breach of the duty of good faith is not established. *See Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988).

¶11 Silver/Woods’ claims that the Bank failed to prove default on the note or the amount of its judgment likewise fail. The record contains sufficient evidence of default to warrant the mortgage’s foreclosure. The Bank officer’s sworn statement, supported by a true and correct copy of the account statement, set forth the amount due and owing. Silver/Woods did not submit opposing

proof. Evidentiary facts, as set forth in the moving party's affidavits or other proof are taken as true if not contradicted by opposing affidavits or other proofs. *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997).

¶12 As to Silver/Woods' counterclaims, we agree with the trial court and the Bank that they have no arguable merit. Silver/Woods asserts that the Bank breached the contract by refusing to fund all draw requests, including one made by e-mail to the Bank in October 2009. Draw requests were processed through the title company. The affidavit of the title company's vice president averred that draw requests were to be made to the title company in affidavit form supported by evidence of contractor needs, and that it received none after December 2008. Silver/Woods did not counter with proof that its requests were properly made or that they were for available funds, rather than additional funds above and beyond the amount in the note.

¶13 Silver/Woods' counterclaims alleging misrepresentation and unjust enrichment also were properly dismissed. This is a contract case. The economic loss doctrine bars negligence and strict responsibility misrepresentation claims. *See Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶30, 283 Wis. 2d 555, 699 N.W.2d 205. Contrary to their claim, the Bank is not unjustly enriched by improvements Silver/Woods made to the mortgaged premises. The sole damages sought are those specified in the note and secured by the mortgage. The Bank thus is not inequitably accepting and retaining a benefit without payment. *See Staver v. Milwaukee Cnty.*, 2006 WI App 33, ¶24, 289 Wis.2d 675, 712 N.W.2d 387.

¶14 We likewise reject Silver/Wood's claim that a factual dispute exists over whether the Bank breached its fiduciary duty. The mere existence of a borrower-lender contract and borrower-lender relationship does not create a

fiduciary duty. See *Production Credit Ass'n of Lancaster v. Croft*, 143 Wis. 2d 746, 752, 423 N.W.2d 544 (Ct. App. 1988). While a fiduciary duty between borrower and lender may be created by special contract terms, or by a special relationship between the borrower and lender, see *id.* at 752-53, 756-57, Silver/Wood has not alleged that any exists here.

¶15 Finally, we affirm the denial of Silver/Woods' motion to compel discovery, a matter Silver/Woods concedes is within the trial court's discretion. See *Franzen v. Children's Hosp. of Wis., Inc.*, 169 Wis. 2d 366, 376, 485 N.W.2d 603 (Ct. App. 1992). Silver/Woods made demands for internal documents of the Bank that it believed would establish that it had made legitimate draw requests that the Bank did not honor and that the Bank had agreed to extend the loan. In denying the motion, the trial court reasoned that the Bank did not go through with the contemplated loan extension due to the cloud on title and the production of further documents would not change that fact. We see no erroneous exercise of discretion.

*By the Court.*—Judgment affirmed.

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

