COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 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. 2011AP2550 **Cir. Ct. No. 2010CV104**

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

CHASE HOME FINANCE, LLC,

PLAINTIFF-RESPONDENT,

V.

VINCENT M. SCARPACE,

DEFENDANT-APPELLANT,

JANE DOE SCARPACE AND OZAUKEE COUNTY CLERK OF CIRCUIT COURT,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

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

¶1 PER CURIAM. This mortgage foreclosure action arose from Vincent M. Scarpace's failure to pay his property taxes. His mortgage servicer, JPMorgan Chase Bank, N.A., successor by merger to Chase Home Finance LLC (Chase), paid them and Scarpace defaulted when he could not meet the tax repayment plus his monthly mortgage obligation. Scarpace appeals from a grant of summary judgment in favor of Chase. We affirm.

¶2 In May 2004, Scarpace borrowed $299,995 from Chase Manhattan Mortgage Corporation secured by a mortgage on his home. Scarpace signed an Escrow/Impound Payment Rider in connection with the loan. The Rider made Scarpace responsible for timely payment of all property taxes and provided that, should he fail to timely do so or to provide a requested proof of payment, Chase could opt to pay the taxes, establish an escrow account and seek immediate reimbursement from Scarpace.

¶3 In late 2005, Chase sent Scarpace a series of four written notices of delinquency. The notices demanded proof of payment and reminded Scarpace that Chase may pay the outstanding taxes on his behalf, establish an escrow account, and increase his monthly payments accordingly. Scarpace did not respond. In June 2007, Chase paid $21,727.18 in delinquent taxes on the property and increased Scarpace's monthly installment payments.

¶4 Scarpace ceased making monthly payments due on and after September 1, 2008, and in January 2009, Chase sent him an Acceleration Warning and Notice of Intent to Foreclose. In April 2009, Scarpace entered into a Forbearance Plan Agreement. The Forbearance Plan required Scarpace to make a $3102.35 down payment and three $1850 monthly payments after which "regular payments will become due in addition to any delinquent payments, fees and/or

charges. If your account is not current once the Forbearance period has ended, collection and/or foreclosure activity will resume." After Scarpace made the three monthly payments, the Forbearance Plan terminated.

¶5 In August 2009, Scarpace applied to Chase for a loan modification under the Home Affordable Modification Program (HAMP). The Secretary of the Treasury implemented HAMP to encourage lenders to refinance mortgages with more favorable interest rates to reduce foreclosures. The Secretary negotiated Servicer Participation Agreements (SPAs) with loan servicers such as Chase. An SPA governs the loan servicer's obligations to the Treasury through its financial agent, the Federal National Mortgage Association, or "Fannie Mae." If the servicer determines a borrower is eligible for loan modification, it may offer him or her a Trial Period Plan (TPP). A TPP allows the homeowner to make modified mortgage payments for a specified term.

¶6 Chase notified Scarpace in December that he did not qualify for a HAMP loan modification because his income was insufficient and his loan failed the Net Present Value test, an accounting calculation done to determine whether it is more profitable to modify the loan or allow it to go into foreclosure. Scarpace did not cure his default. After giving written notice, Chase accelerated the indebtedness owed under the note and filed a foreclosure action. Scarpace counterclaimed, asserting that Chase breached its good-faith duty and failed to comply with its HAMP obligations. Chase moved for summary judgment. The circuit court granted the motion. Scarpace appeals.

¶7 We review a grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). The controlling principle of

the well-known methodology is that "summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***; *see also* WIS. STAT. § 802.08(2) (2011-12).[1]

¶8 Each of Scarpace's appellate arguments is premised on the erroneous notion that he and Chase had a contractual relationship under HAMP. That never came to fruition because he did not qualify for the program. Furthermore, he did not plead or argue breach of contract or promissory estoppel under HAMP. Those arguments therefore are forfeited. *See* ***Gruber v. Village of North 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."). They also fail on the merits.

¶9 Scarpace contends that issues of material fact remain regarding whether Chase complied with its obligations under HAMP. It owed him no obligations, however, because he was not eligible for a loan modification. Therefore, his reliance on ***Wigod v. Wells Fargo Bank, N.A.***, 673 F.3d 547 (7th Cir. 2012), for the point that in some circumstances an individual can sue to enforce a loan servicer's HAMP obligations is to no avail. Unlike here, Wigod and Wells Fargo entered into a TPP after Wigod was found eligible for a loan modification. *See* ***id.*** at 558-59. Wigod alleged a breach of contract on the basis that, after she complied with all of the terms of the TPP, Wells Fargo reneged on its promise to provide her a permanent loan modification. *See* ***id.*** at 560-61. The parties here did not enter into a TPP because Scarpace did not qualify.

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

¶10 Scarpace also contends that he can sue to enforce the contract because he is a third-party beneficiary. Again, there is no loan-modification contract. Furthermore, "[t]he general rule is that only a party to a contract may enforce it." ***Sussex Tool & Supply, Inc. v. Mainline Sewer and Water, Inc.***, 231 Wis. 2d 404, 409, 605 N.W.2d 620 (Ct. App. 1999). An exception exists when the contract was made specifically for the benefit of a third party. ***Id.*** One claiming third-party beneficiary status must show that the contracting parties entered into the agreement for his or her direct and primary benefit, either individually or as a member of a class. ***Id.*** By its very terms, the SPA between Fannie Mae and Chase is for their benefit. A homeowner has no cause of action to enforce HAMP guidelines as a third-party beneficiary of the SPA between the federal government and the mortgage servicer. *See* ***Wigod***, 673 F.3d at 559 n.4.

¶11 Scarpace also contends that Chase "did not bother rebutting" his claims that the HAMP "breach" was inequitable and that foreclosure was barred by unclean hands and estoppel. "Foreclosure proceedings are equitable in nature." ***First Fin. Sav. Ass'n v. Spranger***, 156 Wis. 2d 440, 444, 456 N.W.2d 897 (Ct. App. 1990). Whether to award equitable relief is within the circuit court's discretion. ***Timm v. Portage Cnty. Drainage Dist.***, 145 Wis. 2d 743, 752, 429 N.W.2d 512 (Ct. App. 1988).

¶12 For relief to be denied a plaintiff in equity under the "clean hands" doctrine, "it must clearly appear that the things from which the plaintiff seeks relief are the fruit of its own wrongful or unlawful course of conduct." ***S&M Rotogravure Serv., Inc. v. Baer***, 77 Wis. 2d 454, 467, 252 N.W.2d 913 (1977). Chase sought relief from Scarpace's wrongful conduct—his failure to promptly pay the property taxes and stay current on his loan.

¶13 As to estoppel, Scarpace asserts that he supplied all the documents necessary for approval but still was denied a loan modification, that ***Wigod*** makes clear that promissory estoppel applies to HAMP TPPs, that he put in evidence "saying that he had been in a HAMP TPP," and that he made TPP payments. ***Wigod*** does not assist him. A servicer is not obliged to offer loan modification to an unqualified applicant. "Saying" he and Chase were in a HAMP TPP does not make it so. Scarpace may be thinking of the Forbearance Plan payments, but he cannot have made TPP payments because a TPP depends upon a borrower being found eligible. Scarpace did not make a prima facie showing of his affirmative defenses and therefore is not entitled to a trial on them.

¶14 Scarpace next contends that there is a material issue of fact as to whether Chase breached the good-faith duty imposed by the mortgage contract, as alleged in his counterclaim. "Every contract implies good faith and fair dealing between the parties to it." ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988) (citation omitted).

¶15 Scarpace claims he made his property tax payments "fairly" regularly, although sometimes "a little late," and complains that Chase paid the back taxes without giving him notice. It is not disputed that his outstanding property bill exceeded $21,000. The Escrow Rider expressly authorized Chase to pay the property taxes if Scarpace did not pay them "immediately when due." It did not require Chase to notify Scarpace. Where a contracting party complains that the other party acts in a way specifically authorized in their agreement, a breach of the covenant of good faith is not established. ***Id.***

¶16 Scarpace also protests that Chase arbitrarily and unilaterally shortened the escrow repayment time. The Rider required Scarpace to

"immediately" reimburse Chase for any taxes it paid on his behalf. After Chase advised Scarpace that federal regulations and the mortgage allowed it to collect escrow shortages within one year, Scarpace asked for five. As a courtesy, Chase agreed. When Scarpace fell behind in his mortgage payments, Chase reset the repayment period to a year. Even if Chase might have kept to the five-year repayment period and put off the foreclosure action, it is not a breach of the duty of good faith to not have followed that course. *See* WIS JI—CIVIL 3044 ("It is not a breach of the duty of good faith if a course of action available to (plaintiff) could have avoided the harm and this course was not followed.").

¶17 Finally, Scarpace contends that the affidavits of Chase Assistant Vice President Thomas Reardon did not meet the evidentiary standards necessary to support summary judgment.[2] *See* WIS. STAT. § 802.08(3). When a party objects to an affidavit on the ground that it does not meet the statutory requirements, the circuit court determines whether the submission contains evidentiary facts that would be admissible in evidence. We review this determination under a deferential standard. ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶32, 259 Wis. 2d 181, 655 N.W.2d 718. Whether to allow a supplemental affidavit is a decision committed to the circuit court's discretion. ***Id.***

¶18 Reardon averred that he executed the affidavits on his personal knowledge and the business records of Chase, which owns the note and mortgage and services the mortgage. The records reflected the chronological course of transactions with Scarpace, including payments received, disbursements by Chase

[2] Scarpace acknowledges that summary judgment procedure "allow[s] for the possibility of additional affidavits" but asserts that it does not contemplate a "never-ending series" of them. Reardon submitted an original and one supplemental affidavit.

and charges associated with the loan. The circuit court concluded that one reasonably could infer that Reardon's position gave him some basis for knowing how Chase's records of Scarpace's mortgage loan were prepared. That decision reflects a proper exercise of the circuit court's discretion. *See* ***id.***

By the Court.—Judgment affirmed.

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