COURT OF APPEALS
DECISION
DATED AND FILED

April 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2074 **Cir. Ct. No. 2010CV3814**

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

BANK OF SUN PRAIRIE,

PLAINTIFF-RESPONDENT,

V.

CNC DRYWALL, INC., GUY D. CHAMPAGNE, TAMMY L. CHAMPAGNE AND TLC CUSTOM DRYWALL, LLC,

DEFENDANTS-APPELLANTS,

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. CNC Drywall, Inc. and its loan guarantors Guy and Tammy Champagne appeal a judgment of foreclosure and replevin and the dismissal of their counterclaim.[1] The sole issue on appeal is whether the Bank of Sun Prairie violated an obligation to exercise good faith by declaring CNC in default on a loan without prior notice and based upon a condition of default that was already in existence when the bank extended credit, and by exercising its remedies in a manner that essentially killed CNC's business. For the reasons discussed below, we affirm the decision of the circuit court.

BACKGROUND

¶2 The bank issued a loan to CNC to consolidate a previous term loan and outstanding line of credit. The consolidated loan was secured by a number of security agreements relating to CNC's assets. In addition, the Champagnes had each previously agreed to guaranty all of CNC's obligations to the bank, using their homestead as collateral.

¶3 CNC's promissory note on the consolidated loan provided that the borrower would be in default if it became insolvent, either because its liabilities exceeded its assets or it was unable to pay its debts as they came due. The note specified that the bank's available remedies in the event of a default would include a demand for immediate payment of the remaining balance, set off against any right of payment CNC had against the bank, and any other remedies available under state or federal law. The note did not contain any notice provision for exercising the bank's default remedies, and it expressly provided that a decision

[1] TLC Custom Drywalling, LLC is also listed as an appellant, but the parties do not explain what interest it has in the issues on the present appeal.

not to declare an event a default would not waive the bank's right "to later consider the event as a default if it continues or happens again."

¶4 At the time the consolidated loan was issued, the bank had knowledge that CNC's liabilities already exceeded its assets and that it was having difficulty paying its debts. Less than a year after the consolidated loan was issued, without prior notice and without a payment having been missed, the bank declared CNC in default based upon its negative equity and delinquencies in paying its suppliers, called in the entire amount of the loan, froze CNC's deposits at the bank, and sent demands to CNC's debtors to make any outstanding payments directly to the bank.

¶5 The bank subsequently filed the present action for foreclosure and replevin based upon the default. CNC and the Champagnes filed counterclaims for breach of contract and bad faith. The circuit court granted summary judgment in the bank's favor, and CNC and the Champagnes appeal on their counterclaim for bad faith claim.

STANDARD OF REVIEW

¶6 This court reviews summary judgment decisions de novo, applying the same methodology and legal standards employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and the answer joins an issue of fact or law. ***Id.*** If issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether there are any material

facts in dispute that would entitle the opposing party to trial. ***Id.***; *see also* WIS. STAT. § 802.08(2) (2011-12).[2]

¶7 Because we review the summary judgment materials independently, we do not address the bank's argument that the appellants' brief was inadequate because it failed to discuss the circuit court's decision.

DISCUSSION

¶8 The appellants do not dispute that CNC was insolvent or that insolvency was a basis for default under the note. Nor do they dispute that accelerated repayment, setoffs, and direct repayment of accounts receivable to the bank were available remedies under the terms of the note and state law. They nonetheless contend that the bank violated a statutory duty of good faith by the manner in which it declared a default and demanded full payment without prior notice, even though no loan payments were late or missed; by immediately seizing the deposits in CNC's checking account, which had been earmarked for payroll; and by sending letters to CNC's customers demanding that payments due to CNC be made directly to the bank, which essentially killed the ongoing business.

¶9 Under the Uniform Commercial Code, every contract subject to the code contains an obligation of good faith in its performance and execution. WIS. STAT. § 401.304. In addition, the code requires a secured party to "proceed in a commercially reasonable manner if the secured party … undertakes to collect from or enforce an obligation of an account debtor." WIS. STAT. § 409.607(3)(a).

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

¶10 The appellants rely upon a federal case from the Sixth Circuit for the proposition that the UCC obligation to exercise good faith may have imposed a notice requirement upon the bank even if it was not included in the terms of the note, and that the matter should have been submitted to a jury. *See* ***K.M.C. Co., Inc. v. Irving Trust Co.***, 757 F.2d 752, 758-59 (6th Cir. 1985) (refusal to advance additional funds under a line of credit, without notice, was deemed to be in bad faith because it would be commercially reasonable to allow some time to seek alternative financing). The problem for the appellants is that the Sixth Circuit decision is not binding upon this court, and Wisconsin case law provides otherwise.

¶11 There are multiple cases in Wisconsin stating that a party does not breach its obligation of good faith by exercising a right that is specifically authorized in a contract. *See, e.g.*, ***M&I Marshall & Ilsley Bank v. Schlueter***, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521; ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988). Although the appellants correctly point out that those cases involved different factual scenarios than the present case, they do not point to any Wisconsin cases that would undermine the general principle that a party does not act in bad faith when it takes actions authorized under a contract.[3]

¶12 Here, the appellants have not pointed to any action taken by the bank that was not authorized under the contract. Therefore, the circuit court properly

[3] This is not to say that the duty of good faith does not exist. For instance, a lender would still need to have a good faith basis for believing that the borrowers were in default before exercising its remedies.

dismissed their counterclaim for bad faith, as a matter of law, and entered judgment on the bank's foreclosure and replevin claims accordingly.

By the Court.—Judgment affirmed.

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