

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP271

Cir. Ct. No. 2008CV4721

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE FOR GSR
MORTGAGE LOAN TRUST 2007-AR1, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-AR1,**

PLAINTIFF-RESPONDENT,

v.

DIANE M. PAUK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. This is a mortgage foreclosure case that we have seen before. See *Deutsche Bank Nat'l Trust Co. v. Pauk*, No. 2010AP1583,

unpublished slip op. (WI App May 31, 2012) (“*Pauk I*”). In the instant appeal, Diane Pauk argues that her mortgage lender’s July 2008 breach of the mortgage contract entitled her to a combination of relief that she labels “rescission.” As we shall see, however, what Pauk labels as “rescission” instead appears to be a combination of relief that is *not* rescission. To the extent Pauk makes a true request for rescission, she raises it too late, in her reply brief. To the extent Pauk’s request is for other relief, Pauk fails to show that the circuit court erred in denying that relief. Accordingly, we affirm.

Background

¶2 This case has an extensive factual history, detailed in *Pauk I*, that we need not repeat. We summarize the few facts needed to set the stage for our discussion.

¶3 In July 2008, Pauk attempted to sell her mortgaged property, but the sale fell through because her mortgage lender, Deutsche Bank National Trust Company (“the Bank”), failed to timely provide a payoff statement. *Id.*, ¶¶7-32. Pauk stopped making mortgage payments, and, in October 2008, the Bank commenced a foreclosure action against Pauk. *Id.*, ¶¶1, 5, 31.

¶4 As a counterclaim and defense to foreclosure, Pauk alleged that the Bank’s failure to timely provide the payoff statement was a breach of the mortgage contract. *Id.*, ¶¶31, 38. Pauk sought damages for the Bank’s breach and asserted that, under the circumstances, granting the Bank’s request for foreclosure would be inequitable. *Id.*, ¶¶31, 34, 38.

¶5 Pauk’s breach of contract claim was tried to the court, Judge Julie Genovese presiding. In a judgment entered in March 2010, the court agreed with

Pauk that the Bank breached the mortgage contract and that, based on the nature of the Bank's breach, foreclosure would be inequitable. *Id.*, ¶¶2, 32, 35, 66-67. The court nonetheless ordered transfer of the title of the property to the Bank. *Id.*, ¶35. The court ordered other relief to both parties, including limited damages to Pauk. *Id.*

¶6 Both parties appealed. *Id.*, ¶¶1, 3. We affirmed in part and reversed in part. *Id.*, ¶¶4, 66, 68. More specifically, we affirmed the court's determinations that the Bank breached the mortgage contract and that the Bank's breach provided an equitable basis on which to deny foreclosure at that time. *Id.*, ¶¶4, 38, 51, 53, 65-66. We reversed as to the relief the court granted the parties. *Id.*, ¶¶63-66. We remanded for the court to grant appropriate relief. *Id.*, ¶67. We acknowledged the possibility that foreclosure might be appropriate going forward if there were changed circumstances since the time of the court's March 2010 judgment. *Id.*

¶7 On remand, the case was reassigned to Judge Richard G. Niess. Before Judge Niess, Pauk argued that she was entitled to rescind the mortgage contract while also continuing to seek breach of contract damages. Under Pauk's proposed combination of relief, Pauk would retain the property free and clear of any obligation to the Bank and the Bank would pay Pauk a net amount of \$111,989.76. The court rejected Pauk's proposed relief, and granted the Bank a foreclosure judgment based on changed circumstances since the time of the March 2010 trial court judgment. We reference additional facts as needed below.

Discussion

¶8 On appeal, Pauk spends considerable briefing space on the merits of her argument that the proper relief here is “rescission.” But, as we now discuss, Pauk mislabels the combination of relief she seeks as “rescission.”

¶9 Rescission of a contract “‘restore[s] the parties to the position they would have occupied if no contract had ever been made between them.’” *Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶41, 335 Wis. 2d 566, 799 N.W.2d 815 (quoting *Seidling v. Unichem, Inc.*, 52 Wis. 2d 552, 557-58, 191 N.W.2d 205 (1971)). “When rescission is sought each party is to return to the other such benefits as have been received from the other.” *First Nat’l Bank & Trust Co. of Racine v. Notte*, 97 Wis. 2d 207, 225, 293 N.W.2d 530 (1980); *see also Head & Seemann, Inc. v. Gregg*, 104 Wis. 2d 156, 159, 311 N.W.2d 667 (Ct. App. 1981) (“[T]he parties return the money, property or other benefits so as to restore each other to the position they were in prior to the transaction.”), *aff’d and adopted by Head & Seemann, Inc. v. Gregg*, 107 Wis. 2d 126, 127, 318 N.W.2d 381 (1982).

¶10 Here, as part of her “rescission” request on appeal, Pauk appears to seek a combination of relief that, although modified from what she requested from Judge Niess, goes well beyond rescission. First, Pauk’s “rescission” request, as set forth at the conclusion of her opening brief, involves Pauk obtaining unencumbered ownership of the underlying property, having an estimated value of \$315,000, and ending her obligation to repay the \$190,886.95 principal balance she owes the Bank under the mortgage contract. We fail to see how this amounts to restoration of the parties to the positions they held prior to their mortgage contract. Second, Pauk’s “rescission” request additionally seeks breach of contract damages. The latter request seems to conflict with rescission law stating

that “[t]he aggrieved party has the election of *either* rescission *or* affirming the contract and seeking damages.” *See Notte*, 97 Wis. 2d at 225 (emphasis added). Third, although we need not list them here, Pauk’s “rescission” request fails to account for benefits Pauk received relating to her ownership of the property for the past several years and the actions of the Bank to cover certain expenses relating to the property. *See* ¶17, *infra*.

¶11 In short, as far as we can tell, Pauk seeks a combination of relief that, contrary to rescission law, would put Pauk in a far *better* position, and the Bank in a far *worse* position, than the parties would have occupied if they had never entered into the mortgage contract.

¶12 For the first time in her reply brief, Pauk asserts in a footnote that “an appropriate remedy” would be to “return Pauk and the Bank to their original pre-contract positions,” which Pauk describes as meaning that “Pauk would need to return the money she received from the Bank and the Bank would need to return any monies received from Pauk and release its mortgage.” This reply brief assertion does not square with Pauk’s opening brief or with the combination of relief that Pauk requested while before Judge Niess.

¶13 Because Pauk’s reply brief assertion is the first time she requests what might amount to true rescission, we decline to address the merits of that argument. Instead, we conclude that any true rescission request Pauk makes comes too late and is forfeited. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) (we generally do not address arguments raised for the first time in a reply brief); *see also Marotz v. Hallman*, 2007 WI 89, ¶16, 302 Wis. 2d 428, 734 N.W.2d 411 (“[I]ssues not raised in the

circuit court will not be considered for the first time on appeal.” (quoted source omitted)).

¶14 Having concluded that what appears to be a true rescission request is forfeited, we still have the matter of whether there is merit to Pauk’s request for the combination of relief that she has mislabeled as “rescission.” As we have indicated, that relief appears to be a combination of equitable relief and damages that would place Pauk in a better position than if Pauk had elected to pursue either true rescission or breach of contract damages standing alone. Based on the case law already cited, we think it apparent that Judge Niess correctly viewed that combination of equitable relief and damages as both inequitable and unsupported by law.

¶15 Moving on, Pauk makes other assertions independent of her “rescission” argument. That is, Pauk makes several assertions regarding what relief she believes Judge Niess should have granted in the absence of what she labels “rescission.” For the reasons explained below, we deem these assertions to be undeveloped arguments or forfeited and, on that basis, reject them. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments); *Marotz*, 302 Wis. 2d 428, ¶16 (forfeiture discussed using “waiver” language). Moreover, we choose to point out that, to the extent we understand the gist of Pauk’s assertions, those assertions do not persuade us that Judge Niess erred.

¶16 We begin our explanation for our rejection of Pauk’s assertions by providing additional information about the posture of this case. In *Pauk I*, we left open the possibility not only of foreclosure but also contract damages for Pauk. On remand, the parties stipulated to the facts as of December 2014, including new

circumstances since the time of Judge Genovese's March 2010 judgment. When Judge Niess granted the Bank's request for foreclosure and denied Pauk's request for damages, he relied on that stipulation.

¶17 Judge Niess made the following findings of fact and legal conclusions:

- Had Pauk sold the property as planned in July 2008, she would have walked away free and clear of any obligations but without any profit; instead, because of the Bank's breach at the time, Pauk retained title to the property as well as her mortgage obligations to the Bank and to her second mortgage holder, GMAC.
- Pauk made no further mortgage payments to the Bank after June 2008.
- Pauk has not lived on the property since July 2008.
- Pauk received a total of \$45,000 in rent on the property starting in November 2008, which she is entitled to keep.
- The Bank paid the property taxes for tax years 2008 through 2013, totaling \$31,821.67.
- The Bank purchased "force placed" insurance on the property for 2009 through 2014.
- Pauk did not attempt to sell the property after Judge Genovese's March 2010 judgment.
- The property retained its value.
- In early 2013, GMAC cancelled Pauk's second mortgage.
- GMAC's cancellation effectively forgave amounts Pauk owed GMAC, resulting in a net gain to Pauk of \$80,154.96, representing the \$125,154.96 principal balance on the GMAC loan minus a \$45,000 tax liability Pauk incurred when the cancelled principal amount was treated as income to Pauk.
- The Bank was entitled to a judgment of foreclosure in the full amount due and owing under the mortgage contract, \$289,814.42.

- Expenses the Bank incurs going forward may be added to the judgment.
- The proceeds from a sheriff's sale of the property shall be applied to the amount owed to the Bank, with any surplus subject to further court order.
- The Bank waived, and was not entitled to, a deficiency judgment against Pauk.

¶18 Returning now to Pauk's assertions, Pauk makes a series of minimally developed arguments as to the amount of damages she believes Judge Niess should have awarded her. She also claims generally that Judge Niess's decision allowed the Bank to profit unfairly from the Bank's breach. However, Pauk fails to apply the pertinent damages law to the facts, and we are unable to determine what damages, if any, might be appropriate without such assistance from Pauk. *See, e.g., Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 385, 254 N.W.2d 463 (1977) (the damaged party should be compensated for "losses necessarily and foreseeably flowing from the breach, but the damaged party is not entitled to be placed in a better position because of a damage award than he or she would have been had the contract been performed"); *see also Kuhlman, Inc. v. G. Heileman Brewing Co.*, 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978) ("An injured party has a duty to mitigate damages, that is, to use reasonable means under the circumstances to avoid or minimize the damages. An injured party cannot recover any item of damage which could have been avoided.").

¶19 Apart from damages, Pauk may be arguing that, even absent rescission, foreclosure continues to be inequitable at this time. If so, Pauk's argument fails because she does not meaningfully address the changed circumstances that persuaded Judge Niess that foreclosure was fair to Pauk in light of the benefits she has received since the Bank's breach.

¶20 Alternatively, Pauk may mean to argue that, even absent rescission, foreclosure for the Bank will *never* be equitable because of the Bank's egregious conduct surrounding its 2008 breach. If that is Pauk's argument, we reject it as meritless.

¶21 Finally, Pauk argues that Judge Niess erred by failing to include certain statutorily required information in the judgment. The Bank argues that Pauk forfeited this argument by failing to preserve it in the circuit court. The Bank correctly points out that Pauk did not make this objection before Judge Niess when Pauk listed her objections to the judgment. We therefore agree with the Bank that Pauk has forfeited her argument as to the statutorily required information.

Conclusion

¶22 For the reasons stated, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

