

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2007

David R. Schanker
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. 2006AP1144

Cir. Ct. No. 2005CV570

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

LISA SCHAITBERGER,

PLAINTIFF-APPELLANT,

V.

KLAUS AND REGINA BARK REVOCABLE TRUST,

DEFENDANT-RESPONDENT,

KLAUS D. BARK, REGINA BARK, AND BARK AND ASSOCIATES, INC.,

DEFENDANTS.

APPEAL from orders of the circuit court for Kenosha County:
BARBARA A. KLUKA, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Lisa Schaitberger appeals from the orders that denied her motion for summary judgment against the Bark Revocable Trust, and granted judgment to the Bark Trust on its summary judgment motion.¹ Schaitberger argues that the provision of her land contract with the Bark Trust that prohibited prepayment of the contract for ten years was invalid under WIS. STAT. § 138.052(2) (2005-06),² and therefore the circuit court erred when it denied her summary judgment motion and granted the defendants' motion for summary judgment. Because we conclude that the circuit court properly denied her motion and granted the Bark Trust's motion, we affirm.

¶2 In July 2001, Schaitberger entered into a land contract with the Bark Trust for the purchase of property. The trustees of the Bark Trust are Klaus Bark and Regina Bark, both of whom were also real estate brokers who owned and operated an agency, Bark and Associates. The land contract prohibited prepayment for ten years, and made nonpayment of the installment amount a default event. Schaitberger did not make the monthly payment for August 2004. She eventually contacted the Barks to request a temporary reduction in the monthly payments. The Barks agreed and the parties executed an amendment to the contract in November 2004, providing for six months of reduced payments.³

¹ The underlying action involved claims against Regina Bark and Klaus Bark individually, Bark and Associates, and the Bark Trust. The claim at issue in this appeal involves only the Bark Trust.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ Apparently, Schaitberger's first check at the reduced amount was returned for insufficient funds.

When the reduced payments ended in April 2005, Schaitberger refused to make any additional payments, and brought this suit.

¶3 Eventually, Schaitberger filed an amended complaint that alleged six counts: (1) fraud and misrepresentation; (2) duress; (3) undue influence; (4) violation of the administrative code; (5) misrepresentation of a condition or character of the property by a real estate agent; and (6) ambiguity in the contract. The defendants answered and counterclaimed alleging that Schaitberger had defaulted on the land contract. The defendants also moved to dismiss the claims against them. After hearing a motion for judgment, the court noted that it was “challenging” to determine from the complaint what was actually being pled. The court ultimately dismissed counts 2, 3, 4, and 6 in their entirety. Count 1 was dismissed as to all of the defendants except Klaus Bark. The court withheld ruling on count 5. All of the claims against the Bark Trust were dismissed.

¶4 The defendants then moved for summary judgment on their counterclaim that Schaitberger defaulted on the land contract when she did not make the monthly installments. Shortly afterwards, Schaitberger filed a motion for summary judgment alleging that the contract provision that prohibited prepayment was invalid under WIS. STAT. § 138.052. In support of the motion, she attached an affidavit that stated she had been approved for a refinanced mortgage in January 2005.

¶5 The circuit court granted the defendants’ motion finding Schaitberger in default on the contract. The court, in a separate order, denied Schaitberger’s motion finding that WIS. STAT. § 138.052 does not apply to land

contracts because a land contract is not a loan. Schaitberger appeals from both orders.⁴

¶6 This court initially questioned its jurisdiction of Schaitberger's appeal from an order that denied her motion for summary judgment. We ultimately concluded that she could appeal from that order because the order granting judgment to the Bark Trust resolved all the issues in litigation between Schaitberger and the Bark Trust. Consequently, this court only has jurisdiction to consider issues relating to the Bark Trust, and not to the issues relating to Klaus Bark individually.

¶7 Schaitberger argues that the circuit court erred when it concluded that WIS. STAT. § 138.052 does not apply to land contracts. The Bark Trust argues that Schaitberger's summary judgment motion was defective because it sought reformation of the contract when the only remaining cause of action was for misrepresentation and fraud. It also argues that the fraud and misrepresentation claim was against Klaus Bark personally, not the Bark Trust. Further, the Bark Trust argues that the only remedy for the alleged fraud was rescission, while Schaitberger sought reformation and specific enforcement. While the circuit court granted summary judgment on the basis that § 138.052 does not apply to land contracts, we decline to decide that issue. Instead, we conclude that Schaitberger's summary judgment motion was defective, and affirm.

⁴ The notice of appeal filed by Schaitberger said only that she appealed from the order denying her motion. By subsequent orders of this court, the appeal was deemed to be from both the orders granting the Bark Trust's motion and denying her motion.

¶8 We may affirm on grounds different than those relied on by the trial court. *Vandstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). Further, our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Homes Mgmt, Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. If the movant has carried his [or her] initial burden, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial.

Schurmann v. Neau, 2001 WI App 4, ¶6, 240 Wis. 2d 719, 624 N.W.2d 157 (citations omitted). In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support and opposition to the motion. See *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 573, 431 N.W.2d 721, 724 (Ct. App. 1988).

¶9 The methodology requires us to begin our review by looking at the complaint. We agree with the circuit court that it is challenging to determine exactly what the plaintiff intended to plead. Although Schaitberger stated six causes of action, the only claims remaining at the time of the summary judgment motion were for fraud and misrepresentation against Klaus Bark.⁵ In her

⁵ The basis for this claim was that Schaitberger relied on the Klaus Bark's oral representations that they would not enforce the prepayment penalty and that she would be allowed to prepay at any time. To state these claims, Schaitberger admitted that the prepayment penalty was in the land contract, and implicitly admitted that it was valid.

complaint, she asked the court to modify, “construe” or void the prepayment penalty. Schaitberger alleged that the prepayment clause was ambiguous and should not be enforced on that basis. The complaint does not mention WIS. STAT. § 138.052. Further, in response to the Barks’ counterclaim, Schaitberger admitted that she defaulted on the loan by failing to make payments.

¶10 Although neither party addresses the issue at any length in their brief, Schaitberger did not dispute at any time that she defaulted on the loan, and did not offer any evidence to dispute the claim during the summary judgment proceedings. The circuit court, therefore, properly granted summary judgment to the Barks.

¶11 The issue remaining before us, then, is whether the circuit court properly denied Schaitberger’s summary judgment motion based on WIS. STAT. § 138.052. Schaitberger argued, and argues to this court, that she is entitled to have the contract modified based on this section. The first time Schaitberger argued that she was entitled to have the contract modified under § 138.052 was in her motion for summary judgment. She did not, however, plead this section at any time prior to the summary judgment motion. Further, the Bark Trust was by this time out of the case and the only claims remaining were for fraud and misrepresentation against Klaus Bark. Section § 138.052, however, has nothing to do with fraud and misrepresentation. By basing her motion on this statute, Schaitberger attempted to introduce a new cause of action against the Bark Trust by a summary judgment motion. This she may not do. It may be possible to construe Schaitberger’s summary judgment motion to be an attempt to assert an affirmative defense against the default claim. *See Lentz v. Young*, 195 Wis. 2d 457, 467, 536 N.W.2d 451 (Ct. App. 1995) (a party may raise an affirmative defense by a motion). Assuming that it was intended to be an affirmative defense,

and assuming without deciding that the statute applies to land contracts, it does not provide a defense to defaulting on the contract under all of the circumstances of this case. Consequently, her motion was defective and the circuit court properly denied it.

¶12 For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

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

