

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 93-3441

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

FRANK MUSA,

Plaintiff-Appellant,

v.

**JEFFERSON COUNTY BANK, and
JAMES V. BUELOW,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Jefferson County:
ROBERT G. MAWDSLEY, Judge. *Reversed and cause remanded.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Frank Musa appeals from a summary judgment dismissing his complaint against Jefferson County Bank and its former officer, James V. Buelow. The dispute arose over a loan secured by Musa's hotel and restaurant, which the bank ultimately obtained by foreclosure. Musa contends that the facts submitted on summary judgment reasonably allow an inference that the bank and Buelow engaged in bad faith dealing, and tortiously interfered with his attempts to sell the property before the sheriff's sale. We agree. We therefore reverse and remand for a trial.

In 1982, Musa bought the Jefferson House, a hotel and restaurant in Jefferson. He subsequently borrowed \$167,000 from the bank for remodeling. In the loan contract Musa agreed "[n]ot to sell, assign, lease, mortgage, convey or otherwise transfer any legal or equitable interest in all or part of the Property, or permit the same to occur without the prior written consent of Lender...."

In 1984, Musa received an offer to purchase the property for \$428,000, from Tzelal Aliu. When Aliu called the bank for an appointment to discuss the sale, Buelow told him that the bank could not help him because he was new and the bank did not know him. Aliu knew that he needed the bank's approval, as well as possible additional financing. Buelow's remarks caused him to withdraw his offer.

In 1985, Raif Islami offered to purchase the property for \$450,000. He then contacted the bank and asked for an opportunity to discuss his offer. According to Islami, a loan officer told him "[y]ou are the third person who [is] calling [in] regard [to] that, and we [are] not interested to deal with [you]," and abruptly hung up without identifying himself. Islami withdrew his offer as a result of that conversation.

Musa defaulted on his loan payments and the court appointed a receiver in May 1986. Also in May, Musa arranged to sell the Jefferson House at auction in September 1986.

Buelow had friends and distant relatives, Thomas and Connie Barbian, with experience in the restaurant business. On a July 1986 visit to them in Pennsylvania, he informed them that the Jefferson House was for sale. For the next several weeks, Buelow persistently called Musa's attorney, Dale McKenna, sometimes as often as three times per day, regarding the Barbians' interest in the property. In late August, Thomas Barbian traveled from Philadelphia to inspect the premises, which he did along with Buelow. As a result of these contacts and at Buelow's request, Musa cancelled the scheduled auction.

Shortly afterwards, the Barbians stated their intention to wait for the sheriff's sale. In November, Musa received an offer to purchase from two

other individuals, contingent upon their leasing the premises for six months to establish their credit and reputation. They ultimately withdrew the offer because of a delay in receiving a liquor license. During the city council's proceedings on the matter, the bank actively opposed their application for the license.

In the meantime, the bank's foreclosure action on the property proceeded to its conclusion and the property was sold to the bank for \$162,000, at a sheriff's sale in December 1987. Musa subsequently commenced this action, alleging numerous claims. On appeal, he argues that the trial court erred by granting summary judgment on his claims that the bank and Buelow breached their contractual duty to exercise good faith, and that they tortiously interfered with his contracts with prospective purchasers and with his auctioneer.

Summary judgment is not appropriate if the evidence admits of two reasonable and conflicting inferences. *Wagner v. Dissing*, 141 Wis.2d 931, 940, 416 N.W.2d 655, 658 (Ct. App. 1987). We decide such questions in the same manner as the trial court and without deference to its decision. *Schaller v. Marine Nat'l Bank*, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986).

"Every contract implies good faith and fair dealing between the parties and a duty of cooperation on the part of both parties. The law implies a promise against arbitrary or unreasonable conduct." WIS J I—CIVIL 3044 (1993). Good faith requires decency, fairness or reasonableness in performing a contract. *Schaller*, 131 Wis.2d at 402-03, 388 N.W.2d at 651. Here, two prospective purchasers of Jefferson House testified that they were immediately and rudely rebuffed when they sought the bank's approval of their offers. Additionally, the bank actively opposed the liquor licensing efforts of two other potential purchasers, knowing that the license was a precondition to a successful offer, and that the receiver appointed on their motion favored the license. In direct contrast was Buelow's attitude and efforts on behalf of his friends, the Barbians. Although the bank and Buelow offered evidence that their actions were consistent with their good faith obligation, the credibility and weight afforded to that evidence is an issue for the trier of fact. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984). If Musa's evidence is deemed more credible and given more weight, it could reasonably allow an inference of bad faith on the defendants' part.

For similar reasons, Musa's claim of tortious interference with his contracts must also go to trial. Musa's evidence shows that the bank or Buelow, by deliberate acts, may have played a substantial part in discouraging three offers to purchase the property, and in cancelling the auction of September 1986, in order to exploit Musa's financial problems for either the bank's or the Barbians' benefit. "One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability" for the other's damages. RESTATEMENT (SECOND) OF TORTS § 766 (1979). Musa's evidence, if believed, allows the reasonable inference that the defendants violated this standard.

By the Court.— Judgment reversed and cause remanded.

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