COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP1583 **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-APPELLANT-CROSS-RESPONDENT,

V.

DIANE M. PAUK,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. The parties to this appeal and cross-appeal are Diane Pauk and Deutsche Bank National Trust Company, the holder of a first mortgage on Pauk's residential property. The Bank sought to foreclose on that mortgage after Pauk stopped making mortgage payments. Pauk asserted a counterclaim for breach of the mortgage contract, alleging that the Bank's failure to timely provide her with a critical document, namely, a payoff statement reflecting the remaining loan balance on the first mortgage, prevented her from selling the property, causing her to default on the mortgage and leading to the foreclosure action.

¶2 The circuit court held a bench trial, and found, consistent with Pauk's allegations, that she would have sold the property and thereby satisfied the first mortgage but for the Bank's failure to timely provide the payoff statement. The court concluded that the Bank's failure in this regard was a breach of the parties' mortgage contract and that, as a result, it would be inequitable to grant the Bank a judgment of foreclosure on the first mortgage. At the same time, however, the court rejected tort claims Pauk made for bad faith and conversion. Based on the court's conclusions, the court fashioned relief in the form of a judgment ordering the Bank to release Pauk from the mortgage, ordering Pauk to transfer title to the property to the Bank, and including other relief provisions.

¶3 The Bank appeals, and Pauk cross-appeals. The parties agree that the circuit court exceeded its authority by structuring the relief as it did. However, the parties dispute whether the circuit court was required to enter a judgment of foreclosure, as the Bank argues, and whether the court properly dismissed Pauk's tort claims.

¶4 We conclude that the circuit court reasonably exercised its equitable discretion to deny the Bank's request for foreclosure. We also conclude that the court properly rejected Pauk's tort claims. We therefore affirm the court's judgment in those respects. However, consistent with the parties' agreement, we conclude that the circuit court exceeded its authority by ordering relief, including transfer of title, apparently based on the Bank's foreclosure claim, without entering a foreclosure judgment that complied with WIS. STAT. ch. 846 ("Foreclosure") (2009-10).[1] We therefore reverse that part of the court's judgment providing relief between the parties and remand for the court to reconsider what, if any, relief is appropriate for either party, given our conclusions and any additional facts that may be found by the court on remand.

BACKGROUND

¶5 Below we summarize in some detail the most relevant portions of the circuit court's extensive findings of fact; the detail is necessary to understand the nature of Pauk's counterclaim for breach of contract. Before giving that summary, for the sake of clarity we first make several points regarding our references to the Bank and other entities that undertook responsibilities involving the first mortgage. It is not disputed for purposes of this appeal that the Bank is the current owner and holder of the first mortgage and note on Pauk's property (collectively, the "mortgage contract"). It is also not disputed that the Bank is liable for the conduct of other entities that have serviced the first mortgage or were the Bank's predecessors in interest on the mortgage contract. Thus, while in our

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

description of background facts below regarding the first mortgage we sometimes refer to those companies separately in order to clearly describe background events, the Bank does not contest its liability for the actions or inactions of these other entities regarding the first mortgage.

¶6 In addition to the first mortgage with the Bank, Pauk had a second mortgage on the same property with GMAC Mortgage LLC. Pauk listed the property for sale on April 20, 2008, at a price of $329,000, based on an estimate of the amount she owed at that time on the two mortgage debts combined.

¶7 Pauk received an offer to purchase on or about May 31, 2008. It was a cash offer of $315,000 with no significant contingencies. After some negotiation, Pauk and the buyer entered into a binding contract to purchase, and a closing was scheduled for July 8, 2008.

¶8 Pauk calculated that, after deducting closing expenses, she would cover the first mortgage and then fall short of what she owed on the second mortgage by $12,390. However, Pauk knew that GMAC might agree to a "short sale," in which GMAC would accept less than it was owed, thus potentially allowing Pauk to walk away from the property and both of her mortgage obligations on it. Pauk contacted GMAC to discuss the short sale option.

¶9 On June 10, 2008, the company that had been servicing Pauk's first mortgage, Avelo Mortgage, sent Pauk a letter indicating that, as of July 1, 2008, servicing of that mortgage would be transferred from Avelo to Litton Loan Servicing LLP. The letter indicated that if Pauk had any questions after June 30 she would need to contact Litton.

¶10 In response to Avelo's June 10 letter, Pauk contacted Avelo on June 16. Pauk told Avelo's representative that she had a closing scheduled for July 8, and wanted to know if the transfer of servicing to Litton would affect the closing. Avelo's representative told Pauk that the transfer would not affect the closing, and that she would "not notice the change." Pauk was assured that it would be a "seamless transition."[2]

¶11 During Pauk's discussions with GMAC regarding a potential short sale, a GMAC representative told Pauk that it would need a payoff statement from the first mortgage holder, memorializing the balance due on the first mortgage. GMAC could not agree to close on the short sale until it received the payoff statement. Pauk presented expert testimony that second mortgage holders routinely require payoff statements from first mortgage holders in short sales to protect the second mortgage holders' interests.

¶12 On June 27, Pauk again contacted Avelo to request a payoff statement. On that date, Avelo's representative told her that Avelo could not provide a payoff statement, because Pauk's closing was scheduled to occur after July 1 and therefore Pauk would need to obtain the payoff statement from the new loan servicer, Litton.

¶13 From July 1 through July 7, Pauk and the title company closing officer with whom she was working attempted to contact Litton on several occasions by telephone and through Litton's website with the following results.

[2] When we use quotation marks in the context of the circuit court's findings of fact, we are referring to the wording that the circuit court used.

¶14 When Pauk and the closing officer contacted Litton by telephone, it was a "nightmare": Their calls were answered by an automatic phone system; they would enter Pauk's loan number and receive a pre-recorded message stating that Pauk's loan information would not be available until a later date; and when they would call Litton on the designated date, they would receive another pre-recorded message indicating that Pauk's loan information would not be available until a still later date. At times, the caller was put on hold and the phone system hung up on the caller.

¶15 When Pauk and the closing officer attempted to access Pauk's loan information on Litton's website, their experience was similar. The website displayed a message stating that Pauk's loan was "in the process of being transferred to Litton," that the transfer would be complete by a stated date, and that, "[a]t that time you will be able to complete your new user registration and access your account." However, the stated date kept changing by being pushed further into the future.

¶16 The closing officer, who had twenty years of experience as a closing officer, testified that the industry standard was to provide a payoff statement within twenty-four or forty-eight hours of a mortgagor's request. An attorney with extensive experience in real estate closings representing Pauk testified that he had never known a lender to respond as ineffectively to a request for a payoff statement as Litton had.

¶17 Based in part on the above history, the circuit court found that Pauk and the closing officer "made diligent, reasonable attempts to contact Litton to receive a payoff statement" and that Litton's conduct fell outside industry standards for providing a payoff statement.

¶18 On July 7, the day before the scheduled closing, the buyer transferred funds to an escrow account in an amount approximating what was needed to close the sale. The exact amount could not be determined until Pauk obtained a payoff statement from Litton. The buyer was aware that she might have to pay a small amount in addition to the escrowed funds, and stood ready to do so.

¶19 On the closing date, Pauk and the buyer attended the scheduled closing, but GMAC would not agree to a short sale, and the sale did not close, because Litton had not provided a payoff statement.

¶20 When the sale did not close on July 8, the buyer would not agree to amend the contract to purchase. Pauk's attorney recommended that Pauk give the buyer immediate occupancy and close the transaction when a payoff statement became available. Pauk therefore gave the buyer possession of the property.

¶21 Later in the day on July 8, Pauk and the closing officer again attempted to contact Litton. They were able to access Litton's website and apply online for a payoff statement. In addition, they were able to speak to a Litton representative for the first time. They explained that Pauk had a closing scheduled earlier that day, had been trying to get a closing statement but had been unable to get through to Litton, and needed a payoff statement as soon as possible. The Litton representative had Avelo's customer contract records, which confirmed that Pauk first contacted Avelo on June 16. The representative told Pauk that Litton would provide a payoff statement within an hour.

¶22 By the following day, July 9, Litton still had not provided a payoff statement. Pauk sent Litton a follow-up electronic message including this explanation and request:

> Yesterday I requested a payoff quote and told the representative I needed it ASAP as the closing was 7/8/08. I had requested this information from AVELO before July 1, but did not receive it due to the transition from AVELO to Litton.
>
> Please let me know when to expect it. I requested it be faxed to … [fax number].

Pauk did not receive a reply to this electronic message.

¶23 The next day, July 10, Pauk called Litton to ask about the status of the payoff statement. A Litton representative told her it would take five to seven days because her loan was in the transfer process.

¶24 On the following day, July 11, Pauk telephoned Litton from a conference room at her attorney's office at approximately 11:00 a.m. After almost an hour on the phone, Pauk was able to speak with a Litton representative. This hour-long wait was "typical" of the wait when Pauk would telephone Litton.

¶25 Once Pauk had the Litton representative on the line, her attorney joined the call and explained Pauk's situation. He advised the representative that he would file a lawsuit against Litton if Pauk did not receive a payoff statement that day. The attorney was transferred to another Litton representative who assured him that a payoff statement would be sent within an hour.

¶26 After an hour and a half, Pauk had not received the payoff statement. Pauk called Litton back at 1:30 p.m., spoke with the representative who had promised to send the statement, and told the representative that she would not get off the phone until the statement was provided. Litton provided Pauk a payoff statement at 2:14 p.m. on Friday, July 11.

¶27 The statement was faxed to GMAC the following Monday, July 14, and by 1:59 p.m. that day, GMAC agreed to approve a short sale and accept approximately $20,000 less than what it was owed in full satisfaction of Pauk's second mortgage.[3]

¶28 Based in part on the fact that GMAC approved the short sale quickly upon receipt of Litton's payoff statement, the circuit court found that, if Litton had provided a payoff statement prior to the scheduled July 8 closing, as Pauk had repeatedly and clearly requested, GMAC would have approved the short sale on that date. The court further found that, if the sale had closed on July 8, the buyer would have owned the property, and Pauk's responsibility for the property would have ended because both mortgage debts would be extinguished after the sale; Pauk could have "washed her hands of" the property.

¶29 A new closing date was scheduled for July 16. On July 15, Pauk's attorney received a letter from an attorney representing the buyer indicating that the buyer was rescinding the transaction. The first reason for rescission stated in the letter was Pauk's failure to close on July 8. As a second reason, the buyer asserted that Pauk had misrepresented on a condition report the extent of existing water damage, which had resulted in mold.

¶30 Based on the above, the circuit court found that, if the transaction had closed on July 8 as planned, the buyer would have been unable to rescind the transaction and would have had to pursue other remedies against Pauk for the

[3] We note that this amount left GMAC short by approximately $7,610 more than the $12,390 shortfall Pauk had initially estimated. However, there is no reason to think that the difference between these two amounts is relevant given the circuit court's finding that GMAC agreed to the greater of the two figures.

alleged misrepresentation. The court also found that Pauk was in a difficult position because she lacked the financial resources to litigate rescission with the buyer, and the buyer appeared to be on strong financial footing compared to Pauk. The court further found that Pauk therefore made a reasonable and prudent decision to mitigate by releasing the buyer from the transaction and putting the property back on the market.

¶31 After the sale failed to close, Pauk was unable to find another buyer and failed to make mortgage payments. The Bank commenced an action for foreclosure in October 2008. Pauk answered and alleged a counterclaim for breach of the mortgage contract based on the Bank's failure to timely provide a payoff statement. At the bench trial, Pauk sought to add tort claims against the Bank for bad faith and conversion, in addition to her claim for breach of contract.

¶32 The circuit court found that the Bank's failure to timely provide Pauk with a payoff statement was the reason that the sale failed to close, and concluded that this constituted a breach of the parties' mortgage contract. The court concluded that this failure by the Bank was "inequitable and resulted in thwarting Pauk's sale of the Property." On this basis, the court denied the Bank's request for foreclosure.

¶33 Turning to Pauk's tort claims for bad faith and conversion, the court addressed and rejected those claims. The court concluded that the tort of bad faith is not recognized in Wisconsin outside the insurance context, and that the Bank's conduct did not constitute a conversion of Pauk's property.

¶34 At the circuit court's request, each party had submitted a set of Proposed Findings of Fact and Conclusions of Law, which included proposed relief. The Bank requested that the court grant it a judgment of foreclosure

complying with WIS. STAT. ch. 846 and deny any damages to Pauk on her counterclaims. Pauk requested that the court conclude that foreclosure would be inequitable. In addition, Pauk sought monetary damages totaling $184,423.74, which she submitted represented the following: accrued interest, late fees, and other amounts above the principal balance that she would otherwise owe on her first mortgage; property taxes accrued since July 8, 2008 (the date she had expected to close on the property); the amount owed on her second mortgage with GMAC; an offset in her favor for any tax liabilities she would incur for receiving a money judgment from the Bank to pay off the second mortgage; and an offset in favor of the Bank for rents she had received on the property.

¶35 The judgment the court entered differed from both parties' requests, although it included elements of Pauk's request. As already noted, the court concluded that foreclosure would be inequitable, and it denied the Bank's request for foreclosure. The court ordered the following relief between the parties, including references to GMAC, which is not a party to this foreclosure action:

- Pauk must transfer title to the Bank within fifteen days;[4]
- The Bank must release Pauk from her first mortgage;
- The Bank is not entitled to any deficiency judgment against Pauk;
- The Bank is not entitled to any accrued interest, late fees, or other amounts above the principal balance of the mortgage;
- Pauk must pay $5,943.60 in property taxes that accrued since July 8, 2008;

[4] Regarding the transfer of title, the circuit court's judgment does not expressly specify to whom Pauk must transfer title, but the only logical inference from the record is that the court was ordering that Pauk transfer title to the Bank.

- The Bank must, in a manner not specified by the court, "work with GMAC to release GMAC's security interest in the [p]roperty";
- If GMAC claims a deficiency, Pauk will satisfy the deficiency by making a direct payment to GMAC; and
- Pauk will reimburse the Bank the balance of $18,000 in rent she collected on the property, less the $5,943.60 in property taxes she paid, equaling $12,056.40 in reimbursement to the Bank.

DISCUSSION

¶36 As already indicated, the parties generally agree that the circuit court exceeded its authority by structuring the relief as it did. However, the parties dispute whether the circuit court was required to enter a judgment of foreclosure and whether the court properly dismissed Pauk's tort claims. The determination of what relief, if any, may be now available, going forward, between the parties depends, in part, on our resolution of the disputed issues on appeal. We will therefore address those issues, then turn to the question of relief.

A. Denial of Bank's Request for Foreclosure

¶37 When the circuit court grants or denies a request for foreclosure on equitable grounds, we review the court's decision for an erroneous exercise of discretion. "Foreclosure proceedings are equitable in nature, and the circuit court has the equitable authority to exercise discretion throughout the proceedings." ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). "[T]he court should balance the equities between the parties to determine if foreclosure is merited." ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 383, 254 N.W.2d 463 (1977). We will affirm a circuit court's discretionary decision as long as the court applied the correct legal standards to the relevant facts and reached a

reasonable outcome. ***JP Morgan Chase Bank, NA v. Green***, 2008 WI App 78, ¶11, 311 Wis. 2d 715, 753 N.W.2d 536.

¶38 The Bank argues that the circuit court was required to enter a foreclosure judgment because the Bank proved the elements of a foreclosure claim and Pauk failed to assert any valid affirmative defense to foreclosure. Pauk does not dispute that the Bank proved the facts necessary to support foreclosure, but argues that the circuit court reasonably exercised its equitable discretion to deny the Bank's request for foreclosure, based on the Bank's untimely production of the critical payoff statement, which constituted a breach of the duty of good faith and fair dealing inherent in every contract. We agree with Pauk.

1. Bank's Affirmative Defense Argument

¶39 The Bank argues that Pauk asserted no valid affirmative defenses to foreclosure. While it is true that Pauk did not label any of the allegations in her answer as an affirmative defense, the Bank fails to persuade us that this matters, given the fact that Pauk alleged and then properly developed a record to support a counterclaim for breach of contract.

¶40 The Bank asserts that "[a] counterclaim for breach of contract … does not establish a defense to the foreclosure action." However, the sole authority that the Bank cites in support of this assertion is ***Federal National Mortgage Ass'n v. Prior***, 128 Wis. 2d 182, 381 N.W.2d 558 (Ct. App. 1985). That case does not support the Bank; if anything, it supports Pauk.

¶41 ***Federal National Mortgage*** involved a federal agency rule requiring a lender to accept partial payments on a mortgage. *See* ***id.*** at 184. This court held that a lender's violation of the agency rule was not an affirmative defense to

foreclosure. *See* ***id.*** at 183, 185, 187. We reasoned that the rule regulates the relationship between the lender and the federal government, not the relationship between the lender and the borrower. *See* ***id.*** at 186-87. We concluded that the rule was therefore "irrelevant to the mortgagor-mortgagee relationship." ***Id.*** at 187. We specifically noted that the mortgage contract did *not* require the lender to accept partial mortgage payments. ***Id.***

¶42 Unlike the agency rule at issue in ***Federal National Mortgage***, a mortgage contract plainly "regulates" the relationship between the lender and borrower, and that contract is not "irrelevant" to the lender-borrower relationship. Therefore, ***Federal National Mortgage*** does not support the Bank. If anything, its reasoning supports Pauk to the extent that it may imply that a lender's breach of the mortgage contract, unlike a violation of the agency rule, may constitute a defense to foreclosure. The mortgage contract, unlike the agency rule, directly regulates the relationship between the lender and borrower and is highly relevant to the lender-borrower relationship. *See* ***id.*** at 186-87; *cf. also* ***A.B.C.G. Enters., Inc. v. First Bank Se., N.A.***, 184 Wis. 2d 465, 471-72, 482-83, 515 N.W.2d 904 (1994) (borrower's claims against lender, including claim that lender breached mortgage contract, were precluded if not brought as part of foreclosure action because those claims, if proven, would have undermined the foreclosure judgment).

2. Bank's Breach of Mortgage Contract

¶43 The Bank argues that, contrary to the circuit court's conclusion, it did not breach the mortgage contract. Whether there is a breach of contract under the facts as found by the circuit court is a question of law we review de novo.

Steele v. Pacesetter Motor Cars, Inc., 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141.

¶44 The Bank argues that it could not have breached the mortgage contract because "there was no contract under which the parties agreed that the lender was obligated to provide a payoff statement by a particular date." Pauk acknowledges that there was no such explicit term in the contract, but counters that the Bank's conduct constituted a breach of the implied duty of good faith and fair dealing inherent in every contract. *See, e.g.*, ***LDC-728 Milwaukee, LLC v. Raettig***, 2006 WI App 258, ¶11, 297 Wis. 2d 794, 727 N.W.2d 82 ("In every contract there is the implied duty of good faith and fair dealing."). We agree with Pauk.

¶45 It is not clear whether the Bank intends to argue, as a matter of law, that the breach of the duty of good faith and fair dealing requires a breach of an explicit contract term, but if so, that would be incorrect. "[A] party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the written agreement may have been fulfilled." ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995). Thus, the Bank's argument that it did not breach the mortgage contract because it did not violate any express provision does not provide a meaningful response to Pauk's claim that the Bank breached its duty of good faith and fair dealing. We observe that the logical, but unreasonable, consequence of the Bank's argument seems to be that the Bank could not be in breach of a mortgage contract, even if the Bank *never* provided a payoff statement.

¶46 The Bank's main argument regarding good faith and fair dealing is procedural. The Bank argues that Pauk's claim for a breach of the duty of good

faith and fair dealing should fail because she did not specifically allege it as part of her counterclaim. We are not persuaded by this procedural argument for the following reasons.

¶47 Although Pauk did not specifically allege a breach of the duty of good faith and fair dealing as part of her counterclaim as initially pled, the parties briefed the issue in the circuit court, and the Bank did not object at the time or assert prejudice. Thus, the Bank both implicitly consented to litigating the duty of good faith and fair dealing and forfeited its procedural argument to the contrary on appeal. *See* WIS. STAT. § 802.09(2) ("If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); ***Goldman v. Bloom***, 90 Wis. 2d 466, 480, 280 N.W.2d 170 (1979) (court may "allow a variance between the pleadings and the proof provided the variance does not mislead the opposing party to his prejudice"); ***State v. Saunders***, 2011 WI App 156, ¶29 & n.5, 338 Wis. 2d 160, 807 N.W.2d 679 (failure to timely object at trial forfeits right to appellate review).

¶48 The Bank fails to develop any other clear argument explaining why the circuit court could not, as a matter of law, have concluded that the Bank breached its duty of good faith and fair dealing. More likely, it appears that the Bank simply fails to recognize that the court found a breach of that duty.[5]

[5] We recognize that the circuit court's decision does not expressly refer to the duty of good faith and fair dealing. We conclude, however, that the court's decision is reasonably read as based on that duty because the parties briefed the issue in the circuit court and because the court did not refer to any express term of the mortgage contract when it concluded that the Bank breached the contract.

¶49 However, even if the Bank had argued that the court erred in finding a breach of the duty of good faith and fair dealing, we conclude that Pauk established a breach of that duty on the facts found by the circuit court.

¶50 A party's breach of this duty "may consist of *inaction*, evasion of the spirit of the bargain, *lack of diligence*, [or] slacking off." ***LDC-728 Milwaukee***, 297 Wis. 2d 794, ¶15 (emphasis added) (citation omitted). The Bank's conduct, as described in the circuit court's extensive findings of fact, meets at least two of these standards, "inaction" and "lack of diligence." *See* ***id.*** We need not repeat all of the court's findings. Suffice it to say in summary that those findings show the following:

- Despite Pauk's diligent efforts to promptly arrange for a payoff statement in advance of her closing, the Bank made it impossible for her to obtain the statement in a timely fashion.
- The Bank knew or should have known more than three weeks before the closing that Pauk would need a payoff statement for the sale of her property to close.
- The Bank gave Pauk shifting and inconsistent information over time regarding when a payoff statement or other loan information would become available.
- The Bank repeatedly failed to follow through on its representations that a statement would be provided by a particular time.
- The Bank's conduct fell far outside of industry standards and practices.
- The Bank provided a payoff statement only after Pauk's attorney advised the Bank that Pauk would sue if a statement was not provided immediately.

¶51 In short, these findings show that the Bank engaged in a pattern of inaction and a lack of diligence by failing to timely provide Pauk with a document that only the Bank could provide, that the Bank knew or should have known that the document would be essential for Pauk to close the sale of her mortgaged

property, and that the length of the delay was unreasonable and well outside industry standards. Based on all of the circuit court's findings of fact, we conclude that the Bank breached its duty of good faith and fair dealing.

¶52 The Bank does not develop an argument that, even if it breached its duty of good faith and fair dealing, the circuit court was still required to grant its request for foreclosure. In any case, we conclude that the Bank's breach provided a reasonable basis for the circuit court to exercise its equitable discretion to deny the Bank's request for foreclosure.

¶53 In sum, for the reasons stated above, we conclude that the circuit court reasonably exercised its equitable discretion to deny the Bank's request for foreclosure.[6]

[6] The parties dispute whether the "clean hands" doctrine, although not raised in the circuit court, provides an alternative reasonable basis for the court's decision to deny foreclosure. We need not and do not decide this issue, but note only that at least part of the Bank's clean hands argument lacks merit. Specifically, the Bank argues that the clean hands doctrine cannot be applied because there is no causal connection between the Bank's conduct and the harm from which the Bank sought relief, namely Pauk's default on her mortgage. *See* ***Security Pac. Nat'l Bank v. Ginkowski***, 140 Wis. 2d 332, 339, 410 N.W.2d 589 (Ct. App. 1987) (stating causal element of clean hands doctrine). However, the circuit court plainly found that Pauk would have sold the property and satisfied both of her mortgages—as most relevant here, satisfied the first mortgage—but for the Bank's failure to timely provide Pauk with a payoff statement. Therefore, the causation element is satisfied. We acknowledge that the Bank disagrees with the court's fact finding, but the Bank does not develop an argument demonstrating why any of the court's findings are clearly erroneous. *See* ***Dickman v. Vollmer***, 2007 WI App 141, ¶25, 303 Wis. 2d 241, 736 N.W.2d 202 (court of appeals upholds circuit court findings of fact unless those findings are clearly erroneous).

Separately, we note that we also need not and do not reach an additional argument Pauk makes that the circuit court reasonably denied the Bank's request for foreclosure based on WIS. STAT. § 138.052(7s). Section 138.052(7s) provides, in part, as follows: "A person who receives loan or escrow payments on behalf of itself or another person shall do all of the following: (a) Respond to a borrower's inquiry within 15 days after receiving the inquiry."

B. Pauk's Tort Claims

¶54 We now turn to Pauk's tort claims. Pauk argues that the circuit court should not have rejected her tort claims for bad faith and conversion against the Bank. For the reasons that follow, we disagree and conclude that the court properly rejected those claims.

1. Bad Faith

¶55 As previously indicated, the circuit court rejected Pauk's tort claim for bad faith because it concluded that Wisconsin does not recognize such claims outside the context of insurance. Pauk argues, however, that the Bank owed her a fiduciary duty, the Bank breached that duty by its conduct here, and that a breach of a fiduciary duty may constitute the tort of bad faith. The Bank argues that, under ***Production Credit Ass'n of Lancaster v. Croft***, 143 Wis. 2d 746, 423 N.W.2d 544 (Ct. App. 1988), it had no fiduciary duty to Pauk. We agree with the Bank.

¶56 ***Production Credit*** holds that the mere existence of a borrower-lender contract and borrower-lender relationship does not create a fiduciary duty, but a fiduciary duty between borrower and lender may be created by special contract terms, or by a special relationship between the borrower and lender such as that of "financial advisor." *See* ***id.*** at 750, 752-53, 756-57.

¶57 Pauk argues, without reference to any supporting authority, that the mortgagor-mortgagee relationship is, by its nature, a special type of borrower-lender relationship that gives rise to a fiduciary duty. However, this argument ignores the fact that the court in ***Production Credit*** concluded that there was no fiduciary duty in that case, even though the borrowers had secured loans with real

estate mortgages. *See* ***id.*** at 750, 756. Thus, the court in ***Production Credit*** plainly did not view the relationship of mortgagor-mortgagee as the type of special relationship that necessarily gives rise to a fiduciary duty.

¶58 Pauk suggests no other basis for concluding that her mortgage contract had special terms or that she had a special relationship with the Bank that would give rise to a fiduciary duty. We therefore conclude that, under ***Production Credit***, the Bank did not owe her a fiduciary duty. This conclusion is sufficient to reject Pauk's tort claim for bad faith because Pauk bases that claim on an alleged breach of fiduciary duty. We need not address whether there may be additional reasons why Pauk's tort claim for bad faith should fail.

2. Conversion

¶59 Pauk argues that the circuit court erred in concluding that the Bank's actions did not result in a conversion of Pauk's property. The elements of conversion are: (1) intentionally controlling or taking property belonging to another, (2) without the owner's consent, (3) resulting in serious interference with the owner's possessory rights to the property. *See, e.g.*, ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999); *see also* WIS JI—CIVIL 2200.

¶60 The parties dispute whether the Bank exerted sufficient control over Pauk's property to meet the first element of conversion. Pauk argues that the Bank "intentionally exercised control over" her property "when it failed to provide [the] payoff statement and release its mortgage in time for the closing." The Bank contends that it never controlled Pauk's property within the meaning of conversion law.

¶61 We conclude that Pauk's argument is inadequate because, although she cites some case law addressing "control," the bulk of that case law is in contexts other than conversion, and none of the authority she cites supports a conclusion that the Bank's actions in this context constituted sufficient control as a matter of law. In other words, Pauk cites no authority suggesting that the only reasonable conclusion that the circuit court, sitting as fact finder, could have reached was that the Bank sufficiently controlled Pauk's property.

¶62 Separately, we observe that it is unclear, at best, the extent to which conversion is a viable claim when the property alleged to be converted is real property instead of personal property.[7] Pauk's failure to address this topic is an additional reason we reject her argument that the circuit court erred in concluding there was no conversion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address issues that are inadequately briefed).

[7] *See* ***Production Credit Ass'n of Chippewa Falls v. Equity Coop Livestock Sales Ass'n***, 82 Wis. 2d 5, 10, 261 N.W.2d 127 (1978) ("plaintiff in a conversion suit … must allege and prove either that it was in possession of *the chattel* at the time of the conversion or that it was entitled to immediate possession) (emphasis added); ***id.*** at 10 n.8 ("court has defined conversion as 'any distinct act of dominion wrongfully exerted over another's *personal property* in denial of or inconsistent with his rights therein, such as a tortious taking of another's *chattels*, or any wrongful exercise or assumption of authority … over another's *goods*'") (emphasis added); 1 DAN B. DOBBS, ET AL., THE LAW OF TORTS § 63 (2d ed. 2011) (the tort of conversion was traditionally limited to personal property and its modern expansion is largely limited to certain intangible property); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS, LAWYER'S EDITION § 15 (5th ed. 1984) (same); *see also* WIS. STAT. § 893.51(1) (an "action to recover damages for the wrongful taking, conversion or detention of *personal property* shall be commenced within 6 years after the cause of action accrues or be barred) (emphasis added). The proposition that chattel or personal property subject to conversion may *relate* to ownership of real property, such as when someone is alleged to have converted a document such as a land contract, title, or deed to real property, would not advance Pauk's conversion claim here.

C. Relief

¶63 As already indicated, the circuit court ordered a variety of relief between the parties, including that Pauk must transfer title to the Bank within fifteen days and that the Bank must release Pauk from her mortgage.

¶64 The parties agree that the circuit court erred by ordering the relief that it did. Although the full extent of the parties' agreement is unclear, at a minimum it seems apparent that the parties agree that the court lacked authority to grant some of the types of the relief that it granted absent the entry of a judgment of foreclosure complying with WIS. STAT. ch. 846.

¶65 We agree with the parties, at least to the extent that the court granted relief to the Bank, such as the transfer of title to the property, apparently based on the Bank's foreclosure claim, and without entering a foreclosure judgment complying with WIS. STAT. ch. 846. The foreclosure statutes provide that, if a foreclosure plaintiff is to "recover," the court "shall render judgment of foreclosure" and that the judgment "shall" contain certain findings and conclusions. *See* WIS. STAT. §§ 846.01(1) and 846.10(1).[8] Here, in contrast, the

[8] WISCONSIN STAT. § 846.01(1) provides:

> Except as provided in sub. (2), in actions for the foreclosure of mortgages upon real estate, if the plaintiff recover, the court shall render judgment of foreclosure and sale, as provided in this chapter, of the mortgaged premises or so much of the premises as may be sufficient to pay the amount adjudged to be due upon the mortgage and obligation secured by the mortgage, with costs.

WISCONSIN STAT. § 846.10(1) provides:

> If the plaintiff recovers the judgment shall describe the mortgaged premises and fix the amount of the mortgage debt then due and also the amount of each installment thereafter to

(continued)

court allowed the Bank substantial recovery on its foreclosure claim without entering a judgment of foreclosure containing the required findings and conclusions.

¶66 We therefore reverse that part of the circuit court's judgment granting relief to the Bank. In addition, we reverse that part of the judgment granting relief to Pauk, because it is apparent that, if we reversed only as to the Bank's relief, we would upset the equitable balance that the court carefully attempted to strike. There is no reason to believe that the court would have granted the relief that it did to Pauk without also granting relief to the Bank.

¶67 We remand for the circuit court to determine, with such assistance from the parties and additional fact finding as it deems appropriate, what relief, if any, is appropriate at this time in light of our decision, all facts currently of record to date, and any additional facts generated on remand. We lack the perspective that the circuit court may gain on remand, after receiving new input from the parties and any new fact development. We do not intend to express any opinion on what the court should or must order on remand, but simply note that the court is free to consider whether Pauk is entitled to contract damages, or whether

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> become due, and the time when it will become due, and whether the mortgaged premises can be sold in parcels and whether any part thereof is a homestead, and shall adjudge that the mortgaged premises be sold for the payment of the amount then due and of all installments which shall become due before the sale, or so much thereof as may be sold separately without material injury to the parties interested, and be sufficient to pay such principal, interest and costs; and when demanded in the complaint, direct that judgment shall be rendered for any deficiency against the parties personally liable and, if the sale is to be by referee, the referee must be named therein.

foreclosure is now appropriate due to changed circumstances since the time of the judgment we now review, which was entered in March 2010.

CONCLUSION

¶68 In sum, for all of the reasons stated, we affirm that part of the circuit court's judgment denying the Bank's request for foreclosure and rejecting Pauk's tort claims, reverse that part of the judgment ordering relief between the parties, and remand for the court to reconsider what form of relief, if any, is appropriate consistent with our decision.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.