COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2012

Diane M. Fremgen
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. 2010AP2392

Cir. Ct. Nos. 2009CV1486
2009CV1921

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

BAYTREE NATIONAL BANK & TRUST COMPANY,

PLAINTIFF-RESPONDENT,

V.

ROBERT WATRING, WA-ZAR, INC. AND VIRGINIA TOWERS, INC.,

DEFENDANTS-APPELLANTS.

BAYTREE NATIONAL BANK & TRUST COMPANY,

PLAINTIFF-RESPONDENT,

V.

ROBERT D. WATRING AND ROBERT WATRING, LLC,

DEFENDANTS-APPELLANTS,

MARIANNE WATRING, FAITH TECHNOLOGIES AND POBLOCKI PAVING CORPORATION,

DEFENDANTS.

APPEAL from judgments of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Robert Watring, WA-ZAR, Inc., Virginia Towers, Inc. and Robert D. Watring LLC appeal the circuit court's order granting summary judgment to Baytree National Bank & Trust Company in its action for a money judgment and mortgage foreclosure on a $7,000,000 construction loan made to Watring for the construction of the Lakeview Virginia Towers Condominiums.[1] They also appeal the court's order granting Baytree summary judgment dismissing their counterclaims asserting claims of misrepresentation and breach of Baytree's duty of good faith and fair dealing. Because we conclude that the Watrings' defenses to Baytree's foreclosure action are legally deficient, and that, under the plain terms of the forbearance agreement, the Watrings forfeited their right to bring any claims against Baytree arising out of the Third Amended Mortgage Note given to the Watrings, we affirm.

[1] Only Robert Watring, the Robert D. Watring LLC and Marianne Watring (Robert's now ex-wife) were obligors under the $7,000,000 mortgage note. As set forth *infra*, Marianne was subsequently dismissed from this case. Hereinafter, we refer to Robert Watring, the Robert D. Watring LLC and Marianne Watring collectively as the Watrings.

Neither WA-ZAR, Inc. nor Virginia Towers, Inc. were obligors under the subject notes. WA-ZAR, Inc. was designated only as the grantor on the mortgage for a portion of the property underlying a separate $575,000 note and Virginia Towers, Inc. was designated only as the grantor on the remaining property underlying said note. Robert Watring is the president of both WA-ZAR, Inc. and Virginia Towers, Inc.

Background

¶2 On June 27, 2005, Robert and Marianne Watring[2] executed a promissory note in the amount of $7,000,000 given by Baytree National Bank & Trust to finance the construction of a nine-story, mixed-use condominium building in Kenosha, known as the Virginia Towers. The note was secured by a mortgage on the condominiums, which also was executed on June 27, 2005. The note was due eighteen months from the loan opening date.

¶3 On September 12, 2006, Robert Watring transferred title to the condominium property to Robert D. Watring, LLC ("the LLC")[3] by warranty deed. On March 23, 2007, Robert and Marianne Watring and the LLC signed an amendment to the loan documents. The amendment added the LLC as a co-borrower and additional obligor on the loan so that the transfer of ownership to the LLC could be consented to and acknowledged by Baytree without triggering default. The same day, Robert and Marianne Watring and the LLC (collectively, the Watrings) signed an amended and restated promissory note delivered to Baytree in the amount of $7,000,000.

¶4 Thereafter, the Watrings executed two additional amendments to the loan documents. After the final amendment (the "Third Amended Note") expired on December 31, 2008, the Watrings and Baytree entered into a forbearance agreement on March 31, 2009. In the forbearance agreement, the Watrings

[2] On August 22, 2005, Robert and Marianne Watring were divorced. Marianne had transferred her interest in the property to Robert, other than the note, by quit claim deed dated March 19, 2005. During the circuit court proceedings in this matter, Marianne Watring filed for bankruptcy and she was dismissed as a party to this lawsuit by stipulation on June 22, 2010.

[3] Robert Watring is the sole member of Robert D. Watring, LLC.

acknowledged that they were in default on the loan and that Baytree had the right at that time to enforce its remedies, including foreclosure. The forbearance agreement stated that the Watrings had requested that Baytree forbear from exercising its rights and remedies under the Third Amended Note until the expiration date of the forbearance agreement, April 15, 2009. The agreement further provided that "nothing in this agreement is intended to or shall release any of the [Watrings] from their personal obligations and liabilities to [Baytree] under the terms of the third amended note …." In consideration for executing the forbearance agreement, the Watrings agreed to "hereby absolutely, unconditionally, and irrevocably waive and relinquish any and all claims, demands, rights, and/or actions against [Baytree] in connection with the Third Amended Note and Loan Documents in consideration of the forbearance and the Loan …." Finally, under the forbearance agreement, the Watrings

> acknowledge[d] and agree[d] that upon termination of the Forbearance Period … [Baytree] shall be entitled to immediately exercise its rights and remedies against [the Watrings and the LLC] under this Agreement, the Loan Agreement, the Third Amended Note and the other Loan Documents, including without limitation, to foreclose its liens and security interests in the collateral described in the Loan Documents ….

¶5 In August 2009, after the forbearance period under the forbearance agreement had expired, Baytree filed a foreclosure action (the condo loan case) against the Watrings, Faith Technologies and Poblocki Paving Corporation,[4]

[4] Faith Technologies, Inc. and Poblocki Paving Corporation were named defendants in this matter based on construction liens they had filed on the subject condominium property. From the record, we note that Faith Technologies, Inc. filed a notice of retainer and claim for surplus, but otherwise does not appear to have participated in this case. The only document in the record filed by Poblocki Paving Corporation was a notice of retainer. Neither entity has appealed the subject orders or judgment of foreclosure at issue in this appeal.

alleging that the Watrings were in default on the $7,000,000 promissory note. The complaint demanded the appointment of a receiver and judgment for principal, interest, late charges, taxes, insurance and other costs, and attorney fees.[5]

¶6 The Watrings filed an answer, affirmative defenses, and counterclaims. The affirmative defenses were: failure to mitigate damages; failure to satisfy a condition precedent to liability; equitable estoppel; failure to join necessary parties; failure to state a claim upon which relief can be granted; lack of personal jurisdiction; and that the claims or portions thereof may be barred by the doctrine of waiver, res judicata, or collateral estoppel. The counterclaims alleged that Baytree breached its duty of good faith and fair dealing and made misrepresentations that the Watrings relied upon to their detriment. They requested damages in the amount of the net proceeds that would have been realized by the sale of the condo units but for Baytree's breach and misrepresentations.

¶7 On March 26, 2010, Baytree filed a motion for summary judgment of foreclosure in the condo loan case. In their response, the Watrings' central argument was that there were material issues of fact regarding their affirmative defenses that precluded summary judgment. In support, they attached affidavits from Robert Watring and Melvin Simonovich, general bookkeeper for the Virginia

[5] In the circuit court, this case was consolidated with Kenosha County Circuit Court case No. 2009CV1486 (the lot loan case). The lot loan case involved Baytree's foreclosure of a second promissory note made by Robert Watring, in the amount of $575,000, for the purchase of some vacant lots unrelated to the condo development. The Watrings do not appeal the judgment of foreclosure in the lot loan case. Accordingly, we consider Watring's counterclaims in relation to the condo loan case only.

Towers project, in support of their allegations of misrepresentations and promises made by Baytree employees in connection with the Third Amended Note and loan.

¶8 The circuit court held a hearing on Baytree's motion for summary judgment of foreclosure of the condo loan. At the hearing, Baytree submitted a supplemental affidavit from David Schalk, senior vice president for Baytree at that time, setting forth the current monies owed and, for the first time, asserting a release defense based on the forbearance agreement. In arguing for summary judgment, Baytree argued that, pursuant to the forbearance agreement, the Watrings had specifically "waived any claims against the bank, [and] acknowledged that they owed the money" due on the Third Amended Note. In response to this argument, the Watrings argued that they had signed the forbearance agreement only because they anticipated that Baytree would finance the sales of the condos as they presented qualified buyers to it. We observe, however, that at no time during that hearing did they contend that the forbearance agreement did not bar their claims, or that Baytree had forfeited its rights under the forbearance agreement because Baytree had not asserted the agreement as an affirmative defense. The circuit court granted summary judgment of foreclosure to Baytree on the ground that the Watrings' summary judgment submissions failed to provide sufficient facts in support of their defenses. In so ruling, the circuit court specifically stated that it was not ruling on the Watrings' counterclaims. The court did not address the question of whether the forbearance agreement defeated the Watrings' defenses to summary judgment. The circuit court issued a written order for summary judgment and judgment of foreclosure on the condo loan on June 25, 2010.

¶9 On July 1, 2010, Baytree filed a motion for summary judgment on Watrings' counterclaims. In its brief in support of its motion, Baytree again

argued that the forbearance agreement released Baytree from any claims and defenses arising out of the condo loan transaction. Also in support of its motion, Baytree filed another affidavit from Schalk, asserting the forbearance agreement as a bar to the counterclaims, and attaching a copy of the agreement to the affidavit.

¶10 The Watrings filed their brief in opposition to Baytree's motion for summary judgment on the counterclaims. In that brief, they did not address Baytree's argument that the forbearance agreement barred their claims. In its reply brief, Baytree again argued to the circuit court that the forbearance agreement barred the Watrings' claims.

¶11 The circuit court heard arguments on the motion on August 6, 2010. During the hearing, the court explained that the Watrings' evidentiary submissions were largely conclusory and directed the Watrings to file a supplemental brief citing to specific parts of their submissions evidence that supported their assertions that Baytree refused to provide financing to qualified prospective buyers. The briefing schedule allowed Baytree to respond to the Watrings' supplemental brief.

¶12 The Watrings filed a supplemental brief and two additional affidavits on August 10. In its response, Baytree again asserted that the counterclaims were barred by the forbearance agreement. Yet again, in their reply brief the Watrings ignored Baytree's assertions that the forbearance agreement was dispositive.

¶13 In a telephone hearing on August 13, without oral argument, the circuit court granted summary judgment to Baytree, dismissing the Watrings' counterclaims. In granting summary judgment, the court did not address the forbearance agreement. The court concluded that no dispute of material fact existed and that the Watrings' submissions were insufficient to support their

claims of breach of good faith and fair dealing and negligent misrepresentation. On September 1, 2010, the court issued an order granting Baytree's motion for summary judgment and dismissing the Watrings' counterclaims.[6] The Watrings appeal the June 25, 2010 and September 10, 2010 judgments.[7]

Standard of Review

¶14 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).[8] We draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

---

[6] In correspondence dated June 20, 2011, Baytree notified this court that the Virginia Towers property had been sold at sheriff's sale and provided a copy of the confirmation of sale signed by the circuit court on June 1, 2011. The correspondence noted that a copy was sent to the Watrings' counsel. In the letter, Baytree states that, because of the confirmed sheriff's sale, "it would appear that" the issue of whether summary judgment of foreclosure was properly granted is moot. To date, the Watrings' have provided no response to the correspondence or Baytree's assertion that their appeal of the judgment of foreclosure is moot. However, because Baytree has not filed a motion with this court to dismiss the Watrings' appeal of the judgment of foreclosure, we do not address this issue.

[7] In its response brief, Baytree contends in a footnote that the Watrings' pursuit of this appeal is not appropriate because the LLC filed a Chapter 7 bankruptcy petition, citing ***In re: Robert D. Watring, LLC, Debtor***; U.S. Bankruptcy Court, E.D. Wis. case no. 10-40266-jes. We have reviewed the record and the circuit court docket and do not find reference to this bankruptcy petition. The Watrings do not address Baytree's contention in their reply brief. As we have no information that a stay is currently appropriate in this matter, we have proceeded to decide this appeal.

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

¶15 We may affirm the circuit court on an alternative ground so long as the record is adequate and the parties have the opportunity to brief the issue on appeal. *See* ***Doe v. General Motors Acceptance Corp.***, 2001 WI App 199, ¶7, 247 Wis. 2d 564, 635 N.W.2d 7.

Discussion

¶16 The Watrings appeal two orders granting summary judgment to Baytree. The first order granted a judgment of foreclosure to Baytree on its construction loan to the Watrings. The second order dismissed the Watrings' counterclaims against Baytree arising out of the Third Amended Note made to them by Baytree. The Watrings' primary argument with respect to both orders is that material facts remain in dispute and therefore summary judgment is inappropriate. In response, Baytree argues that the Watrings agreed to release Baytree from any claims they may have against Baytree arising out of the Third Amended Note by entering into the forbearance agreement on March 31, 2009. It is undisputed that the forbearance agreement was executed after the Watrings' alleged counterclaims arose. In their reply brief, the Watrings argue for the first time that Baytree has forfeited its rights under the forbearance agreement because it failed to plead the agreement as an affirmative defense. For the reasons we explain below, we conclude that the Watrings' defenses are legally deficient with respect to the judgment of foreclosure, and that the Watrings' counterclaims are barred by the forbearance agreement.

I. SUMMARY JUDGMENT OF FORECLOSURE

¶17 The Watrings contend that their summary judgment submissions provide a sufficient factual basis to support their defenses to Baytree's motion for summary judgment of foreclosure. They also contend that, based on those

submissions, genuine issues of material fact exist and therefore summary judgment is inappropriate.

¶18 The Watrings raise two defenses to foreclosure, negligent misrepresentation on the part of Baytree, and a breach of the duty of good faith and fair dealing. With respect to the negligent misrepresentation claim, the Watrings allege that the bank misrepresented it would provide financing to "qualified prospective buyers" and then refused to do so, thereby causing damages in the form of lost sales to Watring's detrimental reliance. Regarding the defense that Baytree violated the duty of good faith and fair dealing, the Watrings allege that the bank breached this duty by refusing to provide financing to "qualified prospective buyers," resulting in the Watrings inability to sell condominium units.

¶19 We conclude that neither defense is legally sufficient to bar Baytree from recovering on its note to the Watrings. According to Baytree's submissions, the Watrings owed the bank approximately $7,000,000 based on a construction mortgage loan made to them in 2005, which was later amended three times. The current operative note is the Third Amended and Restated Promissory Note made on May 15, 2008 and which matured on December 31, 2008. The Watrings do not dispute in their summary judgment submissions that they are liable under the note and that they have been unable to repay or refinance the note. They also do not dispute that they are in default of the loan and that the bank is still due and owing the amount stated on the account.

¶20 Turning to the Watrings' defenses, the misrepresentation the Watrings alleged Baytree made do not affect the validity of its note on the Virginia Towers condominiums. The alleged misrepresentation was made by one of the bank's officials, Mark Schubring. The Watrings allege he promised that the bank

would provide financing packages for prospective buyers. The timing of these alleged statements, however, is important. The Watrings allege Schubring made these statements close to the completion of the construction on the condominium project, not at the time the Watrings entered into the original loan in 2005. The Watrings further allege that they would not have entered into the forbearance agreement in the absence of Schubring's promise to provide financing to prospective buyers. However, whether the Watrings would have entered into the forbearance agreement has nothing to do with the debt they owed Baytree, based on a promissory note and mortgage executed over three years earlier.

¶21 Regarding the Watrings' defense that Baytree violated its duty of good faith and fair dealing, they allege the bank violated this duty by not providing financing to prospective buyers in accordance with the 2009 financing guidelines. These guidelines were developed by the bank to inform prospective buyers of condominiums at Virginia Towers of the terms under which they may obtain financing from the bank. The Watrings refer to these guidelines as the "financing package" Baytree promised it would provide for prospective buyers.

¶22 The duty of good faith and fair dealing is implied in every contract. *See* ***Ekstrom v. State***, 45 Wis. 2d 218, 222, 172 N.W.2d 660 (1969). The duty to act in good faith stems from the performance of duties under the contract being enforced. ***Chayka v. Santini***, 47 Wis. 2d 102, 107, 176 N.W.2d 561 (1970). Here, Baytree is seeking to enforce its rights to recover under the Third Amended Note. The Watrings' allegations that the bank breached its duty of good faith are not based on that note. Rather, the alleged breach is based on a document evidently created after the note sought to be enforced was created, and there is no indication in the document that it is related to that note. Therefore, as a matter of law, at a minimum the guidelines could not constitute evidence of a breach of the

duty of good faith and fair dealing on the part of Baytree with respect to the note sought to be enforced in the foreclosure action.

II. SUMMARY JUDGMENT ON WATRINGS' COUNTERCLAIMS

¶23 The Watrings also appeal the circuit court's order granting Baytree summary judgment on the Watrings' counterclaims. On appeal, the Watrings argue that there is a material factual dispute with respect to their counterclaims and therefore summary judgment is inappropriate. In response, Baytree argues that the Watrings' counterclaims are barred under the forbearance agreement. In their reply brief, the Watrings argue for the first time in the entire proceedings—in both the circuit court and on appeal—that Baytree failed to plead release under the forbearance agreement as an affirmative defense, as required under WIS. STAT. § 802.02(3), and therefore Baytree has forfeited it as a defense. The Watrings further contend that Baytree raises the forbearance agreement as a defense for the first time on appeal.

¶24 Under the forbearance agreement, the Watrings agreed to the following: "During and subsequent to the expiration of the Forbearance Period, the [Watrings] each hereby fully, absolutely, and unconditionally waive and relinquish any right or defense that any of the foregoing may have had, may now have, or may have in the future with respect to the agreement by Lender to the forbearance."[9] The forbearance agreement was made in relation to the Third

[9] The Watrings also agreed under the forbearance agreement to the following:

> 11. **Representations, Warranties and Covenants**....
>
> ….
>
> E. No such party has any defense, claim, or right of action or offset of any kind, relating to any matter in connection

(continued)

Amended Note to the $7,000,000 construction loan Baytree made to the Watrings for the condominium project in Kenosha. At the time the parties entered into the forbearance agreement, the Watrings had been in default since December 31, 2008.

¶25 Under WIS. STAT. § 802.02(3),[10] release is an affirmative defense, which is waived if not raised in the pleadings. *See* ***Oetzman v. Ahrens***, 145 Wis. 2d 560, 571, 427 N.W.2d 421 (Ct. App. 1988) ("affirmative defenses are deemed waived if not raised in the pleadings"). It is undisputed that Baytree's answer to the Watrings' counterclaims does not plead release under the forbearance agreement as an affirmative defense. However, as our summary of the facts above demonstrates, it is not true, as the Watrings now argue, that

---

> with the Third Amended Note and/or Loan Documents, and [the Watrings] hereby absolutely, unconditionally, irrevocably waive and relinquish any and all claims, demands, rights, and/or actions against Lender in connection with the Third Amended Note and Loan Documents in consideration of the forbearance and the Loan ….

[10] WISCONSIN STAT. § 802.02(3) states:

> Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of a condition subsequent, failure or want of consideration, failure to mitigate damages, fraud, illegality, immunity, incompetence, injury by fellow servants, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, superseding cause, and waiver. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation. If an affirmative defense permitted to be raised by motion under s. 802.06(2) is so raised, it need not be set forth in a subsequent pleading.

Baytree raised this defense for the first time on appeal. Indeed, as we will discuss below, it is the Watrings who—for the first time on appeal and then only in their reply brief—raise Baytree's failure to plead the forbearance agreement as an affirmative defense.

¶26 The record shows that Baytree first raised the forbearance agreement as an affirmative defense at the hearing on its motion for summary judgment on the condo loan foreclosure. At that hearing Baytree presented the defense in the following way.

> And, finally, Your Honor, as also in [Schalk's] affidavit … attach[ing] a copy of the forbearance agreement, which was signed by Mr. and Mrs. Watring after this alleged financing agreement took place. This was signed March 31st of 2009, and in that forbearance agreement Mr. Watring specifically waived any claims against the bank. In consideration for the bank forbearing from taking immediate action on a matured note, the Watrings waived any claims again [sic] the bank, acknowledged they owed the money. So even if these claims – if they did have these claims or there was some kind of factual or legal basis for those claims, they have all been waived. And we will be readdressing that issue again when we file our motion with respect to the counterclaims.

¶27 In response, rather than object to Baytree's reliance on the forbearance agreement as an affirmative defense, the Watrings acknowledged that they signed the forbearance agreement and that Robert Watring "always felt there was a temporary forbearance agreement because he anticipated that these condominium projects would sell as he presented qualified buyers to them." Watring also averred in an affidavit filed in support of the Watrings' brief in opposition to Baytree's motion for summary judgment of foreclosure that "he signed a temporary forbearance agreement forwarded to him by David Schalk on March 31, 2009." It is clear that as early as Baytree's first motion for summary

judgment on the condo loan that the Watrings were fully aware that Baytree was asserting the forbearance agreement as an affirmative defense and that they did not dispute that they had entered into this agreement. More importantly, at that time they did not argue that Baytree waived its right to assert this defense by failing to plead it as an affirmative defense.

¶28 The next time Baytree raised the forbearance agreement as a defense to the counterclaims was in its brief in support of its motion for summary judgment seeking dismissal of the Watrings' counterclaims. Again, Baytree argued that the Watrings waived all possible claims arising out of the Third Amended Note by entering into the forbearance agreement. David Schalk averred in an affidavit submitted in support of Baytree's motion for summary judgment that "[n]otwithstanding the default, Watring asked the Bank to forbear on its rights to foreclose. The Bank agreed to do so. On March 31, 2009, the parties signed a Forbearance Agreement …." According to the record, the Watrings did not respond to this argument or argue to the court that Baytree waived its right to rely on the forbearance agreement as an affirmative defense.

¶29 Baytree also raised the forbearance agreement as a defense in response to the Watrings' supplemental brief filed on August 10, 2010, just before the scheduled trial in this matter, and, as with the other times that Baytree raised the forbearance agreement as an affirmative defense, the Watrings made no objection.

¶30 Turning to this appeal, we observe that the Watrings did not argue in their brief-in-chief that Baytree had failed to raise the forbearance agreement as an affirmative defense in its answer to their counterclaims, although the Watrings were clearly on notice from the proceedings in the circuit court that Baytree was

relying on the forbearance agreement as a ground for the court to dismiss the Watrings' counterclaims. In its response brief on appeal, Baytree argued that it was entitled to summary judgment on the Watrings' counterclaims based on the forbearance agreement. Only in their reply brief do the Watrings, for the first time, assert that Baytree failed to plead the forbearance agreement as an affirmative defense and therefore waived it.

¶31 We conclude, based on the record, that the Watrings have forfeited their objection to Baytree's failure to plead the forbearance agreement as an affirmative defense. The Watrings were presented with numerous opportunities in the circuit court to assert forfeiture by Baytree and yet they failed to do so. And on appeal, they raise the issue for the first time in their reply brief, in spite of the fact that they were fully aware in the circuit court that Baytree was asserting the forbearance agreement as a defense to the Watrings' counterclaims.

¶32 Generally, we do not consider issues raised for the first time on appeal. ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838. We apply this rule when the circuit court has not had the opportunity to "pass" on the issue. ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). This rule is one of judicial administration and we may choose to address an issue raised for the first time on appeal in the exercise of our discretion, depending upon the facts and circumstances of each case. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489-90, 339 N.W.2d 333 (Ct. App. 1983) (judicial administration); ***Hopper***, 79 Wis. 2d at 137 (depending upon the facts and circumstances of each case). However, even if the circumstances warrant addressing an issue for the first time on appeal, which in this case they do not, the issue must first be raised in an appellant's brief-in-chief. We will not address

issues raised for the first time in a reply brief. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n. 4, 602 N.W.2d 158 (Ct. App. 1999).

¶33 We choose to not exercise our discretion and consider the Watrings' argument that Baytree forfeited its right to rely on the forbearance agreement as an affirmative defense. The Watrings do not explain why they waited until their reply brief on appeal to first address this issue or why we should consider their argument on appeal, when they had opportunities to raise the issue before the circuit court in order to give that court a chance to "pass" on the issue.

¶34 The Watrings acknowledged before the circuit court that they entered into the forbearance agreement, and do not argue to the contrary in this court. Moreover, the Watrings do not dispute that, aside from their assertion that Baytree waived the forbearance agreement as an affirmative defense, the terms of the agreement do not bar their counterclaims against Baytree. We therefore take their silence on this topic as a concession and conclude that the Watrings' counterclaims are barred by the forbearance agreement.

¶35 In sum, because the Watrings provide no reason why we should consider their argument on Baytree's pleading failure, made for the first time in their reply brief, and because the forbearance agreement by its terms bars the Watrings' counterclaims, we affirm the circuit court's grant of summary judgment to Baytree dismissing the Watrings' counterclaims.

Conclusion

¶36 For the reasons set forth above, we affirm the circuit court's orders granting summary judgment to Baytree.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.