OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

April 21, 2014

To:

Hon. John W. Markson
Circuit Court Judge
Dane County Courthouse
215 South Hamilton, Br. 1, Rm. 6109
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 South Hamilton, Rm. 1000
Madison, WI 53703

Anthony F. Baer
Krekeler Strother, S.C.
2901 W. Beltline Hwy., Ste. 301
Madison, WI 53713

Briane F. Pagel Jr.
Krekeler Strother, S.C.
2901 W. Beltline Hwy., Ste. 301
Madison, WI 53713

Chaz Rodriguez
Blommer Peterman, SC
165 Bishops Way, Suite 100
Brookfield, WI 53005-6215

M&I Marshall and Ilsley Bank
770 N. Water Street
Milwaukee, WI 53202

Seminole Forest Neighborhood Association, Inc.
5821 Schumann Drive
Fitchburg, WI 53711

You are hereby notified that the Court has entered the following opinion and order:

2013AP418 Bank of America, N.A. v. John O. Grothman and Lori J. Ingraham (L.C. # 2011CV5448)

Before Lundsten, Sherman and Kloppenburg, JJ.

John Grothman and Lori Ingraham (collectively, Grothman)[1] appeal the circuit court's order granting Bank of America, N.A.'s motion for summary judgment and dismissing Grothman's counterclaims against the Bank (BANA) for bad faith in this foreclosure action. Based upon our review of the briefs and record, we conclude at conference that this case is

[1] For ease of reading, we refer to the appellants collectively as "Grothman," except when a party is referenced in his or her individual capacity.

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[2] We summarily affirm.

BANA initiated this foreclosure action against Grothman in December 2011. Grothman filed a counterclaim, asserting that BANA acted in bad faith by refusing to accept Grothman's offer to pay the full amount due to bring the loan current.

BANA moved to dismiss the counterclaim for failure to state a claim. BANA argued that Ingraham's and Grothman's depositions established that Grothman never offered to pay the total amount due to bring the loan current. Because BANA relied on evidentiary submissions, the court treated the motion as a motion for summary judgment. The court determined that the facts of record established that BANA did not refuse a payment of the full amount due, and granted summary judgment to BANA on Grothman's counterclaim.

Grothman moved for reconsideration, arguing that Grothman did not have notice that the motion to dismiss would be treated as a motion for summary judgment. The court allowed Grothman an opportunity to submit evidence opposing summary judgment, and Grothman submitted three supporting affidavits. The court denied the motion to reconsider, and dismissed Grothman's counterclaim.

Grothman argues on appeal that BANA was not entitled to summary judgment on Grothman's counterclaim for bad faith. Grothman argues that BANA failed to cooperate with Grothman's attempt to perform under the loan contract by refusing to accept Grothman's offer to

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

cure the entire deficiency of the loan. Grothman argues that there is an issue of material fact as to whether BANA breached its duty of good faith.

We review summary judgment decisions de novo, applying the same methodology as the circuit court. *See* ***Siebert v. Wisconsin Am. Mut. Ins. Co.***, 2011 WI 35, ¶27, 333 Wis. 2d 546, 797 N.W.2d 484. Summary judgment "'shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" ***Id.*** (quoted source omitted). The only dispute in this case is whether the depositions and affidavits create an issue of material fact as to whether BANA acted in bad faith by refusing Grothman's offer to bring the loan current.

We turn, then, to the depositions and affidavits submitted on summary judgment. Ingraham provided the following deposition testimony:

> Q ... [O]n October 11[, 2011,] you spoke with [BANA], and you attempted to make a payment in the amount of $2,000, correct?
>
> A Correct.
>
> Q And you also informed [BANA] that you would also pay the remaining $3,000 in two weeks, correct?
>
> A Correct.
>
> Q And you also acknowledge that at that time you thought the estimated amount to reinstate was $5,043.17, correct?
>
> A Correct.
>
> ….
>
> Q Why were you only able to pay $2,000 on October 11 ...?

A Because that was all the money I had at that time. I was going to try to borrow it, the remaining. That's why I needed two weeks.

Q Do you remember who you were going to attempt to borrow the remaining $3,000 from in two weeks?

A I was going to try to borrow it from my sister.

Q Did you ever obtain the additional $3,000 … from your sister?

A No, I did not.

Q So at any time were you able to tender the total amount to reinstate the loan at one time?

A No, I was not.

Ingraham then stated the following in her affidavit:

2. On or about October 11, 2011 I spoke with [BANA,] who told me that the amount necessary to reinstate the mortgage was $5043.17.

3. I told [BANA] that I could pay $2000 immediately [and] would pay the rest of the $3000 odd dollars in two weeks.

4. I had spoken to my sister … about borrowing money from her to reinstate our mortgage and she had told me that she would be happy to help us out.

5. At the time I told [BANA] I could pay the $3000 in 2 weeks I knew that my sister had the $3000 necessary to reinstate the mortgage and I believed that she would loan it to me based upon my previous conversations with her.

6. In the October 11 conversation with [BANA], [BANA] told me that they would not accept my offer to [make a] $2000 payment now and [the] remaining $3000 payment in 2 weeks.

….

8. The reason I never got the $3000 from my sister is because [BANA] said that they wouldn't accept it.

….

11. I would have tendered the entire amount necessary to reinstate the mortgage by the end of October 2011 but for [BANA's] statement that they would not accept the money.

Ingraham's sister stated in her affidavit that she had $3,000 that she was willing to lend to Ingraham in October 2011, but that Ingraham stated she did not need the money because BANA was refusing to accept it.

Grothman acknowledges that Grothman never actually offered the full amount due on the loan, and that BANA was not required to accept a partial payment. Grothman contends, however, that BANA acted in bad faith by refusing to accept Grothman's proposal to cure the entire deficiency by the end of October 2011. Grothman cites ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796-97, 541 N.W.2d 203 (Ct. App. 1995), for the proposition that a bank is liable for acting in bad faith by interfering with a debtor's performance under a contract, even if the bank technically complies with the terms of the contract.

The problem with Grothman's argument is that it relies on a mischaracterization of the evidence. Grothman views the deposition testimony and affidavits as establishing that Grothman offered to cure the entire deficiency by the end of October 2011 and that BANA said it would not accept the payments. Grothman contends that a reasonable fact finder could find that Grothman would have tendered the full amount due by the end of October 2011 if BANA had not stated it would not accept the payments. We disagree with Grothman's view of the evidence.

Contrary to Grothman's argument, nothing in the deposition testimony or affidavits supports a reasonable inference that BANA communicated to Grothman that it refused to accept payment of the full amount due by the end of October 2011. Rather, the evidence plainly establishes that BANA refused to accept a partial payment on October 11, 2011, with a promise of a future payment of the balance due. That refusal is not the same as refusing to accept a full payment.

We conclude that the undisputed evidence establishes that BANA refused a partial payment with a promise to pay the balance in two weeks, and that Grothman never offered to pay the full amount due. In light of Grothman's acknowledgment that BANA was not required to accept a partial payment, BANA's refusal to accept a partial payment on October 11, 2011, does not support Grothman's claim of bad faith for interfering with Grothman's performance under the contract. Accordingly, Grothman's bad faith claim fails as a matter of law.[3]

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[3] Because this issue is dispositive, we do not reach the other arguments raised by the parties.