



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

October 28, 2014

To:

Hon. Maryann Sumi
Circuit Court Judge
Dane County Courthouse
215 South Hamilton, Br 2, Rm 7105
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

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

Russell J. Karnes
Blommer Peterman SC
165 Bishops Way
Brookfield, WI 53005-6235

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

Associated Bank N.A.
c/o Mr. Nathan Schnell
1305 Main Street
Stevens Point, WI 54481

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

2013AP138

US Bank National Association v. Sharon L. Beno
(L. C. #2008CV2338)

Before Lundsten, Blanchard and Kloppenburg, JJ.

Sharon Beno appeals an order dismissing her amended counterclaim in a foreclosure action. Beno argues that US Bank National Association breached a duty of good faith as it relates to her application for a mortgage modification. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2011-12).¹

On February 9, 2009, a judgment of foreclosure was entered. The circuit court granted a motion to reopen to allow Beno to assert a proposed amended counterclaim. The court subsequently granted US Bank's motion to dismiss Beno's amended counterclaim for failure to state a claim upon which relief may be granted.² Beno now appeals.

At the outset, we note Beno's amended counterclaim presented an allegation that "[t]here existed between the defendants and plaintiff a tacit agreement to negotiate in good faith regarding the first HAMP application."³ Beno further alleged US Bank "had an obligation to deal in good faith with defendant by properly evaluating her for a modification, by evaluating her for a modification in a timely manner, and by providing her with a modification." Beno demanded "an order of specific performance requiring the lender to comply with HAMP, and/or an award of damages."

The circuit court correctly recognized that a homeowner has no cause of action to require the lender to comply with HAMP, or otherwise enforce HAMP guidelines as a third-party beneficiary to an agreement between the federal government and the mortgage servicer. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 559 n.4 (7th Cir. 2012). Indeed, it is unclear

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The circuit court prohibited any sale of the property until the counterclaims were heard.

³ This refers to the Home Affordable Modification Program (HAMP), which the Secretary of the Treasury implemented to encourage lenders to refinance mortgages with more favorable interest rates to reduce foreclosures. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556-57 (7th Cir. 2012).

from what source the alleged “tacit agreement” between U.S. Bank and Beno purportedly arises. We conclude that Beno’s vague and conclusory allegation of an unwritten “tacit agreement” to negotiate in good faith regarding the HAMP application is too indefinite and uncertain to enforce, as it provides an insufficient basis for determining the terms or scope of promises the parties allegedly agreed to, or whether those alleged obligations were breached.

Wigod does not ameliorate the deficiency in Beno’s “tacit agreement” argument. In that case, the plaintiff alleged that she had entered into a trial payment plan (TPP) with the bank. *Id.* at 558. The TPP agreement provided: “If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a [permanent] Loan Modification Agreement.” *Id.* The court held that “[o]nce Wells Fargo signed the TPP Agreement and returned it to Wigod, an objectively reasonable person would construe it as an offer to provide a permanent modification agreement if she fulfilled its conditions.” *Id.* at 563. However, the present case does not involve an executed TPP, and *Wigod* did not involve negotiations for a trial loan modification.

For the first time on appeal, Beno argues that a good faith duty arose from the original note and mortgage. According to Beno, “The good faith duty in the original note and mortgage prohibits actions or inactions which are arbitrary, unfair, lacking decency, fairness or reasonableness, evasive, lacking diligence, evincing a slacking off, imperfect performance, or a failure to cooperate.”

We generally do not consider arguments raised for the first time on appeal, and we decline to do so in this instance. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*. We specifically reject Beno’s assertion that she

“sufficiently pled and briefed in circuit court her claim for breach of the duty of good faith arising under the note and mortgage.”

But even if we reached the merits we would be unpersuaded. In her briefs to this court, Beno fails to cite any provision from the note and mortgage supporting a duty to negotiate regarding HAMP applications. In fact, our review of the record shows there was no contractual right under the note and mortgage for Beno to be reviewed for a loan modification.⁴ Because there was no underlying contractual duty under the note and mortgage related to loan modification, Beno cannot maintain an action for breach of the implied duty of good faith on that basis. The amended counterclaim was properly dismissed.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Paragraph One of the mortgage states the “Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder” The mortgage also provides US Bank was under no obligation to return any partial payments made pursuant to a forbearance agreement or offer to modify. Paragraph Seven of the note states that “[e]ven if, at a time I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.”