



App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted). We first examine the pleadings to determine whether the complaint states a claim and the answer joins an issue of fact or law. *Id.* If issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether there are any material facts in dispute that would entitle the opposing party to trial. *Id.*; *see also* WIS. STAT. § 802.08(2).

Here, Borys does not dispute that Chase Home Finance made a prima facie case for foreclosure based upon materials showing that Borys had failed to make payments on a mortgage owned by the bank. Borys contends, however, that his own materials create a material dispute over whether he had an affirmative defense based upon his purchase of what he terms a "mortgage performance" insurance policy common for farmers, wherein the insurer guaranteed to make regular monthly payments on behalf of the borrower in the event of gaps or loss of income of the borrower, to be reimbursed later by the borrower.

According to the closing documents, Borys paid a \$5304 premium at closing for a "RD Guarantee Fee" to be provided to a third party, Rural Development. Chase Home Finance characterizes the Rural Development policy as a typical "mortgage insurance" contract, and points out that the mortgage documents themselves provide that "mortgage insurance" reimburses *the lender* for losses it may incur if the borrower does not repay the loan. However, although we agree with Chase Home Finance's description of the typical mortgage insurance policy as providing coverage for the benefit of the lender, not the buyer, the mortgage documents in the record before us do not settle the question of whether the Rural Development policy was, in fact, a typical mortgage insurance policy.

First, the form language in the mortgage documents does not state that Borys was required to buy mortgage insurance; it says that *if* the lender requires mortgage insurance, the buyer will be responsible for paying the premium. Second, the closing documents have a line entitled Mortgage Insurance that was left blank. Third, there is a document in the summary judgment materials that makes reference to Rural Development guaranteeing payments for Borys. Therefore, without a copy of the actual Rural Development policy—which Borys contends is in the possession of Chase Home Finance, which has refused to produce it during discovery—we cannot determine with certainty whether the policy that Borys characterizes as a “mortgage performance” insurance policy intended to guarantee payments from farmers in the event of crop loss functions in the same manner as typical residential mortgage insurance.

The problem for Borys is that, because he was asserting the existence of the Rural Development policy as an affirmative defense, the burden was on him to show that the policy was material to the foreclosure action. He has not. Missing from Borys’ materials was any explanation of who would be required to make a claim of loss in order to trigger guaranteed payments under the policy, and how recurring coverage would serve as a deferral against foreclosure. Indeed, Borys does not even point to any documents in the summary judgment materials showing that he suffered any loss that would have qualified him to receive guaranteed payments under the policy if such a claim had been made. In sum, Borys has provided no facts, such as an opinion by an expert, or legal authority to support his position that, even assuming the Rural Development policy functions in the way he describes—that is, that the insurer would make monthly payments on Borys’ behalf in response to a claim of loss due to crop failure or some other qualifying event—the policy would have required Chase Home Finance to first “exhaust its other remedies” by making a claim to Rural Development before pursuing

foreclosure against Borys. We therefore conclude that Borys' summary judgment materials did not create a material factual dispute requiring trial on the issue of foreclosure.

Borys claims there was an additional factual dispute over whether he should have to pay a property inspection fee for an inspection he alleges never occurred. However, since Chase forfeited any right to obtain a deficiency judgment by electing to proceed under WIS. STAT. § 846.101(2), the property inspection fee is not recoverable. Therefore any factual dispute as to the fee's validity is immaterial to the foreclosure judgment entered, and does not require a trial.

IT IS ORDERED that the foreclosure judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*