

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 4, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP1849

Cir. Ct. No. 2006CV389

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CONSTRUCTION MORTGAGE INVESTORS CO.,

PLAINTIFF-RESPONDENT,

V.

VWH DEVELOPMENT, LLC AND VERN W. HAGSTROM,

DEFENDANTS,

MAPLE LAWN, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County:
DAVID C. RESHESKE, Judge. *Affirmed.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Maple Lawn, LLC appeals from an order confirming the foreclosure sale of property owned by VWH Development, LLC, and Vern Hagstrom (collectively Hagstrom), and dismissing its counterclaims against mortgage holder Construction Mortgage Investors Co. (CMIC). Maple Lawn argues that CMIC fraudulently induced it to sign a subordination agreement giving CMIC mortgage priority and that CMIC breached special duties owed to Maple Lawn and the duty of good faith and fair dealing implied in every contract. We conclude that the circuit court properly dismissed Maple Lawn's counterclaims and we affirm the order confirming the sale.

¶2 In 2003 Maple Lawn sold Hagstrom vacant land for the development of a residential subdivision and as a result holds a \$240,000 mortgage on that parcel. On September 30, 2004, Hagstrom acquired additional adjacent lands and financed the development efforts by giving CMIC a \$3,890,000 mortgage. Maple Lawn signed a subordination agreement giving CMIC's mortgage first priority. It also loaned additional monies and holds another mortgage for \$650,000. Hagstrom defaulted on the promissory note to CMIC. It was determined that CMIC was owed \$3,308,945 and a judgment of foreclosure was granted requiring the sale of the property as a whole.¹ The sale was conducted October 22, 2007, and CMIC was the purchaser for \$3,660,000. Maple Lawn objected to confirmation of the sale reasserting its position that a disputed issue of fact exists

¹ The judgment was summarily affirmed on Maple Lawn's appeal. *Construction Mortgage Investors Co. v. VWH Dev., LLC*, 2007AP2045, unpublished order (Wis. Ct. App. Mar. 4, 2009).

on whether the property could be divided and sold in parcels and seeking to have \$988,872 retained by the court clerk until resolution of its counterclaims.²

¶3 A summary judgment procedure was utilized to determine that CMIC had first priority³ and that Maple Lawn could not recover on its counterclaims. We review a summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.*; WIS. STAT. § 802.08(2) (2007-08).⁴

¶4 By its counterclaims against CMIC, Maple Lawn seeks to void the subordination agreement. Even though CMIC is not a signatory to the subordination agreement, Maple Lawn characterizes the subordination agreement as confirming part of an agreement between CMIC and Maple Lawn. Maple Lawn states that prior to the execution of the subordination agreement, CMIC represented, promised and agreed to limit the use of any of the loan proceeds to improvements to the subdivision, to inspect the project to make sure that requested

² The \$988,872 figure represents the amounts due, including interest and attorney fees, on the \$650,000 mortgage to Maple Lawn. Maple Lawn previously took a judgment against Hagstrom on the 2003 mortgage.

³ This appeal is not about the subordinate position of Maple Lawn's \$650,000 mortgage that was recorded after CMIC's mortgage. Despite Maple Lawn's motion in the circuit court to retain funds based on its \$650,000 mortgage, in its reply brief in this court Maple Lawn acknowledges that it is an undisputed fact that CMIC's mortgage is superior to Maple Lawn's \$650,000 mortgage and that the real issue has always been the relative priority of its 2003 mortgage.

⁴ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

draws were for improvements that had actually been made in the subdivision, to release to Maple Lawn \$9,000 for each lot sold in the subdivision, and to issue a mortgage payoff on sold lots. Maple Lawn asserts it would not have executed the subordination agreement but for CMIC's assurances. Maple Lawn contends that CMIC breached its promises because it paid out loan proceeds for improvements made at Hagstrom's home and work not actually completed in the subdivision and it allowed Hagstrom to collect a developer's fee for no actual work performed. It also suggests that CMIC unreasonably refused to allow mortgage releases when it offered to purchase lots after Hagstrom's default. Maple Lawn's counterclaims allege that CMIC was negligent in making construction payouts not related to the development, breached a duty of good faith with respect to the subordination agreement, breached a fiduciary duty owed to Maple Lawn, fraudulently induced Maple Lawn to sign the subordination agreement, and made intentional, strict liability and negligent misrepresentations.

¶5 The elements of a claim of fraudulent inducement to enter a contract are “a statement of fact that is untrue, made with the intent to defraud, and for the purpose of inducing the other party to act on it, which the other party relies on to his or her detriment, where the reliance is reasonable.” *Kailin v. Armstrong*, 2002 WI App 70, ¶31, 252 Wis. 2d 676, 643 N.W.2d 132. These are essentially the same elements for an intentional misrepresentation claim. *Id.*, n.21. Claims of strict responsibility misrepresentation and negligent misrepresentation also require the same three common elements: (1) the representation must be of a fact; (2) the representation of fact must be untrue; and (3) the claimant must believe such representation to be true and rely thereon to his or her damage. *Whipp v. Iverson*, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). All species of misrepresentation claims require a false statement of fact. “[A]n action for misrepresentation cannot

be based on future events or facts not in existence when the representation was made, or on unfulfilled promises.” *Schurmann v. Neau*, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157. The misrepresentations must relate to present or pre-existing events or facts. *Hartwig v. Bitter*, 29 Wis. 2d 653, 656, 139 N.W.2d 644 (1966). One exception permitting liability to attach is when at the time of making the promises the promisor has a present intention not to perform. *Id.* at 658.

¶6 As the circuit court determined, the alleged assurances by CMIC relate to things to be done in the future and were not statements of facts.⁵ Maple Lawn contends that the question of CMIC’s intent to not perform at the time the assurances were made is a question of fact that cannot be decided on summary judgment. However, it is not sufficient to merely assert that intent cannot be determined on summary judgment because it is dependent on credibility. *See Harman v. La Crosse Tribune*, 117 Wis. 2d 448, 457, 344 N.W.2d 536 (Ct. App. 1984); *Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 190, 260 N.W.2d 241 (1977). On summary judgment the opposing party is obligated to advance evidentiary facts which demonstrate a disputed material fact that precludes summary judgment. *Dawson v. Goldammer*, 2006 WI App. 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. “[W]hen an essential element of a claim cannot be

⁵ In the summary judgment proceeding resulting in the foreclosure judgment CMIC denied any conversation with Maple Lawn making the representations or promises. Although whether the representations were made appears to be a disputed issue of fact, it is not material to the determination of whether Maple Lawn can recover on its counterclaims. *See Clay v. Horton Mfg. Co.*, 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992) (to preclude summary judgment the alleged factual dispute must concern a fact that affects the resolution of the controversy).

proved under any view of the facts, summary judgment is appropriate.” *Schurmann*, 240 Wis. 2d 719, ¶7.

¶7 Maple Lawn did not submit materials demonstrating facts from which it could be determined or reasonably inferred that CMIC never intended to perform its promises. See *U.S. Oil Co. v. Midwest Auto Care Servs.*, 150 Wis. 2d 80, 88-89, 440 N.W.2d 825 (Ct. App. 1989) (dismissal of misrepresentation claim proper where there were no evidentiary facts that the shareholders did not intend to execute the personal guarantees at the time they promised to do so or linking the misrepresentation claims and the shareholders’ intent at the time they promised to sign guarantees). Maple Lawn only offered conclusory allegations that CMIC did not fulfill its promises and such allegations cannot defeat summary judgment. See *Fritz v. McGrath*, 146 Wis. 2d 681, 689, 431 N.W.2d 751 (Ct. App. 1988). That CMIC had the present intent to not perform the promises when made cannot be inferred from non-performance alone. See RESTATEMENT (SECOND) OF CONTRACTS, § 171 cmt. b (1981).

¶8 CMIC indicated that Hagstrom’s pay requests were reviewed and that it made periodic inspections to satisfy itself that the collateral supported the loan. This bit of performance negates any inference that it never intended to perform. See *Wausau Med. Ctr. v. Asplund*, 182 Wis. 2d 274, 291, 514 N.W.2d 34 (Ct. App. 1994) (that doctor did in fact return to practice as he represented he would renders inapplicable the no intent to perform exception to the pre-existing fact rule). Additionally, any inference to be drawn from the summary judgment submissions must be reasonable. See *Belich v. Szymaszek*, 224 Wis. 2d 419, 425, 592 N.W.2d 254 (Ct. App. 1999) (a reasonable inference is based on the “probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience” and “must be a rational and

logical deduction from facts admitted or established by the evidence when such facts are viewed in the light of common knowledge or common experience”). It would not be reasonable to infer that CMIC had no intention of monitoring the disbursement of loan funds or inspecting the property in protection of its own interests. There is no suggestion that CMIC was in collusion with Hagstrom to permit the use of money for work not performed in the subdivision. In the absence of any suggestion that CMIC had the intent not to perform the assurances on which Maple Lawn relied, the misrepresentation and fraud in inducement claims were properly dismissed.

¶9 Turning to Maple Lawn’s claims that CMIC breached a duty of care owed to Maple Lawn, we first address the claim that CMIC owed a common law fiduciary duty to Maple Lawn.

Generally, there are two types of fiduciary relationships: (1) those specifically created by contract or a formal legal relationship such as principal and agent, attorney and client, trust and trustee, guardian and ward, and (2) those implied in law due to the factual situation surrounding the transactions and relationships of the parties to each other and to the questioned transactions.

Production Credit Ass’n v. Croft, 143 Wis. 2d 746, 752, 423 N.W.2d 544 (Ct. App. 1988).

¶10 There was no contractual relationship whatsoever between Maple Lawn and CMIC. Maple Lawn has not demonstrated any inequality in knowledge of the facts involved or disparity in the parties’ position relative to Hagstrom’s financing that would support the existence of a fiduciary relationship. Maple Lawn’s claim rests solely on the assurances CMIC made to monitor and inspect construction progress in making loan disbursements. However, monitoring and inspection benefits CMIC as well and the promise to do so does not create a

unique or special relationship to Maple Lawn. *See id.* at 756 (attitude of assistance or encouragement can be expected where the lender has a substantial interest in the borrower's financial welfare and did not create a fiduciary relationship). CMIC and Maple Lawn were nothing more than competing lenders. CMIC did not have a fiduciary duty to protect Maple Lawn or accept risk for it.

¶11 Maple Lawn also claims a breach of the implied duty of good faith that accompanies every contract. *See Foseid v. State Bank*, 197 Wis. 2d 772, 794, 541 N.W.2d 203 (Ct. App. 1995) (recognizing that a breach of the implied duty of good-faith dealing is actionable separate from breach of the terms of the contract). The duty represents “a guarantee by each party that he or she ‘will not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶41, 301 Wis. 2d 752, 734 N.W.2d 169. CMIC is not in a contractual relationship with Maple Lawn. Although the subordination agreement refers to CMIC as the “New Lender,” CMIC is not a signatory to the agreement. There can be no duty to prevent contract performance when no contractual obligations exist between the parties.

¶12 All that remains is Maple Lawn's claim that CMIC breached an ordinary duty of care. In *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶21, 291 Wis. 2d 283, 717 N.W.2d 17, the supreme court considered the question of a lender's liability to a third party who suffers losses, where the lender and the third party are not in privity of contract and the lender has no fiduciary duty to the third party. There the court held that the duty of ordinary care between parties with their own respective contractual relationship to one another in a construction

project did not include a duty by the lender or entity dispensing loan funds to assess the progress of the construction and determine whether enough construction has been completed to warrant the disbursement of loan proceeds.⁶ *Id.*, ¶44. CMIC's duty of care to Maple Lawn did not include inspection of the property to assure that funds were being used for improvements in the subdivision. Maple Lawn's claims that CMIC breached a duty of care was properly dismissed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

⁶ Maple Lawn's reliance on *First Nat'l Bank v. Wernhart*, 204 Wis. 2d 361, 555 N.W.2d 819 (Ct. App. 1996), as requiring a lender to perform inspections prior to disbursement of construction funds is misplaced. In *First Nat'l Bank*, the mortgage lender was found to be the agent of the borrower and as a consequence of that agency relationship it owed a duty of due care to assure that funds were paid for work actually done. *Id.* at 364, 370. There is no agency relationship between Maple Lawn and CMIC. Moreover, *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, 291 Wis. 2d 283, 717 N.W.2d 17, represents the controlling precedent.

