**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 92-2336

(Summary Calendar)

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MEGA DEVELOPMENT COMPANY and JOHN P. COLLINS,

Plaintiffs-Appellants,

VERSUS

FSLIC RESOLUTION TRUST CORPORATION as receiver for AMERIWAY SAVINGS,

Defendant-Appellee.

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Appeal from the United States District Court
For the Southern District of Texas
(CA H 90 693)

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( January 7, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Mega Development Company ("Mega") and John P. Collins brought suit against Ameriway Savings Association ("Ameriway"), claiming that Ameriway had breached its duty of good faith and fair dealing. The district court granted summary judgment for Ameriway's receiver, Resolution Trust Corporation ("RTC"), because, under Texas law, Ameriway did not owe Mega and Collins a duty of good

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

faith and fair dealing. Mega and Collins appeal summary judgment and the order denying their motion to alter or amend summary judgment. Finding no error, we affirm.

**I**

Mega executed a promissory note in the amount of $2,680,000 in favor of Ameriway. The promissory note was secured by a lien on real property, and Collins guaranteed payment on the note. Mega and Collins subsequently defaulted on the note and guaranty agreement. As a result, Ameriway accelerated the maturity of the note and demanded payment. However, Mega and Collins refused to pay. Subsequently, the property securing the note was foreclosed upon and sold by the trustee of the property to the highest bidder. Ameriway was the highest bidder, and bought the property for $1,900,000. That amount was applied to the outstanding balance of the note and guaranty, leaving a deficiency of $898,155.42, which Mega and Collins refused to pay. Thereafter, Ameriway was declared insolvent, and RTC was appointed as the receiver for Ameriway.[1]

Mega and Collins originally brought an action against Ameriway in state court, seeking (1) declaratory judgment that Ameriway could not recover the deficiency[2] and (2) damages for breach of fiduciary duty and breach of the duty of good faith and fair

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[1] The RTC))in its capacity as receiver for Ameriway))is now the holder of the note and the guaranty.

[2] Mega and Collins claim that the fair market value of the property on the date of foreclosure was between $4,480,500 and $4,789,500. *See* Brief for Mega and Collins at 3. Mega and Collins claimed that had the property been sold at its alleged fair market value, a deficiency would not have resulted.

dealing. The RTC became a true party in interest, and removed the case to federal district court. RTC counterclaimed, seeking a deficiency judgment on the amount due under the promissory note and guaranty agreement, and attorney's fees. The RTC moved for summary judgment to dismiss the claims of Mega and Collins and for summary judgment on its counterclaims.

The district court found no irregularity in the foreclosure sale. The district court also found that Ameriway did not owe a duty of good faith and fair dealing or fiduciary duty to Mega and Collins. The district court therefore granted summary judgment for RTC, awarding RTC the balance due under the promissory note and guaranty agreement. Mega and Collins filed a motion under Fed. R. Civ. P. 59(e) to alter or amend the summary judgment, which the district court denied.

**II**

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Central R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "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." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Once the movant carries

its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). We also review district court determinations of state law de novo. *Salve Regina College v. Russell,* ___ U.S. ___, 111 S. Ct. 1217, 1225, 113 L. Ed. 2d 190 (1991).

**A**

Mega and Collins claim that Ameriway owed them a common law duty of good faith and fair dealing. We disagree. Under Texas law, an "`agreement made by the parties and embodied in the contract itself cannot be varied by an implicit covenant of good faith and fair dealing.'" *Hall v. Resolution Trust Corp.,* 958 F.2d 75, 79 (5th Cir. 1992) (quoting *Exxon Corp. v. Atlantic Richfield Co.,* 678 S.W.2d 944, 947 (Tex. 1984)). Absent a "special relationship," there is no common law duty of good faith and fair dealing which may give rise to a cause of action in tort. *Id.*; *Fireman's Fund Ins. Co. v. Murchison,* 937 F.2d 204, 208 (5th Cir. 1991); *Pack v. First Federal Sav. & Loan,* 828 S.W.2d 60, 64-65 (Tex. App.))Tyler 1991); *Federal Deposit Ins. Corp. v. Coleman,* 795 S.W.2d 706, 708-09 (Tex. 1990). Under Texas law, the borrower-

lender relationship does not give rise to an implied duty of good faith and fair dealing. *Federal Deposit Ins. Corp. v. Claycomb,* 945 F.2d 853, 859 n.17 (5th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S. Ct. 2301, 119 L. Ed. 2d 224 (1992).[3] Similarly, a lender does not owe a guarantor a duty of good faith and fair dealing. *Coleman,* 795 S.W.2d at 708. Thus, the district court did not err in finding that Ameriway did not owe Mega and Collins a common law duty of good faith and fair dealing.

Mega and Collins also claim that Ameriway owed them a duty of good faith and fair dealing under Tex. Bus. & Comm. Code Ann. § 1.203 (Tex. UCC) (Vernon 1968).[4] Mega and Collins claim that Ameriway had a duty of good faith and fair dealing under the promissory note and guaranty agreement. *See* Reply Brief for Mega & Collins 3-5.

The contractual duty of good faith and fair dealing has been codified under section 1.203, *Adolph Coors Co.,* 780 S.W.2d 477, 481 (Tex. App.))Corpus Christi 1989, writ denied), which provides that "[e]very contract or duty within [the UCC] imposes an obligation of

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[3] *See also Hall,* 958 F.2d at 79 (Applying Texas law, Court "`refused to overlay an implied duty of good faith and fair dealing duty in the lender-borrower relationship.'" (quoting *Cockrell v. Republic Mortg. Ins. Co.,* 817 S.W.2d 106, 116 (Tex.App.))Dallas 1991, no writ)).

[4] Under Texas law the duty of good faith and fair dealing is imposed "under the Uniform Commercial Code, Tex. Bus. & Comm. Code Ann. § 1.203 (Vernon 1968), as part of every commercial contract, and also in limited circumstances under common law as a basis for tort liability." *Adolph Coors Co. v. Rodriguez,* 780 S.W.2d 477, 480-81 (Tex. App.))Corpus Christi 1989, writ denied); *see also Pack v. First Federal Sav. & Loan.* 828 S.W.2d 60, 64-65 (Tex.App.))Tyler 1991).

good faith in its performance or enforcement." Tex. Bus. & Comm. Code Ann. § 1.203. While a special relationship is required under the common law duty of good faith and fair dealing, *see supra*, such a relationship is not required for a cause of action under section 1.203. *Schmueser v. Burkburnett Bank,* 937 F.2d 1025, 1031 (5th Cir. 1991). However, a breach of the duty to act in good faith under section 1.203 does not give rise to an independent cause of action. *Adolpho Coors Co.,* 780 S.W.2d at 482. "[I]n order to be actionable as a breach of contract under Section 1.203, bad faith conduct must be related to some aspect of performance under the terms of the contract." *Id.* at 482. (stating that duty of good faith and fair dealing "is aimed at making effective the agreement's promises" and "defines other duties which grow out of specific contract terms and obligations").

Upon reviewing the record, we find that Ameriway's purchase of the collateral was not related to any "aspect of performance under the terms of the contract[s]."[5] The promissory note and guaranty agreement did not require any performance from Ameriway in the event that Ameriway purchased the collateral at a foreclosure sale. Therefore, Ameriway did not owe Mega and Collins a duty of good faith and fair dealing under section 1.203.

**B**

Mega and Collins also appeal the denial of their motion to alter or amend summary judgment under Fed. R. Civ. P. 59(e). Mega

[5] We assume without deciding that the UCC applies to the promissory note and guaranty agreement.

and Collins claim that the district court erred in finding that Ameriway did not owe them a duty of good faith and fair dealing.

We review an order denying a motion for amendment or alteration of judgment only for an abuse of discretion. *Youmans v. Simon,* 791 F.2d 341, 349 (5th Cir. 1986) (citing *Weems v. McCloud,* 619 F.2d 1081, 1098 (5th Cir. 1980)). Because, as we have already held, Ameriway did not owe Mega a duty of good faith and fair dealing, the district court did not abuse its discretion in denying Mega's motion to alter or amend summary judgment. *See Youmans,* 791 F.2d at 349 (declining to address appeal of order denying motion to amend or alter judgment under Rule 59(e), where motion merely restated the merits of movant's appeal, which Court had already decided).

**III**

Because Mega and Collins did not present any issues of material fact to warrant the denial of RTC's summary judgment motion, we AFFIRM.