

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

RICHARD J. SMETKA,) No. 1 CA-CV 09-0520
)
Plaintiff/Appellant,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
HOMEQ SERVICING CORPORATION;) (Not for Publication -
WELLS FARGO BANK, NA,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Defendants/Appellees.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV 2009-050676

The Honorable Eddward Ballinger, Jr., Judge

AFFIRMED

Richard J. Smetka Phoenix
In propria persona

Tiffany & Bosco, P.A. Phoenix
By Michael A. Bosco, Jr.
May Lu
Attorneys for Appellees

J O H N S E N, Judge

¶1 Richard J. Smetka appeals from the superior court's grant of a motion to dismiss filed by HomeEq Servicing Corporation and Wells Fargo Bank, N.A. (collectively "Appellees"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In February 2004, Smetka borrowed money from WMC Mortgage Corporation ("WMC"). The debt was evidenced by a promissory note and secured by a deed of trust on Smetka's home. In November 2004, Smetka quitclaimed the home to the Trustees of the Smetka Family Trust. In the meantime, in March 2008, WMC assigned its beneficial interest in the deed of trust to Wells Fargo and in October 2008, the trustee recorded a notice of trustee's sale.

¶3 Smetka filed an eight-count complaint against WMC, Wells Fargo and HomeEq. HomeEq and Wells Fargo moved to dismiss the complaint. The court granted the motion and entered an order dismissing HomeEq and Wells Fargo that included language required by Arizona Rule of Civil Procedure 54(b). Smetka timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

A. Standard of Review.

¶4 "We review an order granting a motion to dismiss for abuse of discretion." *Dressler v. Morrison*, 212 Ariz. 279, 281,

¶ 11, 130 P.3d 978, 980 (2006). “[W]e assume the truth of the allegations set forth in the complaint and uphold dismissal only if the plaintiffs would not be entitled to relief under any facts susceptible of proof in the statement of the claim.” *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996).

B. Smetka’s Issues on Appeal.

¶15 Rather than offering legal argument for why the superior court erred in dismissing the complaint against Appellees, Smetka’s brief instead argues facts and theories not contained in the complaint and not raised in the superior court. In our discretion, we decline to address these issues on appeal. *See, e.g., Maher v. Urman*, 211 Ariz. 543, 548, ¶ 13, 124 P.3d 770, 775 (App. 2005) (arguments not made in superior court are waived on appeal). For the most part, Smetka’s brief argues that the trustee’s sale of the home was unauthorized or illegal. As Appellees note, however, the trustee’s sale did not occur until after the court granted their motion to dismiss. As Appellees argue, Smetka’s complaint did not contain any allegations arising from the sale of the home.

C. Smetka’s Complaint Was Properly Dismissed.

1. General principles.

¶16 We determine the sufficiency of a complaint by evaluating it under the standard stated in Arizona Rule of Civil

Procedure 8(a), which requires “[a] short and plain statement of the claim showing that the pleader is entitled to relief.” “If a pleading does not comply with Rule 8, an opposing party may move to dismiss the action for ‘[f]ailure to state a claim upon which relief can be granted.’” *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008) (quoting Ariz. R. Civ. P. 12(b)(6)). “[A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona’s notice pleading standard under Rule 8.” *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. We look only to the complaint when evaluating a motion to dismiss for failure to state a claim. *Id.*

¶17 As noted, Smetka’s complaint alleged eight counts against all defendants. We address each in turn.

2. Count One.

¶18 Smetka’s first count was titled, “Unfair Lending Practices.” It alleged, “Defendants knowingly or intentionally made this loan to Plaintiff without determining, using commercially reasonable means or mechanism, that the Plaintiff had the ability to repay the home loans, in violation of under Arizona Revised Statutes.” According to the complaint, however, neither Wells Fargo nor HomEq “made [the] loan” at issue to Smetka; that loan was made by WMC. Smetka offers no authority for the proposition that an assignee of a deed of trust or a

loan servicing company is liable for any wrongdoing of a lender. Therefore, we conclude the superior court correctly dismissed this count.

3. Count Two.

¶9 Smetka's second count alleged the defendants acted negligently by "failing to disclose relevant information, failing to provide additional options for [Smetka], failing to conduct reasonable evaluation into the merits of the loan transactions and the property itself, and other regular, customary and usual activities that are born and conducted by professionals of their same nature and type." Again, these allegations arise out of the original making of the loan by WMC rather than servicing activities performed by HomeEq or actions by Wells Fargo. To the extent the complaint meant that Appellees were negligent in "failing to provide additional options" for him, on appeal Smetka does not specify what those "options" might have been or provide any authority for the proposition that either HomeEq or Wells Fargo were obligated to provide such options.

4. Count Three.

¶10 Count Three alleged negligence per se. Negligence per se requires "a violation of a specific requirement of a law." *Hutto v. Francisco*, 210 Ariz. 88, 91, ¶ 12, 107 P.3d 934, 937 (App. 2005) (citation omitted). The complaint, however, fails

to cite any specific law that the Appellees allegedly violated; nor does Smetka identify any such provision on appeal. Therefore, the superior court correctly dismissed this claim.

5. Count Four.

¶11 Count Four alleged defendants breached a fiduciary duty to Smetka that arose in connection with their "work[ing] on behalf of [Smetka] to close the loan transactions discussed herein." Because neither Wells Fargo nor HomeEq was involved in the closing of the loan to Smetka, we do not understand these allegations to have been directed at them; accordingly, dismissal of these allegations against them was proper. Moreover, assuming without deciding that HomeEq and Wells Fargo owed Smetka a fiduciary duty, the complaint contained no facts to support Smetka's contention that they breached that duty.

6. Count Five.

¶12 Count Five alleged negligent misrepresentation. According to the complaint, defendants breached their duty "to represent accurately, truthfully, and completely all information that [Smetka] relied upon in performing [his] investigation, consideration and evaluation and/or the selection of financing for the subject property." Again, these allegations concern the original loan transaction, in which neither Wells Fargo nor HomeEq was involved. The contention that Appellees negligently represented information in connection with Smetka's decision to

enter into the loan is an "unwarranted deduction[] of fact" that is insufficient to withstand a motion to dismiss. See *Aldabbagh v. Ariz. Dep't of Liquor Licenses and Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989).

7. Count Six.

¶13 Count Six alleged that Appellees "intentionally misrepresented the nature of the loan, that [Smetka] needed a mortgage of a sub-prime nature that such a sub-prime loan was in [Smetka's] benefit, and other intentional misrepresentations." Again, this allegation concerned acts committed or omissions made in connection with the issuance of the loan, in which neither Wells Fargo nor HomeEq was involved. Accordingly, dismissal of this claim was proper.

8. Count Seven.

¶14 Count Seven alleged defendants breached the covenant of good faith and fair dealing. "In Arizona, a covenant of good faith and fair dealing is implied in every contract." *Maleki v. Desert Palms Prof'l Props., L.L.C.*, 222 Ariz. 327, 333, ¶ 28, 214 P.3d 415, 421 (App. 2009). The complaint, however, alleged no facts supporting the contention that Appellees breached a duty of good faith and fair dealing. The complaint alleged in conclusory fashion that defendants breached by not dealing fairly and in good faith with Smetka and by taking "undue advantage" of him "regarding the loan transactions." These

allegations are too vague to support a claim for relief; moreover, they appear to concern acts committed prior to the formation of any contract that may have given rise to a duty of good faith owed to Smetka by Wells Fargo or HomEq. Therefore, we conclude the superior court correctly dismissed Count Seven.

9. Count Eight.

¶15 Count Eight was a claim "to restrain or to set aside a wrongful foreclosure against all defendants." To obtain an injunction, a plaintiff must first establish "[a] strong likelihood that he will succeed at trial on the merits." *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). As we have concluded that dismissal of each of the other claims was proper against Appellees, the superior court was correct in dismissing count eight.¹

D. Request for Attorney's Fees.

¶16 Appellees request their attorney's fees and costs pursuant to A.R.S. § 12-341.01(A) (2003) and ARCAP 21, as well as A.R.S. § 12-349 (2003) and ARCAP 25. Because this case arises out of a contract, A.R.S. § 12-341.01(A) applies, and we grant Appellees' request for attorney's fees on appeal, as well as their costs subject to compliance with ARCAP 21.

¹ We also note that according to our record, Smetka quitclaimed his interest in the home and therefore may lack standing to seek to restrain or set aside the trustee's sale.

CONCLUSION

¶17 For the foregoing reasons, we affirm the superior court's dismissal of the complaint against Wells Fargo and HomeEq.

/s/_____
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/_____
PATRICK IRVINE, Judge

/s/_____
PHILIP HALL, Judge