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Case No. K12C-01-021 WLW

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EARL STRONG and LILLIE STRONG,	:	C.A. No. K12C-01-021 WLW
Plaintiffs,	:	
v.	:	
WELLS FARGO BANK and THOMAS D.H. BARNETT, ESQ.,	:	
Defendants.	:	

Submitted: September 6, 2012
Decided: November 30, 2012

ORDER

Upon Defendants' Motion to Dismiss.
Granted.

Mr. Earl Strong and Mrs. Lillie Strong, *pro se*

Geoffrey G. Grivner, Esquire of Buchanan Ingersoll & Rooney, P.C., Wilmington, Delaware; attorney for Wells Fargo Bank, N.A.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorney for Thomas D.H. Barnett, Esquire.

WITHAM, R.J.

The issue before the Court is whether the Court should grant Defendants' Motion to Dismiss Plaintiff's deceptive trade practices claim?

FACTUAL AND PROCEDURAL BACKGROUND

This case originated from a foreclosure action brought by the holder of a mortgage on Plaintiff Earl Strong's home. Plaintiff entered into a mortgage agreement with MIT lending on October 20, 2004, which named Mortgage Electronic Registration Systems, Inc. ("MERS") as a nominee.[1] In exchange for a loan in the amount of $205,277.00, Plaintiff agreed to a mortgage on his property at 11 Gooseneck Lane, Smyrna, Delaware (hereinafter "Gooseneck Lane Property"). The agreement provided that Defendant would make monthly payments of $1,133.55.

Plaintiff failed to tender payments as required, and MERS filed a foreclosure action on June 10, 2005. Default judgment was entered on November 3, 2005. MERS filed a writ of *levari facias* on January 31, 2006. The foreclosure was halted due to an automatic stay when Plaintiff filed for bankruptcy. MERS received relief from the automatic stay on October 24, 2007, but Plaintiff filed a second bankruptcy petition on August 13, 2008, resulting in another stay. The second bankruptcy case was dismissed on September 4, 2008. Plaintiff subsequently filed for bankruptcy a third time on July 1, 2009, resulting in yet another stay. MERS obtained relief from the third automatic stay on May 5, 2010. The note was assigned to Wells Fargo on November 15, 2010, and MERS filed a writ of levari facias in the name of Wells

[1]The facts as recited herein are adopted, in part, from *Mortgage Electronic Registration Systems, Inc. v. Strong*, 2011 WL 5316766 (Del. Super. Oct. 19, 2011).

Fargo Bank on January 11, 2011. This Court dismissed the foreclosure action on October 19, 2011, on the grounds that the mortgage and the note on the Gooseneck Lane Property were unsealed instruments, and thus, could only be enforced at equity.

Plaintiff, along with his wife, Lillie Strong (collectively "Plaintiffs), filed the instant action against Thomas Barnett, Esquire, and Wells Fargo Bank, N.A. ("Defendants") on January 19, 2012. In their complaint, Plaintiffs allege that Defendants committed fraud, forgery, misrepresentation, perjury, defamation, conspiracy, malicious prosecution, and deceptive trade practices by misrepresenting themselves as the holder of the note and mortgage on the Gooseneck Lane Property. Plaintiffs dispute the authenticity of the mortgage, and allege that Defendants misled and filed false documents with both this Court and the United States Bankruptcy Court for the District of Delaware. Defendant Wells Fargo Bank filed a motion for summary judgment on April 25, 2012, which was joined by Defendant Barnett on May 4, 2012. This Court dismissed all but the claim for "deceptive trade practices" in an order issued on July 20, 2012.[2] In that order, the Court ordered Plaintiffs to file a more definitive statement as to their "deceptive trade practices claim" as they did not state a basis in law for this claim in their original complaint.

Plaintiffs filed a document on July 30, 2012 titled "Statement As To The Deceptive Trade Practice And Correction of Plaintiffs Claims" (hereinafter " More Definitive Statement"). On August 13, 2012, Defendants moved to dismiss this

[2]*Strong v. Wells Fargo Bank*, 2012 WL 3549730 (Del. Super. July 20, 2012).

remaining claim pursuant to Superior Court Civil Rule 12(b)(6).[3] Plaintiffs subsequently filed their own "motion to dismiss" on August 22, 2012, which essentially asks this Court to enter a default judgment in Plaintiffs' favor for Defendants' failure to respond to the More Definitive Statement. The Court will now review the merits of both parties' motions.

DISCUSSION

I. Plaintiffs' "Motion to Dismiss"

Turning first to the motion filed by Plaintiffs on August 22, 2012, the Court finds that this motion is procedurally unsound. Plaintiffs' *pro se* status does not excuse their failure to comply with the Court's rules.[4] To the extent that Plaintiffs are filing a motion to dismiss, the rules of this Court do not permit Plaintiffs to file such a motion. Furthermore, Superior Court Civil Rule 12(e), which governs motions for a more definitive statement, merely provides that the party that filed the vague or ambiguous pleading must file a more definite statement within 10 days of a court order.[5] The Court finds nothing within the body of that rule, or any other rule, requiring the non-responding party to file a response. Therefore, Plaintiffs' motion is hereby dismissed.

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[3]Superior Court Civil Rule 12(b)(6) provides that a defendant may move to dismiss a complaint for "failure to state a claim upon which relied can be granted." Super. Ct. Civ. R. 12(b)(6).

[4]*Hall v. Danberg*, 998 A.2d 850, at *1 (Del. 2010) (table).

[5]*See* Super. Ct. Civ. R. 12(e).

II. Defendants' Motion to Dismiss

In the More Definitive Statement filed with the Court on August 13, 2012, Plaintiffs appear to allege that Defendants violated both the Deceptive Trade Practices Act and the Delaware Consumer Fraud Act, but this statement is so rambling and incoherent that the Court remains unclear as to which claims Plaintiffs assert and what relief they seek. Consequently, Defendants have moved to dismiss the lone remaining claim in this case pursuant to Superior Court Civil Rule 12(b)(6).

The standards governing a motion to dismiss are well-settled.[6] All well-pleaded factual allegations are accepted as true.[7] Even vague allegations are "well-pleaded" if they give the opposing party notice of the claim.[8] Dismissal will only be warranted when "under no reasonable interpretation of the facts could the complaint state a claim for which relief might be granted."[9]

A. Deceptive Trade Practices Act

Plaintiffs allege that Wells Fargo has caused a "likelihood of confusion and misunderstanding" as to the true mortgage holder of the Gooseneck Lane Property in violation of 6 *Del. C.* 2532(a)(2), a subsection of the Deceptive Trade Practices Act.[10]

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[6] *Beck v. Brady*, 860 A.2d 809, at *1 (Del. 2004) (table).

[7] *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995).

[8] *Id.*

[9] *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Aug. 20, 2004).

[10] Plaintiffs allege additional violations of 6 *Del. C.* 2532(a), all of which are nonsensical in light of the fact that only competing businesses, and not consumers, have standing to raise a

As Defendants point out, however, a consumer has no standing to state a cause of action under the DTPA. "[The DTPA] is intended to address unfair or deceptive trade practices that interfere with the promotion and conduct of another's business."[11] Unlike the Consumer Fraud Act, the DTPA is not intended to redress wrongs between a business and its customers.[12] It is the Consumer Fraud Act, codified at 6 Del. C. § 2511-2527, which provides a cause of action for a consumer. As the Supreme Court noted in *Whaley*:

> In short, the most logical interpretation of the Consumer Fraud Act in conjunction with the DTPA is that the Consumer Fraud Act provides remedies for violations of the "vertical" relationship between a buyer (the consumer) and a producer or seller .... Conversely, the DTPA addresses unreasonable or unfair interference with the "horizontal" relationships between various business interests.[13]

Since Plaintiffs, as a mortgagor, are consumers of the services Defendants provide and are not a competing business, they have no standing to bring a claim under the DTPA. Therefore, any claims brought by the Plaintiffs pursuant to DTPA are dismissed.

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claim under the DTPA.

[11] *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 64 (Del. 1993).

[12] *Id.* at 65.

[13] *Id.* at 70; *see also Nieves v. All Star Title, Inc.*, 2010 WL 2977966, at *6 (Del. Super. July 27, 2010); *Ewing v. Bice*, 2001 WL 880120, at *7-8 (Del. Super. July 25, 2001); *S&R Assoc. v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. 1998).

B. Consumer Fraud Act

Plaintiffs also alleged that Defendants violated 6 *Del. C.* § 2513(a), a subsection of the Delaware Consumer Fraud Act, by making the aforementioned misrepresentations to both this Court and the United States Bankruptcy Court. The Delaware Consumer Fraud Act ("CFA") is intended "to protect consumer and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State."[14] Plaintiffs rely on Section 2513(a) of the DCFA, which defines an unlawful practice as follows:

> The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale, lease, or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.[15]

Thus, by the express language of Section 2513(a), Plaintiffs must show that Defendants made a material misrepresentation at the time of sale, or in the course of services provided after the point of sale. The misrepresentations alleged here were made to the courts, and not at the time that the Plaintiffs executed the mortgage on the Gooseneck property. The allegations in Plaintiffs' More Definitive Statement relate most directly to claims of fraud, forgery, and perjury - all claims that this Court

[14] 6 *Del. C.* § 2512.

[15] 6 *Del. C.* § 2513(a) (emphasis added).

dismissed in the previous Opinion and Order. Therefore, the allegations found within Plaintiffs' More Definitive Statement are insufficient to state a cause of action under either the DTPA or the CFA, and cannot survive Defendants' Motion to Dismiss.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is hereby **GRANTED**, and Plaintiffs' complaint is dismissed in its entirety.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh