

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-002101-MR  
AND  
NO. 2008-CA-000212-MR

CADE CUMMINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 06-CI-03061

JOSH MORITA; JOE ESLAMI;  
HON. CARROLL REDFORD;  
HON. HENRY DAVIS; HON.  
PAMELA GOODWINE; AND  
HON. SHEILA ISAAC

APPELLEES

AND

NO. 2008-CA-000211-MR

JOSH MORITA AND JOE ESLAMI

CROSS-APPELLANT

v. CROSS-APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 06-CI-03061

CADE CUMMINS

CROSS-APPELLEE

OPINION  
AFFIRMING

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BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, Cade Cummins, appeals from a summary judgment dismissing his claims against Appellees, Josh Morita and Joe Eslami. Morita and Eslami cross-appeal from the trial court’s denial of attorney fees and costs associated with defending the action. Upon review of the record, we affirm the decision of the Fayette Circuit Court.

Appellant’s claims stem from a business transaction whereby he engaged American Lending Group, Inc., (ALG) to aid him in obtaining a home mortgage loan. When Appellant contacted ALG, he spoke with Morita, a loan officer, and the two negotiated the terms of a loan agreement. Appellant then met with Morita at ALG and signed the loan documents. When Appellant asked Morita why the name “Pinnacle” was on some of the documents, Morita explained that Pinnacle was an affiliate of ALG.

However, it was later revealed that Pinnacle Mortgage, L.L.C. (Pinnacle) was a separate and competing entity that had been formed by Morita and Eslami. Eslami had previously served as a loan officer for ALG, but had resigned a couple of months prior to Appellant’s transaction. Morita was fired by

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

ALG shortly after he facilitated Appellant's transaction. Apparently, Morita and Eslami had diverted other loans from ALG to Pinnacle.

Prior to the instant lawsuit, ALG sued both Morita and Eslami after it learned that they were using ALG offices and resources to secure mortgage loans for Pinnacle. Morita and Eslami had not signed an employment contract or a non-compete agreement with ALG, but served as outside-sales loan officers. The two relied on their status as independent agents of ALG to defend against the allegations of wrongdoing, claiming that they referred ALG customers to Pinnacle when ALG could not offer loans on terms commensurate with the customers' needs. Morita's assertion that these customers were informed that they were dealing with Pinnacle instead of ALG was heavily contested. As one of the customers whose business Appellees had diverted from ALG to Pinnacle, Appellant filed the instant claim upon several common-law theories and also alleged violations of various federal statutes and regulations. The trial court granted summary judgment to Appellees and this appeal followed.

Summary judgment is only appropriate where there is no genuine issue as to any material fact. Kentucky Rules of Civil Procedure (CR) 56.03. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). We review the record in a light most favorable to the party against whom the motion for summary judgment was made, resolving all doubts in that party's favor. *Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828 (Ky. App. 2002).

Turning first to Appellant's common-law theories of recovery, we conclude that summary judgment was proper in view of Appellant's failure to assert injury or damages resulting from Appellees' alleged misconduct. Appellant asserted claims of negligence, fraud, civil conspiracy, conversion, tortious contract interference and invasion of privacy. An essential element of each of these tort claims is legally compensable injury or damages. As explained by the trial court, Appellant obtained the mortgage loan he sought, consistent with bargained-for terms, and he expressed no dissatisfaction with the loan nor did he seek to rescind the mortgage loan agreement.

A review of Appellant's brief to this Court reveals only two potential injury claims. First, Appellant asserts that being induced by Appellees to divulge certain personal and financial information constitutes injury. Second, Appellant asserts that he suffered severe emotional distress. As to the latter assertion, it is well established in Kentucky law that mental anguish, unaccompanied by physical contact or injury, is not in and of itself a compensable injury. *See Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980); *Hetrick v. Willis*, 439 S.W.2d 942 (Ky. 1969). Concerning Appellant's disclosure of information to Appellees, the trial court properly reasoned that such could not be characterized as injury because the information was utilized by Appellees only for the purpose for which it was divulged, i.e., to facilitate the desired mortgage loan for Appellant. Accordingly, regardless of whether genuine issues of fact exist with respect to Appellees'

wrongful conduct, Appellant failed to assert injury, an essential element of these common-law claims.

Likewise, Appellant's claims based on violations of various statutory and regulatory schemes were properly dismissed via summary judgment.

Appellant alleged that Appellees violated the Fair Credit Reporting Act (FCRA), the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), and the Racketeer Influenced and Corrupt Organizations Act (RICO).

The FCRA prohibits obtaining consumer credit information under false pretenses. 15 U.S.C. § 1681q. However, Appellant gave Morita permission to obtain access to his credit report for the purpose of facilitating his home mortgage loan and Appellant did, in fact, ultimately obtain a home mortgage loan in the time frame he desired and under terms that satisfied him. The loan documents disclosed that Pinnacle was the lender. Thus, the only alleged misrepresentation that was made to Appellant was that Pinnacle was associated with ALG. Despite this alleged misrepresentation to Appellant, there are no allegations that any misrepresentations were made to the credit agencies for obtaining Appellant's credit information. As such, the credit information was not obtained wrongfully.

Appellant also asserted a violation of the Truth in Lending Act, 15 U.S.C. § 1602. In dismissing this claim, the trial court emphasized Appellant's failure to specify the actionable violation. Before this Court, Appellant has refined his argument and asserts that Appellees' failure to disclose the true identity of the

lender in his loan transaction violates 12 C.F.R. § 226.18. This regulation provides a list of disclosures that a creditor must make to a borrower. The first requirement is that the actual creditor be identified. This regulatory requirement mirrors 15 U.S.C. § 1638(a)(1). Here, it was truthfully disclosed on the loan documents that Pinnacle was the creditor. The disputed alleged misrepresentation was that Pinnacle was affiliated with ALG. We need not determine whether such conduct could constitute a TILA violation because, as detailed hereinabove, Appellant failed to allege injury or damages. We recognize that certain TILA violations may entitle a consumer to statutory civil penalties. However, 15 U.S.C. § 1640, which establishes the range of potential civil liability for TILA violations provides that violations of only certain subsections of 15 U.S.C. § 1638 may entitle a consumer to civil penalties, and 15 U.S.C. § 1638(a)(1), the subsection implicated here, is not among them. Rather, the damages available for a violation of the relevant subsection are “any actual damages sustained . . . as a result of the failure” to make the disclosure. 15 U.S.C. § 1640(a)(1). As such, the trial court properly determined that Appellant’s TILA claim could not survive summary judgment.

Next, we affirm the trial court’s dismissal of Appellant’s claim under the Real Estate Settlement Procedures Act. Before this Court, Appellant makes rather vague allegations that RESPA was somehow violated by Morita’s alleged arrangement with Pinnacle for securing Appellant’s loan. RESPA prohibits kickbacks, fee splits, or receipt of other undisclosed monies in federally related mortgage transactions. As noted by the trial court, Appellant “fails to cite to any

deposition testimony or any applicable section of RESPA that supports his RESPA claim.” In any event, the evidence is undisputed that Morita received no commission from Pinnacle for loan referrals and was without any such expectation.

Finally, Appellant asserted a claim under the Racketeer Influenced and Corrupt Organizations Act. The trial court concluded that Appellant failed to establish the necessary prerequisites for maintaining a claim for relief under RICO. Additionally, we recognize that RICO authorizes suit to be brought by a person “injured” in his business or property by reason of the alleged RICO violation. 18 U.S.C. § 1964(c). However, Appellant has failed to assert any compensable injury. Accordingly, dismissal of this claim was also appropriate.

On cross-appeal, Morita and Eslami claim that the trial court erred when it denied their request for costs and fees. Morita and Eslami, believing the action had no basis, sought recovery of their costs and legal fees for defending themselves as well as sanctions pursuant to CR 11. At a motion hearing, the trial court verbally indicated that it would award sanctions as well as costs and fees. However, upon Appellant’s motion to reconsider, the trial court rescinded the sanctions and issued a written order that denied the defendants’ request for costs because no depositions were taken in the underlying case. Further the trial court denied the request for payment of attorney fees to defend against the action.

The record is clear that depositions were not taken in this particular case. These parties and related parties have engaged in at least three other legal actions and while some of the depositions from the other actions were used in this

case, there were no significant additional costs incurred here. The trial court did not abuse its discretion in denying the award of any court costs when there were little or none in this case. An award of attorney fees is likewise subject to the sound discretion of the trial court, in a proper case, depending on the circumstances of the case. *Kentucky State Bank v. AG Servs., Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984). We discern no abuse of discretion in the trial court's denial of attorney fees.

For the foregoing reasons, the trial court's decision is affirmed in its entirety.

ALL CONCUR.

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