[Cite as *Wells Fargo Bank v. Fusco Properties, L.L.C.*, 2010-Ohio-1417.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92689 and 93164

WELLS FARGO BANK, N.A.

PLAINTIFF-APPELLEE

vs.

FUSCO PROPERTIES, LLC, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED (APPEAL NO. 93164)
REVERSED AND REMANDED (APPEAL NO. 92689)

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-644627

BEFORE: Dyke, P.J., Boyle, J., and Jones, J.

RELEASED: April 1, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} In these consolidated appeals, appellants Fusco Properties LLC, CK Fusco Properties LLC, and individuals Carlo Fusco, Sr., Mariano Fusco, Anthony

Diganti, Angie Diganti, and Giuseppe Fusco [1] ("appellants") challenge the judgment of the trial court that service of process was sufficient in the foreclosure action filed by appellee Wells Fargo Bank N.A. (Appeal No. 93164), and the order that dismissed appellants' third party claims against Marcus & Millichap Real Estate Investment Services and Marcus & Millichap Capital Corp. (Appeal No. 92689). For the reasons set forth below, we affirm Appeal No. 93164 and reverse and remand Appeal No. 92689.

{¶ 2} Appellants, the purchasers of the Hedgewood Apartment Complex, executed a Multifamily Note in the amount of $2,640,000 payable to LaSalle Bank, N.A. They also executed a Multifamily Mortgage, Assignment of Rents and Security Agreement, payable to LaSalle Bank, N.A. In addition, Carlo Fusco, Sr., Mariano Fusco, Anthony Diganti, Angie Diganti, and Giuseppe Fusco also executed a Guaranty of Payment to LaSalle in their individual capacities.

{¶ 3} On May 1, 2006, LaSalle assigned its interest in this matter to Wells Fargo Bank, N.A., Trustee for the registered holders of various LaSalle Commercial Mortgage Securities. On December 14, 2007, Wells Fargo filed a complaint for foreclosure against appellants, and any unknown spouses of the individual appellants, in connection with the purchase of the Hedgewood Apartment Complex, alleging, inter alia, that appellants had defaulted on the Multifamily Note, and that there was due and owing to plaintiff on the note the

[1] Appellants Carlo Fusco, Sr., Mariano Fusco, Anthony Diganti, Angie Diganti, and Giuseppe Fusco are collectively referred to herein as "the individual appellants."

aggregate sum of $2,745,206.50. Appellant CK Fusco Properties, LLC was served with summons and complaint via its statutory agent. The remaining appellants were served via certified mail at Adirondack Lane in Claremont, California, the address listed on the General Warranty Deed as the tax mailing address for defendants. The record contains signed return service receipts for all appellants. Appellants submitted an answer in which they asserted that appellee did not state the correct address for the individual appellants. Appellants also asserted that the court lacked jurisdiction over appellants and that the claims were barred by insufficiency of service of process.

{¶ 4} Appellants filed a third party complaint against Wynn Investments, LLC and Brenda Niederst claiming that these third-party defendants made false statements as to the occupancy rate and rent rolls at the complex, and breached the purchase agreement for the Hedgewood Apartment Complex. In an amended third-party complaint, appellants also set forth third-party claims against mortgage broker Marcus & Millichap Capital Corp. ("MMCC"), Niederst's real estate broker, Marcus & Millichap Real Estate Investment Services of Ohio ("MMREO") and appellants' real estate broker, Marcus & Millichap Real Estate Investment Services, Inc. ("MMREI"). In relevant part, appellants asserted that MMCC "certified to [Appellants] and [LaSalle], under penalty of perjury, that the average monthly occupancy rate at Hedgewood was ninety-seven percent (97%) over the preceding twelve months." Appellants also asserted that they entered into the purchase agreement based upon the representations of Niederst, Ryan

Investments, LLC and MMCC, that the representations were materially false. Appellants set forth a third-party claim for fraud against MMCC, a claim for indemnification against all of the Marcus & Millichap entities, and a claim of breach of fiduciary duties against MMREO and MMREI alleging improper "dual agency."

{¶ 5} Wynn Investments, LLC, successor to Ryan Investments, LLC and Niederst subsequently filed cross-claims for indemnification and contribution against the Marcus & Millichap third-party defendants.

{¶ 6} On August 25, 2008, the Marcus & Millichap third-party defendants filed a motion to dismiss the third-party claims and cross-claims against them pursuant to Civ.R. 12(B)(6). In relevant part, the Marcus & Millichap entities asserted that the claim for indemnification must fail since there was no express right of indemnification and there could be no implied right of indemnification since appellants did not allege that "the Fuscos are related tortfeasors" with the Marcus & Millichap parties and did not allege that "the Fuscos have been held vicariously liable for any tort[.]" The Marcus & Millichap parties also asserted that the claim for breach of fiduciary duties from "dual agency" must fail since MMREO represented the sellers of the Hedgewood Apartment Complex, not appellants, and therefore owed appellants no fiduciary duties, and appellants' broker worked for a different entity, MMREI. In addition, the Marcus & Millichap parties maintained that the fraud claim must fail for lack of particularity under Civ.R. 9(B).

{¶ 7} On October 28, 2008, the trial court dismissed the third-party claim of fraud against MMCC, the third-party claim for indemnification against all Marcus &

Millichap defendants, the third-party claim of breach of fiduciary duty against MMREO, and Niederst and Wynn Investment, LLC's cross-claim against MMREO. Appellants dismissed their remaining third-party claims and filed a notice of appeal from this ruling in Appeal No. 92689.

{¶ 8} With regard to the foreclosure proceedings, Wells Fargo moved for summary judgment asserting that the Multifamily Note remains unpaid and that it has a valid first and best lien on the property. The individual appellants also moved for summary judgment and maintained that they were not properly served. According to these appellants, service of process was not reasonably calculated to reach them at the Adirondack Lane address in Claremont, California where service was sent as this is the registered business address for Fusco Properties but is neither the residence or place of business for the individual appellants. In opposition, Wells Fargo indicated that the individual defendants do not deny being served herein, that the Adirondack Lane address was provided by the appellants in the Warranty Deed for the subject property, and in the Mailing Address Request from the loan document packet. Wells Fargo also filed a praecipe for amended service, instructing the clerk of courts to serve the individual appellants at their residences, and a motion to amend process nunc pro tunc. Appellants moved to strike this motion.

{¶ 9} The trial court subsequently granted Wells Fargo's motion for summary judgment in the amount of $2,745,206.50, and denied the motion for summary judgment filed by the individual appellants. The trial court also denied

the motion to amend process nunc pro tunc and concluded that service at the Adirondack Lane address was reasonably calculated to reach the appellants.

{¶ 10} On February 2, 2009, the foreclosure magistrate issued a decision in which he found that "all necessary parties have been served with Summons and Complaint according to law and that service of process on all Defendants was sufficient." Appellants objected to this finding. The trial court overruled the objections and adopted the magistrate's decision. Appellants appeal from this order in Appeal No. 93164. For the sake of clarity, we shall address Appeal No. 93164 first.

Appeal No. 93164

Sufficiency of Service of Process

{¶ 11} For their sole assignment of error in Appeal No. 93164, appellants state:

{¶ 12} "The trial court abused its discretion in adopting the magistrate's decision by finding that all of the Appellants were served with summons and complaint according to law and that service of process on all Appellants was sufficient."

{¶ 13} The determination by the trial court of the question of sufficiency of service of process is a matter in its sound discretion. *Magoteaux v. Magoteaux* (Nov. 26, 1986), Miami App. No. 86-CA-16, unreported; *Lanza v. Lanza* (June 11, 1992), Cuyahoga App. No. 60225.

{¶ 14} In *Money Tree Loan Co. v. Williams,* 169 Ohio App.3d 336, 2006-Ohio-5568, 862 N.E.2d 885, this Court explained:

{¶ 15} "Civ.R. 4.1 outlines how a plaintiff may effect proper service of a summons and complaint upon a defendant. Case law interpreting this rule and defining the parameters of constitutionally sufficient due process holds that service of process must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond. *Akron-Canton Regional Airport Auth. v. Swinehart* (1980), 62 Ohio St.2d 403, 406, 16 O.O.3d 436, 406 N.E.2d 811, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865. In order for service of process to a business address to be 'reasonably calculated' to apprise an individual of an action, 'the party being served must have such a habitual, continuous or highly continual and repeated physical presence at the business address that the party ordering the service of process would have reasonable grounds to calculate that the service would promptly reach the party being served.' *Bell v. Midwestern Educational Serv., Inc.* (1993), 89 Ohio App.3d 193, 202, 624 N.E.2d 196.

{¶ 16} "The plaintiff in a case bears the burden of achieving proper service on a defendant. *Cincinnati Ins. Co. v. Emge* (1997), 124 Ohio App.3d 61, 63, 705 N.E.2d 408. In those instances where the plaintiff follows the Ohio Civil Rules governing service of process, courts presume that service is proper unless the defendant rebuts this presumption with sufficient evidence of nonservice. *Rafalski* [*v. Oates* (1984), 17 Ohio App.3d 65, 66, 477 N.E.2d 1212], 17 Ohio

App.3d 65, 17 OBR 120, 477 N.E.2d 1212; *Grant v. Ivy* (1980), 69 Ohio App.2d 40, 23 O.O.3d 34, 429 N.E.2d 1188. The 'party attempting to avoid jurisdiction has the burden of showing a defect or irregularity in the process.' *United Ohio Ins. Co. v. Rivera* (Dec. 11, 1998), Ashtabula App. No. 98-A-0026, 1998 WL 965989. When a party seeking an order to vacate makes an uncontradicted sworn statement that she never received service of a complaint, she is entitled to have the judgment against her vacated even if her opponent complied with Civ.R. 4.6 and had service made at an address where it could reasonably be anticipated that the defendant would receive it. *Jacobs v. Szakal,* Summit App. No. 22219, 2005-Ohio-2146, 2005 WL 1026685; [*Clark v. Marc Glassman, Inc.,* Cuyahoga App. No. 82578]*,* 2003-Ohio-4660, 2003 WL 22053446; *Plain Dealer Publishing Co. v. Percaiz,* Cuyahoga App. No. 82205, 2003-Ohio-4347, 2003 WL 21957117[]."

{¶ 17} Further, in *Akron-Canton Regional Airport Authority v. Swinehart* (1980), 62 Ohio St.2d 403, 406 N.E.2d 811, syllabus, the Ohio Supreme Court held that "[s]ervice of process may be made at an individual's business address pursuant to Civ.R. 4.1(1), but such service must comport with the requirements of due process." The Supreme Court, however, warned of the "inherent risks" involved in attempting certified mail service at a business address rather than at a defendant's residence, but explained that each case must be examined "upon its particular facts." Id. at 407.

{¶ 18} In this matter, the record supports the conclusion that service of process was made in a manner reasonably calculated to apprise the appellants of the action and to afford them an opportunity to respond because the Adirondack Lane address was provided by the appellants in the Warranty Deed for the subject property and in the Mailing Address Request from the loan document packet. Thus, circumstances are such that successful notification could be reasonably anticipated using that address.

{¶ 19} This assignment of error is therefore without merit.

{¶ 20} Appeal No. 93164 is hereby affirmed.

Appeal No. 92689

Dismissal of the Third-Party Complaint against Marcus & Millichap

{¶ 21} Appellants' first and second assignments of error are interrelated and state:

{¶ 22} "The trial court erred by dismissing the Appellants' claim for breach of fiduciary duty against [MMREO] based upon the standards of Civ.R. 8(A) and Civ.R. 12(B)(6)."

{¶ 23} "The trial court erred by dismissing the Appellants' claim for fraud against MMCC based upon the standards of Civ.R. 8(A) and Civ.R. 12(B)(6)."

{¶ 24} Pursuant to Civ.R. 12(B)(6), a motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *D'Amore v. Matthews,* Cuyahoga App. No. 91420, 2009-Ohio-131.

{¶ 25} Such motions should be granted only where the allegations in the complaint show the court to a certainty that the plaintiff can prove no set of facts upon which he might recover. Id. In ruling on a motion to dismiss for failure to state a claim on which relief can be granted, the trial court must "construe the allegations in the complaint in a light most favorable to the plaintiff and must presume the truth of any factual allegation as contained in the complaint." *Universal Coach, Inc. v. New York City Transit Auth., Inc*. (1993), 90 Ohio App.3d 284, 290, 629 N.E.2d 28. "In order to dismiss a case for failure to state a claim upon which relief can be granted, it must appear beyond doubt that [the plaintiff] can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [the plaintiff's] favor." *State ex rel. Hunter v. Summit Cty. Human Resource Comm.* (1998), 81 Ohio St.3d 450, 451, 692 N.E.2d 185.

{¶ 26} Civ.R. 8(A)(1) provides that a pleading that sets forth a claim for relief must contain "a short and plain statement of the claim showing that the party is entitled to relief." A "heightened standard" of pleading is required when a party brings a claim for fraud, *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 61, 565 N.E.2d 584, as Civ.R. 9(B) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Under the particularity requirement, a party must (1) specify the statements claimed to be false, (2) state the time and place where the statements were made,

and (3) identify the defendant who claimed to have made them. *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 4, 531 N.E.2d 318.

{¶ 27} With regard to the substantive law regarding the right to indemnity, there must be an allegation of some implied or express contract creating a duty by one party to indemnify the other. *Reynolds v. Physicians Ins. Co. of Ohio* (1993), 68 Ohio St.3d 14, 623 N.E.2d 30. An implied contract of indemnity may be recognized in situations involving related tortfeasors, where the one committing the wrong is so related to a secondary party as to make the secondary party liable for the wrongs committed solely by the other. *Losito v. Kruse* (1940), 136 Ohio St. 183, 24 N.E.2d 705; *Reynolds v. Physicians Ins. Co. of Ohio,* supra.

{¶ 28} In this matter, with regard to the third-party claim for fraud, the appellants alleged in their fraud claim that "a representative of MMCC, acting within the scope of employment, certified to Defendants/Third party Plaintiffs and the Bank, under penalty of perjury, that the average monthly occupancy rate over the preceding twelve months at Hedgewood was ninety-seven percent (97%) [; that] MMCC made the foregoing material misrepresentation as a matter of present fact with the intention that Defendant/Third party Plaintiff would rely on such representation[;] the representation *** was false [;] * * * and MMCC either knew that the oral and written representations concerning the occupancy rate at Hedgewood were false, or they recklessly asserted them as true without knowing whether they were true or false." Appellants further alleged that if they had accurate information they would not have agreed to purchase the complex and

that they have sustained damages as the result of the alleged fraud. These allegations specify the statements claimed to be false, the time and place where the statements were made, and identify the defendant claimed to have made them. They are therefore sufficient to set forth a claim for fraud. Further, it does not appear beyond doubt that appellants can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in their favor, so the trial court therefore erred in dismissing the third-party complaint pursuant to Civ.R. 12(B).

{¶ 29} With regard to the claim for indemnification, the third-party complaint does not show the court to a certainty that the third-party plaintiffs can prove no set of facts upon which they might recover upon the claim for indemnity as the complaint does not indicate that there is no express contract of indemnity and does not demonstrate the absence of an implied agreement of indemnity. It does not appear beyond doubt that appellants can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in their favor. The trial court therefore erred in dismissing this claim for relief pursuant to Civ.R. 12(B).

{¶ 30} Similarly, as to the claim of breach of fiduciary duty for dual representation, the complaint does not show the court to a certainty that the third-party plaintiffs can prove no set of facts upon which to recover as the relationship, if any, among the various Marcus & Millichap third-party defendants is unclear at this time.

{¶ 31} In accordance with the foregoing, the third-party complaint was sufficient to state claims for fraud and breach of fiduciary duty, and the trial court therefore erred in dismissing this pleading. The first and second assignments of error are well-taken.

{¶ 32} Appellants' third assignment of error states:

{¶ 33} "The trial court erred by not treating the motion to dismiss as a motion for summary judgment."

{¶ 34} In light of our disposition of the first and second assignments of error, the third assignment of error is moot. App.R. 12(A)(1)(C).

{¶ 35} Appeal No. 93164 is affirmed. Appeal No. is 92689 is reversed and remanded.

It is ordered that appellee and appellant split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR