Third District Court of Appeal

State of Florida

Opinion filed June 19, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-131
Lower Tribunal No. 14-12224

Laptopplaza, Inc., etc., et al.,
Appellants,

vs.

Wells Fargo Bank, NA,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Reemberto Diaz, Judge.

Law Offices of Charlton Stoner, P.A., and Charlton Stoner, for appellants.

The Lehman Law Firm, PLLC, and Gary E. Lehman; Nelson Mullins Broad and Cassel, and Beverly A. Pohl and Christina Lehm (Fort Lauderdale), for appellee.

Before EMAS, C.J., and SALTER and SCALES, JJ.

SCALES, J.

Appellants, plaintiffs below, 345 Carnegie Avenue LLC ("345 Carnegie"), Iwebmaster.net, Inc. ("Iwebmaster") and Iwebmaster's successor, Laptopplaza, Inc.,

along with Vladimir Galkin and Yakov Baraz, appeal a December 12, 2017 order dismissing with prejudice their Second Amended Complaint against Wells Fargo Bank, N.A. for failure to state a cause of action. We dismiss the appeal as to appellants Laptopplaza and Iwebmaster as premature. We reverse and remand the dismissal order as to 345 Carnegie, Galkin and Baraz because we conclude that Florida recognizes a statutory cause of action for a lender's alleged deliberate inflation of the amounts "properly due under or secured by" a mortgage. § 701.04(1)(a), Fla. Stat. (2014).

I. RELEVANT FACTS[1] AND PROCEDURAL BACKGROUND

On or about December 14, 2007, 345 Carnegie executed a promissory note memorializing a loan from Wells Fargo's predecessor, Wachovia Bank, to 345 Carnegie in the amount of $1,237,500.00. This note was secured by a mortgage on commercial property owned by 345 Carnegie. As additional security for the note, Iwebmaster, along with Galkin and Baraz, executed separate guarantees of 345 Carnegie's obligations under the note. On November 16, 2012, Iwebmaster's successor, Laptopplaza, assumed Iwebmaster's guaranty obligation.

[1] This opinion's recitation of the relevant facts is based on the allegations of the Second Amended Complaint which, for the purposes of this opinion, are taken as true. See W.R. Townsend Contracting, Inc. v. Jensen Civil Constr., Inc., 728 So. 2d 297 (Fla. 1st DCA 1999).

On March 31, 2014, Wells Fargo, through counsel, declared appellants in default of the loan documents based on various alleged non-monetary defaults.[2] The default letter outlined the amounts Wells Fargo claimed were due and owing as a result of the alleged defaults as follows:

- Principal due in the amount of $1,091,744.24;
- Accrued and unpaid interest at the default rate in the amount of $1,554.21, with a per diem accrual of $155.42; and
- Attorney's fees and costs through March 27, 2014, in the amount of $92,910.79.

In response to Wells Fargo's default letter, appellants, pursuant to section 701.04(1) of the Florida Statutes (2014), requested Wells Fargo to provide an estoppel letter itemizing the exact amount Wells Fargo claimed it was due. In response to appellants' request, Wells Fargo sent an April 21, 2014 estoppel letter setting the full payoff amount at $1,343,065.76, itemizing the amounts due as follows:

- Principal due in the amount of $1,089,057.63;
- Accrued and unpaid interest through April 22, 2014, in the amount of $1,084.68, with a per diem accrual of $154.95;
- Phase I environmental fees in the amount of $2,850.00;
- Appraisal fees for the years 2010, 2011, and 2013 totaling $9,070;
- Attorney fees in the amount of $100,403.50;

[2] The alleged non-monetary defaults, which are not relevant to this appeal, include: (1) appellants' failure to provide copies of leases to Wells Fargo; (2) appellants' failure to deliver Wells Fargo a current flood insurance policy with respect to the property securing the note; and (3) the administrative dissolution of Iwebmaster and the closing of a Wells Fargo account maintained by Iwebmaster. The default letter did not assert that 345 Carnegie had failed to make any payments due under the note.

- Attorney costs in the amount of $1,289.95; and
- Estimated pre-payment penalty in the amount of $139,310.00

In response to the April 21, 2014 estoppel letter, appellants requested documentation of the legal fees claimed in the estoppel letter. Citing attorney-client privilege concerns, Wells Fargo refused to provide any substantiation as to the amount of legal fees or that the amount had actually been incurred by Wells Fargo for enforcement and collection of the note.

On May 5, 2014, appellants attempted to tender to Wells Fargo the sum of $1,243,231.71, i.e., the amount claimed in the estoppel letter less the approximate $100,000.00 in legal fees claimed in the estoppel letter. Wells Fargo rejected the tender. In response, on May 9, 2014, appellants filed the instant action against Wells Fargo seeking to enjoin Wells Fargo from collecting on the note and from foreclosing on the mortgage.

Wells Fargo answered appellants' complaint and filed a seven-count Counterclaim against appellants. Counts I through V of Wells Fargo's Counterclaim alleged appellants' default on the loan documents and sought to collect on the note. On October 22, 2014, appellants deposited into the court registry the total liquidated amount of damages (including legal fees) sought by Wells Fargo in counts I through V of Wells Fargo's Counterclaim.[3] Appellants thereafter collectively stipulated both

[3] In November 2014 and May 2016, appellants made subsequent deposits into the court registry to cover the claimed damages.

to their liability on counts I through V of Wells Fargo's Counterclaim and, except for the amount of legal fees, to entry of judgment against them for the amounts Wells Fargo alleged were due therein. Ultimately, on May 31, 2016, the trial court entered a partial final judgment in favor of Wells Fargo on counts I through V of Wells Fargo's Counterclaim and ordered that the funds held in the court registry with respect to the stipulated damages amount be released to Wells Fargo. The lower court "specifically reserve[d] jurisdiction to conduct an evidentiary hearing and determine the reasonableness of the amount of . . . attorneys' fees and costs" owed by appellants to Wells Fargo.

On September 13, 2016, appellants sought leave to file an Amended Complaint, which the trial court granted. On August 8, 2017, the lower court entered an order granting Wells Fargo's motion to dismiss the Amended Complaint, again giving appellants leave to amend. Appellants' Second Amended Complaint, filed on October 12, 2017, is the operative pleading in this appeal. Therein, both 345 Carnegie and the guarantors asserted various claims for breach of the loan documents and breach of Florida's covenant of good faith and fair dealing. While the pleading alleges a total of seven causes of action, the gravamen of each is that Wells Fargo inflated the April 21, 2014 estoppel letter to include over $100,000 of legal fees that appellants claim are grossly overstated and unreasonable. Appellants alleged that they "have suffered consequential damages of the costs and expenses of

having to continue carrying the mortgaged property and by their inability to sell the property to a ready, willing and able buyer or to refinance the property."

Wells Fargo moved to dismiss the Second Amended Complaint for failure to state a cause of action. The trial court conducted a hearing on December 12, 2017, and entered an order granting Wells Fargo's motion, dismissing the Second Amended Complaint with prejudice. Appellants appeal this dismissal order.

II. JURISDICTIONAL ISSUE

Counts VI and VII of Wells Fargo's Counterclaim against guarantor Iwebmaster and its successor, Laptopplaza, alleged that Iwebmaster had fraudulently transferred to Laptopplaza the real property securing 345 Carnegie's obligation to Wells Fargo in violation of sections 726.105 and 726.106 of Florida's Uniform Fraudulent Transfer Act (the "Act"). On September 27, 2018, the trial court entered a partial summary judgment in Wells Fargo's favor on counts VI and VII of Wells Fargo's Counterclaim, but those claims have not been finally adjudicated, and are still being litigated between the parties.[4]

The issues related to Wells Fargo's counterclaims that Laptopplaza and Iwebmaster violated the Act are inextricably intertwined with the allegations in

[4] Laptopplaza and Iwebmaster attempted to appeal the trial court's partial summary judgment regarding Wells Fargo's alleged violations of the Act. We dismissed that appeal as premature. See Laptopplaza, Inc. v. Wells Fargo Bank, NA, 264 So. 3d 1049 (Fla. 3d DCA 2019).

appellants' Second Amended Complaint. Therefore, we lack jurisdiction to review the trial court's dismissal order as it relates to the claims of appellants Laptopplaza and Iwebmaster and dismiss the appeal as to appellants Laptopplaza and Iwebmaster. See Bardakjy v. Empire Inv. Holdings, LLC, 239 So. 3d 146, 147 (Fla. 3d DCA 2018) (dismissing appeal from an order granting final judgment on complaint for breach of contract where the claims and defenses raised on appeal were intertwined with the issues and facts of the still pending counterclaims for unjust enrichment and breach of fiduciary duty); Fla. R. App. P. 9.110(k).

Because, however, appellants 345 Carnegie, Galkin and Baraz are not parties to Wells Fargo's counterclaims based upon the Act, the trial court's December 12, 2017 dismissal order is final as to them and the appeal of these appellants is ripe for our review.

III. ANALYSIS[5]

The transcript from the December 12, 2017 hearing on Wells Fargo's motion to dismiss – resulting in the entry of the dismissal order on appeal – reflects a significant amount of confusion regarding the actual nature of the claims being made

[5] We review an order dismissing a complaint for failure to state a cause of action *de novo*. W.R. Townsend Contracting, Inc., 728 So. 2d at 300 ("Whether a complaint is sufficient to state a cause of action is an issue of law. Consequently, the ruling on a motion to dismiss for failure to state a cause of action is subject to *de novo* standard of review.").

in appellants' Second Amended Complaint. While it is certainly not a model of clarity, as mentioned earlier, the Second Amended Complaint essentially alleges that Wells Fargo's April 21, 2014 estoppel letter was deliberately inaccurate in setting forth the amount of legal fees to which it was entitled to recover from appellants, and that appellants suffered consequential damages as a result of the inaccuracy. The hearing transcript reveals that the trial court conflated the issue of whether Wells Fargo was entitled to attorney's fees based on appellants' stipulated default on the loan documents, with the *different* issue of whether Wells Fargo's estoppel letter was inaccurate causing consequential damages to appellants. It is clear to us that this confusion resulted in the dismissal of a cognizable claim.

The trial court was, of course, correct in its pronouncement at the December 12, 2017 hearing, that the determination of the amount of fees to which a successful litigant is in entitled is generally determined at the end of the lawsuit. See Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 979 (Fla. 1987). But, the claims asserted in appellants' Second Amended Complaint are more than garden-variety challenges to a lender's fee claim in an action to collect on a note. Appellants alleged that, in the April 21, 2014 estoppel letter, Wells Fargo deliberately inflated the amount of fees to which Wells Fargo was entitled, thus causing appellants to suffer consequential damages that were separate and distinct from appellants being required to pay the claimed attorney's fees.

There is little doubt that Florida recognizes such a separate and discrete cause of action by a borrower against a lender.[6] Specifically, section 701.04(1)(a) of the Florida Statutes requires a holder of a mortgage to deliver to the mortgagor, upon request of the mortgagor, a written estoppel letter setting forth not only the unpaid balance of the loans secured by the mortgage but "any other charges *properly due* under or secured by the mortgage." § 701.04(1)(a), Fla. Stat. (2014) (emphasis added). And, the Legislature expressly contemplated a cause of action based on the parties' respective obligations under the statute: "In the case of a civil action arising out of this section, the prevailing party is entitled to attorney fees and costs." § 701.04(2), Fla. Stat. (2014). Indeed, one Florida bankruptcy court, applying Florida law, has held that section 701.04 becomes a part of a contract between a mortgagor and a mortgagee and that a mortgagor has a breach of contract action against a

[6] At oral argument, Wells Fargo's counsel seemed to concede that Florida recognizes a cause of action for a lender's deliberate inflation of an estoppel letter, but argued that such cause of action would exist only when the lender's deliberate falsification of the estoppel letter appeared "on the face" of the estoppel letter. While we agree, in concept, with Wells Fargo on this point, we find it problematic to craft an opinion that provides any meaningful guidance to trial courts and parties regarding such a "face of the document" test. From a practical perspective, however, we surmise that, rather than filing a statutory cause of action against their lender, most borrowers challenging the accuracy of an estoppel letter would likely tender the entire amount claimed in the estoppel letter, while reserving the right to challenge inaccuracies, thus avoiding foreclosure. Again, from a practical perspective, only in the most egregious cases would a borrower risk foreclosure by asserting a statutory cause of action against its lender.

mortgagee if the mortgagee provides an intentionally false estoppel letter. See In re Kraz, LLC, 570 B.R. 389, 406 (Bankr. M.D. Fla. 2017).

In this case, appellants allege in their Second Amended Complaint that the approximately $100,000.00 in attorney's fees claimed in Wells Fargo's estoppel letter were grossly inflated and inaccurate and, as a result, appellants suffered consequential damages separate and distinct from Wells Fargo's claimed entitlement to the fee amount. At this stage of the proceedings, we are required to accept these allegations as true. See W.R. Townsend Contracting, Inc., 728 So. 2d at 300 ("In reviewing an order granting a motion to dismiss for failure to state a cause of action, we must accept as true all well-pled allegations in Appellant's . . . complaint, and we must draw all reasonable inferences in favor of the pleader.").[7] Therefore, as to appellants 345 Carnegie, Galkin and Baraz we reverse the dismissal order with the instruction that the trial court allow these appellants twenty days in which to file an amended complaint consistent with this opinion. We dismiss the appeal as to appellants Laptopplaza and Iwebmaster for lack of jurisdiction.

Reversed in part and remanded with instructions; dismissed in part.

[7] We express no opinions as to whether appellants will ultimately be able to establish these allegations.