

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001984-MR

GAIL LAMB; COREY C. KING;
KELLI B. KING; DORMAN A.
HOLLAND; and STACEY HOLLAND

APPELLANTS

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 07-CI-01702

BRANCH BANKING & TRUST
COMPANY; U.S. BANK, N.A.;
SACRAMENTO DEPOSIT BANK;
and ROGER MILLER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS, SENIOR JUDGE.

MOORE, JUDGE: Gail Lamb, Corey C. King, Kelli B. King, Dorman A. Holland and Stacey Holland (collectively “Appellants”) appeal from the Daviess Circuit Court’s orders dismissing their claims of negligent misrepresentation against their

respective lenders, Sacramento Deposit Bank, U.S. Bank, N.A., and Branch Banking and Trust Company (collectively “Appellees”).¹ After a careful review of the record, we affirm because Appellants should have had notice, or, at the very least, had constructive notice of the defects in the title to their land before they sought loans from the Appellee banks.

Appellants purchased and intended to improve upon respective lots in a subdivision called “The Joe Young Locus Grove Estates, Phase One” (Locus Grove). Each Appellant purchased their respective lots prior to approaching the Appellee banks for construction loan financing. Each Appellant alleges he or she “relied upon representations and promises made . . . that all of the lots in the subdivision were or would be subject to certain deed restrictions.” These representations were made by the seller of the property and prior in time to when the loans at issue were taken out. Relevant to the Locus Grove subdivision was a deed, dated June 19, 2003, filed and recorded with the Clerk of Daviess County, Kentucky, entitled “Corrected Deed of Dedication and Restrictions for Locust Grove Estates, Phase 1.” This deed purported to dedicate the Locus Grove subdivision’s streets to public use and impose restrictions on tracts in Locus Grove. At some point after the closings of the loans, Appellants learned that this deed was ineffective. Appellants contend the ineffective Corrected Deed of Dedication

¹ Appellants also argue that the trial court erred in dismissing another party, Roger Miller, as a third-party defendant. However, as there is no indication that Appellants brought any claims against Miller or named him as a defendant in their own suit, Appellants have no standing to make such an argument.

rendered the deeds to their respective properties defective, and that the banks knew of these “defects” through a title examination, but failed to disclose them.²

For the purpose of deciding whether the trial court was warranted in granting the motion for judgment on the pleadings, this Court must assume the truth of the following allegations contained in the Appellants’ complaint:

- Gail Lamb acquired tracts identified as Lots 1 and 2 in Locus Grove Estates, Phase 1 through a General Warranty deed from O.L. Avery, Jr., dated November 25, 2005. On March 19, 2007, Sacramento Deposit Bank extended credit to Lamb and, in the course of its pre-loan process, secured a title examination report on Lamb’s tract containing information relative to the existence of restrictions and dedication of roadways to public use. Sacramento Deposit Bank discovered and failed to disseminate the absence of any restrictions as to the use of residential properties in Locus Grove Estates, Phase 1, and the failure of the developers to dedicate roadways therein.
- Corey C. King and Kelli B. King (the Kings) acquired the tract identified as Lot 4 in Locus Grove Estates, Phase 1, through a General Warranty deed from O.L. Avery, Jr., dated November 15, 2002. On May 21, 2003, U.S.

² The Kings also assert for the first time in their brief that “U.S. Bank agreed to have the deed of restrictions drafted and filed on June 19, 2003.” However, we do not consider this contention on appeal because the Appellants’ complaint fails to assert such facts and it was not considered by the court below in its order. The record below is devoid of any allegation concerning why the deed of dedication and restrictions was prepared, executed and recorded in June of 2003, or any indication that the Kings raised this issue in their response to U.S. Bank’s motion for judgment on the pleadings, or at any point prior to appeal.

Bank, N.A., extended credit to the Kings in the form of a construction loan. On June 30, 2003, U.S. Bank, N.A., further extended credit to the Kings for permanent financing of the construction of the residence located on the Kings' tract, and secured a mortgage thereon. In the course of both pre-loan process, U.S. Bank, N.A., secured title examination reports on the Kings' tract containing information relative to the existence of restrictions and dedication of roadways to public use, and U.S. Bank, N.A., discovered and failed to disseminate the absence of any restrictions as to the use of residential properties in Locus Grove Estates, Phase 1, and the failure of the developers to dedicate roadways therein.

- Dorman A. Holland and Stacey Holland (the Hollands) acquired the tract identified as Lot 10 in Locus Grove Estates, Phase 1, through a General Warranty deed from O.L. Avery, Jr., dated March 18, 2004. On February 15, 2005, Branch Banking and Trust Company extended credit to the Hollands for permanent financing of the construction of the residence located on the Hollands' tract and secured a mortgage thereon. In the course of its pre-loan process, Branch Banking and Trust Company secured a title examination report on the Hollands' tract containing information relative to the existence of restrictions and dedication of roadways to public use. Branch Banking and Trust Company discovered and failed to disseminate the absence of any restrictions as to the use of residential properties in Locus

Grove Estates, Phase 1, and the failure of the developers to dedicate roadways therein.

On November 6, 2007, the Appellants jointly filed suit against their respective lenders, Appellees Sacramento Deposit Bank, U.S. Bank, N.A., and Branch Banking and Trust Company.³ The sole cause of action included in Appellants' complaint against Appellees was that of negligent misrepresentation; specifically, Appellants alleged that they justifiably relied upon the Appellees' silence as to a defective condition in the Appellants' chain of title at a time when this information was important to a decision whether to encumber the Appellants' land and incur the expenses of closing and repayment of debt with interest.

Subsequently, each of the Appellees moved for judgment on the pleadings pursuant to Civil Rule (CR) 12.03. On March 31, 2008, the trial court dismissed the Hollands' claim against Branch Banking and Trust Company, and dismissed the Kings' claim against U.S. Bank, N.A. Then, on September 18, 2008, the trial court dismissed Lamb's claim against Sacramento Deposit Bank.

While the trial court dismissed the Appellants' claims for negligent misrepresentation in two separate orders, it did so on the same grounds. First, it reasoned that because the Appellee banks became involved after the Appellants purchased their respective properties and the Appellee banks could not have reasonably foreseen the Appellants' prior failure to detect the defects in their

³ Appellants also brought claims against the developers of Locus Grove, real estate agents who sold them their property, the attorney who prepared the deed of dedication and restrictions, and Old National Bank; none of whom are parties to this appeal.

respective titles and, thus, owed them no duty to disclose the defects they had allegedly discovered. Second, the trial court reasoned that even if such a duty to disclose the defects did exist on the part of the banks, the Appellants' reliance on their non-disclosure was unjustified because the Appellants had already purchased the property in separate and earlier transactions not involving the banks and, in so doing, relied upon the validity of instruments the banks did not prepare.

A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that the claimant is not entitled to relief under any state of facts which could be proved in support of the claim. *Spencer v. Woods*, 282 S.W.2d 851, 852 (Ky. 1955) (internal citations omitted). Thus,

when a party moves for judgment on the pleadings, he admits for the purposes of his motion not only the truth of all of his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all of his own allegations which have been denied by his adversary. The question thus presented is one of law and requires an examination of the pleadings.

Archer v. Citizens Fidelity Bank & Trust Co., 365 S.W.2d 727, 729 (Ky. 1963) (internal citations omitted).

Appellants rely on negligent misrepresentation for their cause of action. In their view, the Appellee banks should have revealed to Appellants the absence of any restrictions as to the use of residential properties in Locus Grove and the developers' failure to dedicate any roadways therein, prior to the loan closings. The elements of a claim for negligent misrepresentation as set forth in Restatement (Second) of Torts, § 552(1) and adopted by the Supreme Court in

2004), are:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1).

As stated above, the trial court granted Appellees' various motions for judgment on the pleadings, holding as a matter of law that the face of the pleadings precluded Appellants from demonstrating that Appellees breached a duty to Appellants (*i.e.*, failed to act reasonably with regard to the loan transaction), or that they could have justifiably relied upon Appellees' representations. We address only the element of justifiable reliance, contained in the elements for negligent misrepresentation, as we believe it to be dispositive to the resolution of this case.

Even if we were to assume that the Appellee banks negligently breached a duty to disclose to Appellants that a defect rendered the deed of restrictions invalid and unenforceable and that the Appellants relied upon Appellees' non-disclosure in closing on their respective construction loans, Appellants are barred from any of the relief prayed for in their complaint against Appellees. This is so because the face of the pleadings prevents any finding that such reliance was justified. "As purchaser[s], the law regards [Appellants] as

constructively notified of any defect in [their] vendor's title that appears of record.” *Elkhorn Coal Corporation v. Hite*, 9 S.W.2d 1083, 1086 (Ky.App. 1928); *Howton v. Roberts*, 49 S.W. 340, 342 (Ky. App. 1899). Moreover, “if the [Appellants] had access to information that was equally available to both parties and would have led to discovery of the true facts, the [Appellants] had no right to rely upon the misrepresentation.” *Honolulu Disposal Service, Inc. v. Am. Benefits Plan Adm’rs, Inc.*, 433 F. Supp.2d 1181, 1193-94 (D. Haw. 2006). Here, there is no allegation that the defect at issue was of such a nature, or so concealed, that it could not have been previously discovered by the use of reasonable diligence; indeed, the founding premise of Appellants’ complaint, which we are bound to take as the truth, is that a title examination did reveal, or would have revealed, the defects at issue in this litigation. As the records necessary for any title examination would have been a matter of public record to which Appellants had equal access, Appellants were properly charged with constructive notice of these defects upon purchasing their properties before the Appellee banks had any involvement.⁴ In light of this notice and their equal access to this information, it is clearly unreasonable for Appellants to wholly fail to allege any reasonable excuse for their own collective failure to examine their respective titles or the deed of restrictions when they purchased their respective properties without the involvement of any of the Appellee banks, and instead claim that they relied upon an alleged

⁴ Regarding the Kings, their allegations reveal that they purchased their lot on November 15, 2002, prior to the filing of any deed of dedication in Locus Grove, ineffective or otherwise. As such, they had also had constructive notice of its non-existence prior to securing any loans with Appellee, U.S. Bank.

misrepresentation (*i.e.*, that there were no defects in the title of the properties) made by the Appellee banks several months afterward.

Nevertheless, Appellants contend that the facts of this case could demonstrate justifiable reliance because they are analogous to those found in the Massachusetts case of *Danca v. Taunton Savings Bank*, 429 N.E.2d 1129 (Mass. 1982). We disagree.

In *Danca*, a bank was held liable to borrowers under a negligent misrepresentation theory based upon the following factors: 1) the bank required the borrowers to pay for a plot plan prior to the closing of the mortgage and purchase of the property; 2) the bank's expressed purpose of requiring the plot plan was to verify that the house on the subject property was correctly located on the lot and in compliance with zoning regulations; 3) the plot plan revealed several zoning violations; 4) the borrowers asked the bank to see the plot plan, which was in the possession of the bank, prior to purchasing the property and closing on the mortgage; 5) the bank only did so two weeks after the borrowers closed on the loan and purchased their property; and 6) the borrowers would not have proceeded with the sale had the contents of the plot plan been disclosed to them before they closed. Under these circumstances, the *Danca* court held that "the conduct and words of the bank officials who handled the [borrowers'] closing amounted to a representation to the [borrowers], negligently made, that the plot plan disclosed no irregularities and that the plaintiffs could safely close without having seen it." *Id.* at 1133.

Danca is distinguishable from the case at bar. As indicated above, Appellants had already purchased their respective properties before securing loans from the Appellee banks. Consequently, they already had constructive notice of any defects that the Appellee banks' respective title examinations could have uncovered. Accordingly, their claim of having justifiably relied upon Appellees' non-disclosures months after the fact is untenable.

For the reasons stated, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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FOR APPELLEE, U.S. BANK, N.A.:

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