RENDERED: SEPTEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001724-MR

PEPPY MARTIN — APPELLANT

v.

APPEAL FROM HART CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 09-CI-00338

FARM CREDIT SERVICES AND CITIMORTGAGE, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JOHNSON, AND JONES, JUDGES.

JOHNSON, JUDGE: Peppy Martin appeals from the entry of a partial summary judgment in favor of appellees Farm Credit Services of Mid-America, FLCA, and CitiMortgage, Inc., in their foreclosure actions against Martin's real property and from the dismissal of Martin's claims against the two lending institutions for alleged fraud; violation of the "Truth in Lending" Act, 15 U.S.C. § 1601 *et seq*;

and violation of the Fair Debt Collection Practices Act. After reviewing the record in conjunction with the applicable legal authority, we affirm the judgment of the Hart Circuit Court.

BACKGROUND

Martin completed a cash purchase of a 98.63-acre tract of land in Hart County, Kentucky. The property includes a large house which Martin established as her primary residence and the entire property has an address of 360 Chestnut Grove Road, Bonnieville, Kentucky. In 2003, Martin signed a note and mortgage on the property for $202,336.00 with New Equity Financial Corporation, a lending institution not a party to these proceedings. CitiMortgage purchased the note and mortgage from that transaction in 2007. Martin contends that while the original mortgage purports to include the entire 98.63 acres, it should have included only the ten-acre residential parcel and thus it encumbered more of her property than was agreed to. Martin subsequently obtained an additional $152,527 loan from Farm Credit in 2007, pledging the entire 98.63 acres as collateral. After Martin fell behind on her payments to both mortgage holders, Farm Credit filed a foreclosure action on its mortgage in December 2009. CitiMortgage intervened in that action in 2010 and, seeking to foreclose on its mortgage, filed a counterclaim against Farm Credit and a cross-claim against Martin. In her answer to the actions, Martin did not deny that she was in default on both mortgages but raised objections to

enforcing the mortgages and questioned the proper allocation of the property encumbered by each mortgage.

Martin also filed a counterclaim, and later an amended counter-claim, against Farm Credit alleging fraud and failure to conform to the Truth in Lending Act. In addition, she cross-claimed against CitiMortgage alleging fraud, breach of contract/warranty, violation of the Truth in Lending Act, and violation of the Fair Debt Collection Practices Act.

During the pendency of the circuit court action, Martin filed a parallel action in United States District Court,[1] asserting essentially the same claims asserted in the state action. On March 27, 2015, the district court dismissed her claims for lack of subject matter jurisdiction. The Sixth Circuit Court of Appeals subsequently affirmed the district court's dismissal of Martin's action.

After the dismissal of the federal action, on June 22, 2016, the circuit court granted partial summary judgment to the lending institutions on the basis that there were no genuine issues of material fact and that CitiMortgage and Farm Credit were entitled to judgment on their foreclosure actions as a matter of law. In that order, the circuit court held that CitiMortgage's mortgage applied only to the 10 acres of Martin's property known as the house property and that Farm Credit's mortgage applied to the remaining 88.63 acres, known as the farm property.

[1] *Martin v. Citimortgage*, No. 1:14-CV-134-GNS-HBB, 2015 WL 1438057, at *1 (W.D. Ky. March 27, 2015).

Martin appealed the June 22, 2016 order to this Court, but that appeal was dismissed as interlocutory. The circuit court subsequently held a one-day bench trial on all remaining issues on September 29, 2016. On November 10, 2016, the court entered two final and appealable orders: 1) an order confirming its order of June 22, 2016, as to the foreclosure judgments and ordering sale of the property; and 2) findings of fact and conclusions of law on CitiMortgage's foreclosure claim to the farm property (in addition to the house property allocated to it in the partial summary judgment) and on all of Martin's remaining claims against CitiMortgage. In the latter order, the circuit court dismissed all of Martin's claims; reconsidered its order limiting CitiMortgage's interest to the 10-acre house tract; and ordered the sale of the 98.63 acres as a whole. The circuit court also found that the two lending institutions had settled the issue of lien priority through mediation.

This appeal followed.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, the focus centers on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgment involves only legal questions, "an appellate court need not defer to the

trial court's decision and will review the issue de novo." *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001).

We will not set aside a judgment following a bench trial unless it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure ("CR") 52.01. A factual finding is not clearly erroneous if it is supported by substantial evidence, which is defined as evidence of sufficient probative value to induce conviction in the mind of a reasonable person. *Gosney v. Glenn*, 163 S.W.3d 894, 898-99 (Ky. App. 2005). The trial court's conclusions of law, however, are reviewed *de novo. Id*.

ANALYSIS

Martin raises several issues on appeal. First, Martin asserts that the circuit court erred when it granted a partial summary judgment to Farm Credit and CitiMortgage three months prior to trial. In reviewing a grant of summary judgment, our initial inquiry is whether the trial court correctly determined there were no genuine issues of material fact. Here, the circuit court specifically found that Farm Credit and CitiMortgage were holders of promissory notes secured by mortgages of record and that Martin failed to maintain payments on the notes. Martin did not, and does not in this appeal, dispute those facts.

Martin attempts to create a factual dispute by alleging in this appeal that CitiMortgage defrauded her when it attached the wrong property description to its mortgage to include all 98.63 acres as collateral, when her intent was to encumber only the 10-acre house property. Under the statute of frauds, Kentucky Revised Statutes ("KRS") 371.010, and the parol evidence rule, Martin's intent may be gleaned only from the language of the mortgage itself. *See Johnson v. Johnson*, 297 Ky. 268, 178 S.W.2d 983 (1944). Martin does not dispute that the 2003 mortgage on its face encumbered all 98.63 acres and admits that she did not review the documents at closing. In addition, Martin was made aware of the extent of the encumbrance when she sought another loan on the property in 2005. Thus, because Martin failed to offer proof substantiating her claim of fraud, there were no genuine issues as to the validity of the mortgages which would preclude the entry of summary judgment. We now consider whether Farm Credit and CitiMortgage were entitled to judgment as a matter of law.

CR 56.03 authorizes a trial court to enter summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In *Steelvest*, the Supreme Court of Kentucky reiterated the purpose of summary

judgment: "The benchmark case of *Paintsville Hospital v. Rose,* [683 S.W.2d 255 (Ky. 1985)], specifically held that the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." While Martin insists that the trial court ruled too quickly on the foreclosure claims, our civil rules and well-established case law make clear that the circuit court was not required to wait until trial on all other issues before granting the lending institutions partial summary judgment on their foreclosure claims. Because the circuit court correctly determined that Martin executed valid mortgages on her property and Martin did not dispute that she failed to make payments as required by the notes, we are convinced that Farm Credit and CitiMortgage were entitled to a partial summary judgment in the foreclosure actions as a matter of law.

Furthermore, even if Martin had been able to prevail on the issues advanced in her counterclaim and cross-claim under the Truth in Lending Act, she would have been entitled only to proven damages and attorney's fees, not to avoidance of her obligations under the mortgages. *See Riggs v. Gov't Emps. Fin. Corp.*, 623 F.2d 68, 71 (9th Cir. 1980), and *Marema v. First Fed. Sav. Bank of Elizabethtown, Inc.*, 405 S.W.3d 512, 518 (Ky. App. 2012). Thus, Martin suffered no prejudice to the matters advanced in her counterclaim and cross-claim by the

entry of partial summary judgment in favor of CitiMortgage and Farm Credit on their foreclosure claims.

Martin next argues that the circuit court erred in applying the doctrine of *res judicata* to her claims under the Truth in Lending and Fair Debt Collection Practices Acts. The circuit court took judicial notice of Martin's action in the U.S. District Court and determined that Martin had asserted the same claims against the same parties in the federal action as she was asserting in the state case. In *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998), the Supreme Court of Kentucky clearly set out the elements which must be demonstrated for the doctrine of *res judicata* to apply as a bar to issues:

> For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. *Restatement (Second) of Judgments* § 27 (1982). Second, the issue must have been actually litigated. *Id*. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. *Id.* Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. *Id.*

Id. at 465.

To properly analyze the issue preclusion aspect of *res judicata* in this case, we must carefully examine the holding of the federal district court. We therefore quote extensively from its ruling:

Because both Plaintiff and one of Defendants, Farm Credit, are citizens of Kentucky, the Court cannot exercise diversity jurisdiction over this dispute.

To the extent that diversity jurisdiction existed, Martin's fraud claims **would** be time-barred. The Complaint alleges the Citimortgage loan was consummated on January 20, 2003. (Compl.3). The Farm Credit mortgage was consummated on August 12, 2007. (Compl.3). Martin did not file this lawsuit until September 24, 2014. Because Plaintiff alleges the fraud occurred before any mortgages were signed, Kentucky's five year statute of limitations for fraud claims **would bar** her claim. *See* KRS 413.120(12).

. . . .

Martin's TILA [Truth-in-Lending Act] claims against Defendants are barred by the statute of limitations. TILA claims must be brought within one or three years from the date of the occurrence, depending on the nature of violation alleged. 15 U.S.C. § 1640(e). The date of the occurrence, for allegations of non-disclosure, is the date on which the contract extending credit was signed. *Wachtel v. West*, 476 F .2d 1062, 1065 (6th Cir.1973). Thus, regardless of whether the one or three-year statute of limitations applies, Plaintiff's claims were filed after the limitations period. Accordingly, Plaintiff's TILA claims **would be time-barred if diversity jurisdiction existed in this Court.**

Because this Court finds Farm Credit to also be a citizen of Kentucky, complete diversity is lacking. To the extent that jurisdiction were proper, Plaintiff's state-law fraud and TILA claims **would** be also barred by the statute of limitations, and she would lack standing to assert claims under TILA and the National Mortgage Settlement Agreement. Because Plaintiff's federal claims are also time-barred, this Court lacks both federal question and diversity jurisdiction. **As such, the Court lacks subject**

> **matter jurisdiction, and the motions to dismiss are GRANTED.**

Martin v. Citimortgage, No. 1:14-CV-134-GNS-HBB, 2015 WL 1438057, at *2-3 (W.D. Ky. Mar. 27, 2015), *aff'd* (Mar. 18, 2016) (emphasis added.) In addition, with reference to Martin's motion to amend her complaint to add a claim under the Fair Debt Collections Practices Act, the federal district court concluded:

> While alleging additional facts, Martin's final motion to amend is futile. Plaintiff claims prohibited harassment under TILA, citing "15 USCS n. 162d." While this statute does not exist, she appears to be referring to 15 U.S.C. § 1692(d). That provision prohibits "a debt collector [from engaging] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The term "debt collector" does not include a collection action that "concerns a debt which was not in default at the time it was obtained by such person. . . ." 15 U.S.C. § 1692a(6)(F)(iii). As alleged in the Complaint, Citimortgage acquired her mortgage in 2007, well before Plaintiff's 2010 default. *Accord Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 457 (6th Cir. 2013). As such, Citimortgage is not a debt collector under this provision and is not subject to its prohibitions. **Because this request for leave to amend is futile, it is DENIED.**

Id. at *4 (citation omitted) (emphasis added).

Applying *Yeoman* to the federal district court's holding, we cannot agree that the doctrine of *res judicata* applies in this case. The federal district court dismissed Martin's fraud and Truth in Lending claims on the basis that it lacked subject matter jurisdiction. It did not actually decide the issues raised regarding fraud or the Truth in Lending Act, it merely stated how it *would have*

ruled if it had jurisdiction. Neither did it decide Martin's claim under the Fair Debt Collection Practices Act; the federal court simply denied her motion to amend her complaint to add that claim. Thus, prongs three and four of the *Yeoman* requirements for application of the *res judicata* doctrine have not been satisfied. The federal district court did not actually *decide* the issues Martin seeks to litigate in the state court. Even if its dicta statements could be construed as a decision, those statements were not necessary to the federal court's dismissal of Martin's action on the basis that it lacked subject matter jurisdiction.

Miller v. Administrative Office of the Courts, 361 S.W.3d 867, 873 (Ky. 2011), is also instructive in determining whether *res judicata* bars Martin's state court claim of fraud and claims under the Truth in Lending and Fair Debt Collection Practices Acts. Quoting the *Restatement (Second) of Judgments* § 26(1)(c) (1982), the Supreme Court in *Miller* explained that *res judicata* will not bar litigation of an issue if "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . . and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief." In other words, where the first forum is unable to grant relief because it lacks subject matter jurisdiction, claim or issue preclusion is not a bar in the second

forum. *See Cream Top Creamery v. Dean Milk Co*., 383 F.2d 358, 363 (6th Cir. 1967).

Nevertheless, despite our holding that *res judicata* did not bar Martin's state claims of fraud and claims under the Truth in Lending and Fair Debt Collection Practices Acts, Martin is not entitled to relief. In dismissing Martin's claims, the circuit court set out alternative bases for denying each of these claims. We are in complete agreement with the circuit court's thorough and well-reasoned explanation for rejecting Martin's fraud, Truth in Lending, and Fair Debt Collection Practices claims.

Regarding the fraud claim, the circuit court correctly determined that the five-year statute of limitations set out in KRS 413.120(11) bars that claim. Martin asserted that the alleged fraud was committed prior to her signing the note and mortgage on January 20, 2003. Martin filed her initial state court counterclaim and cross-claim alleging fraud on September 21, 2010, significantly more than five years after the execution of the note and mortgage. But there is an even more fundamental reason for rejecting Martin's fraud claim: CitiMortgage cannot be held responsible for fraud as it was not the initial lender. In *Berghaus v. U.S. Bank*, 360 S.W.3d 779 (Ky. App. 2012), this Court rejected an almost identical claim of fraud against a lending institution which was not a party to the initial loan transaction:

> However, Berghaus has not explained how U.S. Bank could be found liable for fraud. She has not alleged that U.S. Bank was involved in her loan transaction in any way. U.S. Bank acts as trustee for Home Equity Asset Trust 2004-2, which is the mortgage-backed securities trust pool that includes Berghaus's loan. Decision One originated Berghaus's loan in December 2003; the trust acquired the mortgage in March 2004. There is no indication whatsoever that U.S. Bank was directly involved with her transaction. Additionally, there is no suggestion that U.S. Bank acquired the note in any manner inconsistent with the exercise of good faith and due diligence. Thus, the trial court did not err by concluding that there was no genuine issue as to any material fact and that U.S. Bank was entitled to judgment as a matter of law as to this claim.

Id at 783-84.

We are similarly convinced that Martin's Truth in Lending claim is barred by the federal statute's limitations provisions. 15 U.S.C. § 1640(e) provides that Truth in Lending claims must be brought within one or three years from the date of the occurrence, depending on the nature of violation alleged. Regardless of whether the one-year or three-year statute of limitations applies in Martin's case, the circuit court correctly held that her claim was barred because it was advanced for the first time well beyond three years from the date the note and mortgage were initially executed.

However, even if Martin's Truth in Lending claim was not barred by the statute of limitations, there are two even more fundamental reasons she cannot prevail on her claim. First, as the circuit court specifically found, there was no

Truth in Lending violation because Martin concedes that at the closing she was provided the disclosure and notice of right to cancel which contained all of the correct terms required by the federal statute. Second, Truth in Lending's specific disclosure requirements apply only to the initial lender and not to a party to whom the creditor's rights are later assigned. And, again, we find this Court's opinion in *Berghaus* to be dispositive: "[t]he Act specifically provides that the 'creditor,' who has the duty to disclose, is limited to the person or entity 'to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness. . . . .' 15 U.S.C. § 1602(g)." 360 S.W.3d at 784. Because it is undisputed that New Equity was the initial lender at the loan transaction in 2003, CitiMortgage, which did not acquire the indebtedness until 2007, could not have been held to have violated the Truth in Lending Act.

Regarding Martin's claim under the Fair Debt Collection Practices Act, the circuit court correctly held that she failed to establish a violation of 15 U.S.C. § 1692(d). That section prohibits "a debt collector [from engaging] in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." The circuit court properly determined that the term "debt collector" does not include a collection action that "concerns a debt which was not in default at the time it was obtained by such person. . . ." 15 U.S.C. § 1692a(6)(F)(iii). Because CitiMortgage acquired

Martin's mortgage in 2007, well before her default in 2009, CitiMortgage cannot be construed to be a debt collector under this provision and is not subject to its prohibitions.

Finally, Martin advances a litany of allegations in an attempt to avoid her obligations to Farm Credit and CitiMortgage. She complains that CitiMortgage cannot produce the original note she signed and yet does not challenge the validity of CitiMortgage's mortgage. She contends that CitiMortgage's mistake of attaching a property description of the entire farm property instead of just the 10 acres of the home property tied up too much of her land which placed an undue burden upon Martin because she was faced with having to pay off two mortgages in order to keep up her payments. She maintains that Farm Credit's note was "structurally illegal" because the appraisal on which it was based was agricultural and not residential. She asserts that Farm Credit's mortgage is based on an appraisal of farm land when she intended to use the money from that loan for improving her property and paying off a prior mortgage. She claims that she did not understand the issue of having to buy stock in Farm Credit in order to obtain a mortgage. Finally, she contends that the appraisal Farm Credit used for their mortgage failed to consider standing timber as woodlands, arguing that if the appraisal had valued the timber as an asset, Farm Credit's mortgage would only have applied to 25 acres of Martin's farm property. In each

allegation, her claim of error is that she failed to understand the printed documents which she signed. Martin cannot prevail on any of these contentions.

In *Clark v. Brewer*, 329 S.W.2d 384 (Ky. 1959), the former Court of Appeals reiterated the well-settled proposition that under Kentucky law:

> one who signs a contract is presumed to know its contents, and that if he has an opportunity to read the contract which he signs he is bound by its provisions, unless he is misled as to the nature of the writing which he signs or his signature has been obtained by fraud.

Id. at 387 (quoting *Sears, Roebuck & Co. v. Lea*, 198 F.2d 1012, 1015 (6th Cir. 1952)). Here, the circuit court followed the clear and specific rule set out in *Johnson* concerning Martin's intent in encumbering her property:

> The case is to be decided upon the application of the familiar rule that where a written instrument is clear and complete in itself it must be interpreted according to its terms and legal import without the influence of or variation or contradiction by extrinsic parol evidence. Any oral understanding by the parties to the contract was merged in the writing so that evidence of the understanding cannot be used to change or show any intent different from that expressed in the instrument.

Johnson, 178 S.W.2d at 985. This fundamental principle applies to each of Martin's contentions and thus we perceive absolutely no basis upon which we might disturb the circuit court's denial of each claim.

In each of her arguments, Martin suggests that either CitiMortgage or Farm Credit defrauded her despite her admission that she did not read the closing

documents until she was sued. Martin acknowledges she had an opportunity to read the documents, but did not do so. If she chose not to act, she did so at her own peril.

CONCLUSION

Based upon the foregoing, we affirm the judgment of the Hart Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Peppy Martin, *pro se*
Bonnieville, Kentucky

BRIEF FOR APPELLEE CITIMORTGAGE, INC.:

Shannon O'Connell Egan
Harry W. Cappel
Ft. Mitchell, Kentucky

BRIEF FOR APPELLEE FARM CREDIT SERVICES OF MID-AMERICA, FLCA

Lisa Koch Bryant
Louisville, Kentucky