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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001063-MR

TAMARA V. ZUSSTONE — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 14-CI-00081

BANK OF AMERICA N.A. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND SPALDING, JUDGES.

ACREE, JUDGE: This Court must decide whether the Oldham Circuit Court properly dismissed Tamara Zusstone's counterclaims against Bank of America, N.A. ("the Bank") centered on her allegations that the Bank violated the Home Affordable Mortgage Program (HAMP), a federal program enacted pursuant to the Emergency Economic Stabilization Act, 12 U.S.C. § 5201 *et seq.* Zusstone

proceeded *pro se* in the trial court. Similarly, she prosecutes this appeal *pro se* as well. We affirm.

We begin by addressing the Bank's objection to the deficiencies in Zusstone's brief. Indeed, those deficiencies are numerous. Although this Court will overlook a *pro se* appellant's minor deviations from the straightforward guidance provided by CR[1] 76.12, we still expect a good faith attempt at compliance. *Hallis v. Hallis*, 328 S.W.3d 694, 698 (Ky. App. 2010) ("we have every reason to expect the briefs filed by *pro se* appellate advocates to demonstrate a good faith attempt to comport with CR 76.12"). More significantly than these minor deficiencies, Zusstone fails to comply with substantive parts of that rule which prevents meaningful appellate review. In addition to disregarding formatting requirements, Zusstone fails in her brief-writing effort in two substantive ways: (1) she includes virtually no citation to the nearly 500-page trial court record; and (2) she fails to tell this Court how or even whether she preserved for appellate review her claims of error.

When a party submits such a brief, the Court has three options: "(1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990)."

[1] Kentucky Rules of Civil Procedure.

Id. at 696. Ignoring such deficiencies encourages more of the same. Striking the brief closes the appellate courthouse doors entirely. Therefore, we will review the appeal for manifest injustice only.

To constitute manifest injustice, an error generally must have "seriously affected the fairness, integrity, or public reputation of the proceeding [before the trial court] as to be shocking or jurisprudentially intolerable." *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quotation marks and citation omitted). We will not, however, scour this record in search of support for Zusstone's arguments. *See, e.g., Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006).

Zusstone's notice of appeal identifies as the orders from which her appeal is taken not only the summary judgment and order of sale, but also the interlocutory orders dismissing her counterclaims with prejudice. However, she makes no argument in her brief challenging the propriety of the foreclosure action itself. Her focus is entirely on her counterclaims. In her words, "Zusstone asked in this appeal to determine whether she has stated claims under Commonwealth of Kentucky law against her home mortgage servicer for refusing to modify her loan pursuant to the federal Home Affordable Mortgage Program (HAMP), particularly to reduce borrowers' total payment (including principal, interest, taxes, insurance, and association fees) to 31 percent of their current income for a five-year period." (Appellant's Reply Brief, p. 2). We agree with the circuit court that she has not.

HAMP "is a federal program enacted pursuant to the Emergency Economic Stabilization Act, 12 U.S.C. §§ 5201-61, that gives lenders incentives to offer loan modifications to borrowers who have a mortgage payment-to-income ratio of over 31%." *Thompson v. Bank of America, N.A.*, 773 F.3d 741, 747 (6th Cir. 2014) (citation omitted). Zusstone argues the facts demonstrating the Bank's violation of this program support the various state law counterclaims she presented to the circuit court, and that those claims should be reinstated.

As she explains those facts, in 2006, she borrowed money from the Bank's predecessor-in-interest resulting in a monthly payment of $1,819.79. Beginning in the autumn of 2008, Zusstone experienced a decline in income. In March 2011, she contacted the Bank to inquire about modifying her mortgage under HAMP. The Bank did modify Zusstone's mortgage.

Beginning in October 2011, Zusstone's new monthly mortgage payment, including escrow, was $1,369.43. She made those payments for a year after which she stopped paying and she defaulted on the note underlying the mortgage. The Bank foreclosed.

Zusstone asserts the Bank violated HAMP when it modified her original $1,819.79 mortgage payment downward to $1,369.43 instead of "$739.43 (or very close to it)" which she claimed was 31% of her income in 2011. On that basis, she filed counterclaims against the Bank.

Although Zusstone does not identify in her brief the Kentucky laws the Bank allegedly violated, the Bank cites to the Record and tells us she counterclaimed "for violations of the Kentucky Residential Mortgage Fraud Act, False Claims Act, and the Financial Institutions, Reform, Recovery, and Enforcement Act." The Bank answered the counterclaim, denying the allegations. The Bank, again citing the Record, notes Zusstone filed an amended counterclaim six months later without leave of court in violation of CR 15.01. However, the circuit court implicitly allowed the filing out of time.

The new counterclaims were for "promissory estoppel; breach of contract; fraudulent misrepresentation, including promissory fraud; gross negligence in misrepresentation; unclean hands in misrepresentation; and a violation of the Kentucky Consumer Fraud and Deceptive Business Practices Act." (R. 382).

After sequential rounds of motions and memoranda, first, on the statute-based allegations and, second, on the common law causes of action, the circuit court entered separate orders dismissing all Zusstone's claims.

We understand Zusstone's arguments as variations on a theme – she claims the lack of a private right of action for violation of HAMP provides no reason to dismiss a claim under state law just because it refers to or incorporates some element of the federal law. In support of this position, she cites *Mik v.*

Federal Home Loan Mortgage Corp., 743 F.3d 149 (6th Cir. 2014). However, the federal law the court addressed in *Mik* was not HAMP. The United States District Court for the Western District of Kentucky pointed this out when it analyzed this same kind of claim and reliance on *Mik*, stating:

> District courts have noted that *Mik* concerned the Protecting Tenants at Foreclosure Act rather than HAMP and thus cannot serve as a basis for recognizing negligence claims under HAMP where there is no applicable state authority recognizing such an action. *See, e.g., Campbell v. Nationstar Mortg.*, No. 14-cv-10645, 2014 WL 3808934, at *5 (E.D. Mich. May 19, 2014). Indeed, the Sixth Circuit affirmed *Campbell* and has implicitly recognized that *Mik* does not answer the specific question of whether the absence of a private right of action under HAMP bars state law claims based on a HAMP violation. 611 Fed. Appx. 288, 299 (6th Cir. May 6, 2015) ("As the district court correctly observed, Michigan courts have not recognized that such a duty exists under HAMP. Its decision accords with the decisions of other Michigan federal district courts that have declined to find a duty exists under Michigan law."); *see also Ray v. U.S. Bank Nat. Ass'n*, 627 Fed. Appx. 452, 456 (6th Cir. Sept. 28, 2015) ("[T]his court recently ruled in *Campbell* as well as in *Rush v. Freddie Mac*, 792 F.3d 600 (6th Cir. 2015) . . . that the HAMP regulations do not impose a duty of care, an essential element of any negligence claim, on servicers to borrowers under Michigan law.").
>
> Unlike the Michigan law at issue in *Campbell*, the Court is aware of no Kentucky caselaw specifically addressing whether a plaintiff may maintain a state-law negligence claim based on a HAMP violation, and the parties have cited none. However, the Kentucky Supreme Court has held that Kentucky's codification of the common-law doctrine of negligence per se (*see* Ky. Rev. Stat. §

> 446.070) does not extend to federal statutes and regulations or local ordinances. *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006); *see also McCarty v. Covol Fuels No. 2, LLC*, 978 F. Supp. 2d 799, 808 (W.D. Ky. 2013) (citing *T & M Jewelry, Inc.*, 189 S.W.3d at 530) (finding that under Ky. Rev. Stat. § 446.070, a plaintiff could not base his negligence claim on violations of federal mining regulations).
>
> [The Appellant] fails to show that her negligence action arises from a source created separately from and independently of a federal statute or regulation. Indeed, the complaint is clear that [the Appellant] bases her negligence claims on HAMP violations . . . , which is negligence *per se*. *See Real Estate Mktg., Inc. v. Franz*, 885 S.W.2d 921, 926-27 (Ky. 1994) ("[Negligence per se] is merely a negligence claim with a statutory standard of care substituted for the common law standard of care."). Thus, in light of how Kentucky has construed its negligence per se statute, and in the absence of Kentucky caselaw recognizing negligence claims under HAMP, the Court finds that [the Appellant] cannot base her negligence claims on HAMP violations. *See Ray*, 627 Fed. Appx. at 456.

Miller v. Caliber Home Loans, Inc., 3:16-CV-621-DJH-DW, 2018 WL 935439, at *5-6 (W.D. Ky. Feb. 16, 2018). We are not following this opinion as precedent, or even citing it as persuasive. However, if the federal court for the Western District of Kentucky had not said this first, this Court would have.

Every one of Zusstone's counterclaims relies on the Bank's violation of HAMP as an element. The claims cannot stand independently, and the circuit court was correct in dismissing each of the counterclaims.

Zusstone does not argue in her brief how these counterclaims survive independent of the alleged violations of HAMP. Furthermore, she barely alludes in her brief to these other state statutory and common law claims. Vague arguments do not present convincing reasons for reversing the circuit court, especially when the standard for reviewing the circuit court's order is manifest injustice.

Zusstone agreed to the payment schedule she now decries, and the repayment terms were not secret – to the contrary they were printed prominently in a chart as part of the modification agreement. (R. at 31). If the monthly payment was erroneous and excessive, then it was so on the day Zusstone agreed to the new terms. She paid the modified mortgage payment for a year before defaulting. She has made no argument and cited no evidence that would support the conclusion that the Bank materially misled or defrauded her when she agreed to the plain terms of the modified contract she knowingly and voluntarily signed.

We also find no merit in Zusstone's claim that granting the Bank's motion for judgment on the pleadings violated her right to a jury trial under §7 of the Kentucky Constitution. To accept Zusstone's argument would logically entitle a party to a jury trial on all claims, no matter how legally deficient, or even frivolous. As we held nearly twenty years ago:

> In each and every action to which the right to a jury trial might be applicable, there are many and various hurdles

> which parties must clear prior to actually exercising that right. We are cited to no authority, nor are we aware of any, which indicates that the proper use of summary judgments, directed verdicts, or other forms of disposition prior to submission to a jury are violative of § 7.

Godbey v. Univ. Hosp. of the Albert B. Chandler Medical Center, Inc., 975 S.W.2d 104, 106 (Ky. App. 1998).

In short, we find no manifest injustice and, therefore, affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Tamara V. Zusstone, *Pro se* Crestwood, Kentucky	Edmund S. Sauer Brian R. Epling Nashville, Tennessee