

STATE OF MICHIGAN
COURT OF APPEALS

DAVID HAYNER and TERESA HAYNER,

Plaintiffs-Appellants,

v

OLD KENT BANK,

Defendant Cross-
Plaintiff-Appellee,

and

ASPERLINE OF NORTH CENTRAL PA, INC.,
COLONIAL STRUCTURES OF MID
MICHIGAN, INC., JAMES MARTIN, and TOP
NOTCH CONTRACTING, INC.,

Defendants,

and

HOLLEY & ASSOCIATES,

Third Party Defendant.

Before: Sawyer, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's judgment entered in favor of defendant Old Kent Bank. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs bought an Asperline log home kit from defendant Colonial Structures of Mid-Michigan, Inc ("Colonial Structures"). When plaintiffs were rejected for financing from their bank, Colonial Structures directed them to defendant Old Kent Bank, which provided the financing. Plaintiffs brought this action to recover for defects in the home. The sole issue on appeal concerns the grant of summary disposition on a Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, claim against Old Kent. We review de novo a trial court's

decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiffs asserted that Old Kent was a closely related lender, and the failure of Old Kent to include in financing documents the notice required by the Federal Trade Commission (FTC) holder rule, 16 CFR 433.2 was a deceptive trade practice. They asserted that Old Kent violated MCL 445.903(1)(n) by “[c]ausing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.” Plaintiffs maintained that had the loan agreement contained the holder notice, they could have asserted their claims against the seller as a defense to the loan obligation.

The FTC rule¹ does not directly create a duty of the bank to place this language in a loan agreement or to inform the buyers of its absence. The rule only places a duty on the “seller.”

¹ 16 CFR 433.2 provides:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as “commerce” is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or,

(b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Old Kent is not a seller² because it does not sell or lease goods in the ordinary course of business. 16 CFR 433.1(j).³

While the MCPA is to be construed liberally to broaden a consumer's remedies, *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 417-418; 415 NW2d 206 (1987), a liberal construction does not allow for the creation of a duty where none otherwise exists. See, e.g., *Zine v Chrysler Corp*, 236 Mich App 261, 276-278; 600 NW2d 384 (1999).

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

² 16 CFR 433.1(j) defines "seller" as "[a] person who, in the ordinary course of business, sells or leases goods or services to consumers.

³ In their briefs on appeal, plaintiffs and defendant Old Kent agree that Old Kent is not a "seller" as defined by 16 CFR 433.1(j).