STATE OF MICHIGAN

COURT OF APPEALS

FRANCOIS A. FARAH, FRANCOIS A. FARAH REVOCABLE LIVING TRUST, ROCKIN Z, L.L.C., FARAH OF DORT HIGHWAY, INC., and PASADENA FRESH MEAT & FISH MARKET, INC., Plaintiffs-Appellants,	UNPUBLISHED June 23, 2011
v BANK OF AMERICA, N.A., Defendant-Appellee.	No. 297261 Genesee Circuit Court LC No. 09-091481-CK

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), and dismissing with prejudice all of plaintiffs' claims. We affirm.

Plaintiffs' claims stemmed from conduct that occurred after defendant refinanced plaintiffs' loan to afford plaintiffs a better opportunity to make their monthly loan payments. However, plaintiffs continued to make untimely payments. After plaintiffs obtained financing from another lender, they initiated the instant action against defendant, alleging fraud, negligent misrepresentation, intentional infliction of emotional distress, a violation of the Equal Credit Opportunity Act (ECOA), 15 USC 1691 *et seq.*, and slander and libel.

Plaintiffs challenge the trial court's grant of summary disposition in favor of defendant. We review de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Our review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

Plaintiffs first argue that the trial court erroneously found that they defaulted on their loan obligations. We disagree. To determine whether plaintiffs defaulted on their loan obligations, it is necessary to interpret various provisions of the loan agreement, term note, and mortgages. Issues of contract interpretation present questions of law subject to de novo review. *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647

(2003). The primary goal in interpreting a contract is to honor the parties' intent. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

The record is replete with evidence of several events of default. Plaintiffs' first payment was due October 5, 2005, but they made their first payment on October 18, 2005. Plaintiffs generally submitted their loan payment by the middle of the month, more than 10 days after the due date. Plaintiffs regularly took advantage of the 10-day grace period, never making a full monthly payment on the fifth of the month as required by the term note. Defendant assessed late charges on each of plaintiffs' 34 late payments. Defendant reversed the late charges on the first 20 of these payments, but it imposed some kind of late charge for the remaining payments (after July 2007).

The term note provided in relevant part that "[t]he outstanding principal balance of the Term Note shall be repaid in equal installments of principal and interest in the amount of $7,787.00 each month, beginning October 5, 2005, and continuing on the same day of each month thereafter." The cumulative transaction report provided by defendant clearly establishes that none of plaintiffs' payments was made on the fifth of the month. Notwithstanding Farah's self-serving claim to the contrary, plaintiffs presented no evidence below to refute the fact that none of their payments was paid when due on the fifth of the month. Plaintiffs' untimely payments constituted events of default under the plain and unambiguous language of the term note and loan agreement.

On appeal, plaintiffs suggest that they were not in default because they made their payments within the 10-day grace period. But nothing in the loan documents supports the proposition that payments made within the grace period cure a default. The only provision concerning a grace period addresses the imposition of late charges (specifically when defendant may assess a late charge and how much will be assessed).

Plaintiffs also claim that internal banking documents demonstrated that they were in compliance with the loan agreements' various covenants, and that all payments were timely. Plaintiffs cite online printouts that they attribute to defendant. These documents state "in compliance," with a date of March 13, 2007. However, the "in compliance" notation contained in the documents has little context. Further, it is unknown who prepared these documents and the complete documents were not filed below. Even assuming that these documents could be authenticated, without additional context they do not create a question of fact as to whether plaintiffs defaulted on their loan obligations. Plaintiffs also cite a "memorandum" and "approval summary," both of which they attribute to defendant, wherein it was stated that plaintiffs had made all loan payments on a timely basis. The first document is dated March 13, 2007, and the second document was generated on October 5, 2006. Assuming that these documents were prepared by defendant's representatives, the record still indicates that defendant assessed late charges on each of plaintiffs' 34 payments. While defendant reversed the late charges on the first 20 payments, it imposed some kind of late charge for the remaining payments. Even if defendant ultimately decided to not consider plaintiffs' payments late until March 13, 2007, the record demonstrates without question that plaintiffs' subsequent payments were not paid on the due date. Further, defendant was under no obligation to take any action because of the default, and the loan agreement provides that such inaction does not amount to a waiver of said default.

In addition, plaintiffs defaulted by failing to pay their real property taxes. The loan agreement provided that "[t]he Borrower shall pay any Other Taxes to the relevant governmental authority in accordance with applicable law." The commercial and residential mortgages also provided that "[t]he Mortgagor will pay when due and before any penalty attaches, all general and special taxes, assessments, water charges, sewer charges, and other fees, taxes, charges and assessments." The term note provided that a default exists with "the occurrence of any other Event of Default," and the loan agreement provided that an event of default exists when plaintiffs fail to perform "any covenant, condition or agreement contained in this Agreement or in the other Loan Documents or any other agreement with the Bank." Therefore, under the terms of the loan agreement, mortgage, and term note, a default existed as a result of plaintiffs' failure to pay their real property taxes.

Plaintiffs claim that defendant entered into the loan agreement with knowledge that they had not paid their real property taxes, which were being appealed. According to Farah, defendant's representative agreed that plaintiffs would have a reasonable time to pay the delinquent taxes. However, even if defendant's representative orally agreed to this, the record contains no evidence of such an agreement. Significantly, the loan agreement provides that "[n]o Event of Default shall be waived by the Bank except *in writing*." (Emphasis added.) And defendant's failure to exercise its rights under the loan documents does not constitute a waiver. We perceive no evidence in the record to suggest that defendant waived this event of default by plaintiffs.

Plaintiffs also complain that the trial court improperly weighed the evidence and determined witness credibility in deciding the summary disposition motion. We cannot agree. We find no indication that the court improperly weighed the evidence or determined the credibility of the witnesses. The trial court considered the pleadings, affidavits, depositions, admissions, and other documentary evidence in determining that defendant was entitled to summary disposition. MCR 2.116(G)(4) and (5). In reaching that conclusion, the trial court concluded that plaintiffs had defaulted on their loan obligations by failing to make timely payments and by failing to pay their real property taxes. As discussed previously, the record supports the trial court's conclusion that no genuine issue of material fact existed in this regard. The trial court properly determined that there was no genuine factual dispute concerning whether plaintiffs had defaulted on their loan obligations as provided by the aforementioned loan documents.

Plaintiffs next argue that the trial court erroneously granted summary disposition in favor of defendant with respect to their fraudulent and negligent misrepresentation claims. In their amended complaint, plaintiffs alleged that defendant's representatives made intentional, reckless, or negligent statements to plaintiffs suggesting that defendant's representatives were "working on adjusting the terms of the loan so that the loan payments could be lower." Plaintiffs claimed that defendant's representatives told Farah that they were reviewing the loan agreements to determine whether plaintiffs' loan payments could be reduced, and that defendant's representatives were processing plaintiffs' request to modify the terms of the loan agreements. After defendant moved for summary disposition, plaintiffs further claimed that any default was the result of defendant's "fraudulent misrepresentations," which included an alleged statement by defendant's representative Teresa Irland that plaintiffs could make two monthly payments without adverse repercussions, the fact that defendant never told plaintiffs to seek financing from

another bank, and the fact that defendant never told plaintiffs that their loan had been transferred to the workout area. Plaintiffs further claimed that defendant's failure to comply with its legal duty to inform them of its decision to deny their application for credit under the ECOA amounted to negligent misrepresentation and silent fraud.

The trial court properly granted summary disposition in favor of defendant with respect to plaintiffs' claims. First, with respect to plaintiffs' fraud claim, there was no evidence of any false material representations on the part of defendant. See *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 623; 769 NW2d 911 (2009). Because there was no evidence of any false material representations, we conclude that the trial court properly granted summary disposition in favor of defendant with respect to plaintiffs' fraud claim as set forth in the complaint. Second, plaintiff cannot litigate its allegations that defendant's representatives made fraudulent misrepresentations that caused them to default, or that defendant's failure to provide a reason for the denial of their request to modify the loan agreements amounted to a negligent misrepresentation, because those issues were not raised in the pleadings, *Belobradich v Sarnsethsiri*, 131 Mich App 241, 246; 346 NW2d 83 (1983), and nothing in the record indicates that the parties expressly or implicitly agreed to try these issues, *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002). Moreover, these claims lack merit because there was no genuine issue of material fact concerning whether defendant's representatives made fraudulent misrepresentations that caused plaintiffs to default, and defendant had no duty under the ECOA in these circumstances.[1] Plaintiffs' negligent misrepresentation and silent fraud claims were without merit. See *Hord v Environmental Research Institute*, 463 Mich 399, 412; 617 NW2d 543 (2000).

Plaintiffs also contend that the trial court erroneously granted summary disposition in favor of defendant with respect to their claim of intentional infliction of emotional distress. "To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). "The threshold for showing

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[1] Plaintiffs essentially argue that defendant had a legal duty under the ECOA "to inform [plaintiffs] when they are denied credit." Defendant, as a creditor, would have an obligation to provide a "statement of reasons" if it denied or revoked credit, changed the terms of an existing credit agreement, or refused "to grant credit in substantially the amount or on substantially the terms requested." 15 USC 1691(d); 15 USC 1691a(e). Defendant extended credit to plaintiffs in the form of a loan, which was refinanced in August 25, 2005. We note that an adverse action "does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit." 15 USC 1691(d)(6). Plaintiffs were in default of their loan obligations, and defendant's denial of their request to modify the terms of the loan agreements did not constitute an adverse action. Accordingly, plaintiffs were not entitled to a statement of reasons from defendant regarding the denial. 15 USC 1691(d)(2) and (6).

extreme and outrageous conduct is high." *VanVorous v Burmeister*, 262 Mich App 467, 481; 687 NW2d 132 (2004). Extreme and outrageous conduct is generally "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community[.]'" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 608; 374 NW2d 905 (1985) (citation omitted).

Even assuming that plaintiffs' claims regarding the conduct of defendant's representatives were true, we conclude as a matter of law that such conduct did not rise to extreme and outrageous conduct. Moreover, the record undermines plaintiffs' claims. Plaintiffs defaulted on their loan obligations. Even though defaults occurred, defendant's representatives considered modifying the terms of plaintiffs' loan agreements. However, defendant apparently never produced a modification that was agreeable to plaintiffs. Plaintiffs wanted to pay interest only for a period of time. Although the forbearance agreement drafted by defendant included such an option, plaintiffs never executed it. Additionally, contrary to plaintiffs' assertion, the record demonstrates that plaintiffs were pursuing alternative financing as early as 2006, and had a loan pending with another lender as of October 2007. Ultimately, it appears that plaintiffs are seeking to hold defendant liable for their own economic woes. In *Roberts*, 422 Mich at 607-608, our Supreme Court concluded that the dilatory handling of the plaintiffs' claim did not amount to extreme and outrageous behavior. And as in *Roberts*, there is no evidence in the present case to suggest that defendant sought to harass plaintiffs. Accordingly, there was no evidence that defendant intended to inflict emotional distress on plaintiffs. See *Margita v Diamond Mtg Corp*, 159 Mich App 181, 190; 406 NW2d 268 (1987).[2] Even viewing the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to plaintiffs, no reasonable person could conclude that defendant's conduct amounted to extreme and outrageous behavior.

Plaintiffs next argue that the trial court erroneously rejected their ECOA claim by requiring a showing of discrimination and a "formal loan application." Plaintiffs claimed that defendant failed to provide them with its "statement of reasons" for denying credit as required by 15 USC 1691(d). Plaintiffs correctly observed that such provision was separate and distinct from the ECOA's antidiscrimination provision. *Costa v Mauro Chevrolet, Inc*, 390 F Supp 2d 720, 729 (ND Ill, 2005). However, the trial court did not reject plaintiffs' ECOA claim because plaintiffs failed to present evidence of discrimination by defendant. Rather, the trial court concluded that plaintiffs could not prevail under the ECOA because there was no evidence that they submitted a "formal application" to defendant.

The trial court correctly determined that the notification requirement was triggered by the filing of such an application. The ECOA provides that "after the receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application." 15

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[2] We find plaintiffs' reliance on *Margita*, 159 Mich App at 190, to be strained. Indeed, in that case the defendants repeatedly harassed the plaintiffs in an effort to collect a debt, which, in fact, was not overdue.

USC 1691(d)(1). The statute does not define "completed application," but 12 CFR 202.2(f) provides the following relevant definition: "an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested . . . ." There was no evidence that plaintiffs submitted a completed application in this case. Indeed, plaintiffs essentially ask this Court to engage in speculation as to whether they submitted such an application.

Moreover, even if they did submit a completed application, plaintiffs were still not entitled to defendant's statement of reasons for denying credit because they were in default of their loan obligations. Defendant's denial of plaintiffs' request to modify the terms of the loan agreements did not constitute an adverse action. Thus, plaintiffs were not entitled to a statement of reasons from defendant regarding the denial. 15 USC 1691(d)(2) and (6). We conclude that defendant was not obligated to provide plaintiffs a "statement of reasons" for its denial of credit in these circumstances.

Finally, plaintiffs assert that the trial court erroneously granted summary disposition in favor of defendant with respect to their libel and slander claims. We disagree. Plaintiffs identified as the allegedly defamatory statements Irland's purported comments to her colleagues that plaintiffs had defaulted on their loan. The "truth is an absolute defense to a defamation claim[.]" *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). As discussed previously, the record clearly demonstrates that plaintiffs were in default. Moreover, plaintiffs defaulted on their loan obligations well before Irland made any of the allegedly defamatory statements. Because Irland's remarks were true, plaintiffs' libel and slander claims were without merit. *Id.*

Furthermore, as noted by the trial court, plaintiffs failed to establish that Irland's remarks were not privileged or that Irland acted with malice in this case. See *Prysak v R L Polk Co*, 193 Mich App 1, 14-15; 483 NW2d 629 (1992). We conclude that qualified privilege shielded Irland's allegedly defamatory statements, and there is no indication that Irland made such statements with malice.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad