In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

PARK RIDGE ASSOCIATES, ET AL.,	)	No. ED108740
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	
	)	Honorable Brian H. May
U.M.B. BANK, ET AL.,	)	
	)	
Respondent.	)	Filed: November 17, 2020

Introduction

Appellants Park Ridge Associates Limited Partnership ("Park Ridge"), SM-T.E.H. Realty 9 LLC (SMTEH), and Michael Fein (collectively "Appellants") appeal the trial court's grant of U.M.B. Bank ("U.M.B."), Spenserv-St. Louis, Inc. ("Spenserv"), Sugar Creek Finance Company ("Sugar Creek"), and Meramec Enterprise Holdings II LLC's ("Meramec") (collectively "Respondents") motion to dismiss. Appellants owned an apartment development in Ferguson, Missouri. Respondents are the entities involved in the 2019 foreclosure and non-judicial sale of the development.

Appellants' petition alleged six causes of action: breach of fiduciary duty, conspiracy to breach fiduciary duty, breach of the covenant of good faith and fair dealing, conspiracy to breach the covenant of good faith and fair dealing, unjust enrichment, and the equitable right of

redemption. Appellants claim the trial court erred in granting Respondents' motion to dismiss because their petition alleged facts that – if proven – would support their claims.

Appellants raise four points on appeal. In Point I, Appellants argue the trial court erred by dismissing their breach of fiduciary duty claim because the petition alleged facts sufficient to establish U.M.B. and Spenserv ("Trustees") acted as trustees under the deed of trust during foreclosure, failed to treat Appellants fairly and impartially during the foreclosure process, failed to secure the best possible foreclosure price, negotiated in bad faith, and colluded to transfer the property to a holding company at a price below its true value.

In Point II, Appellants argue the trial court erred by dismissing their conspiracy to breach fiduciary duty claim because the petition alleged facts sufficient to establish Respondents conspired to further their own interests in the property at Appellants' expense by driving down the foreclosure price.

In Point III, Appellants argue the trial court erred by dismissing their claim Respondents breached the implied covenant of good faith and fair dealing. Appellants claim the petition alleged facts sufficient to establish Respondents wrongfully drove down the foreclosure sale price by negotiating in bad faith and colluding to produce an artificially low appraisal value for the property.

In Point IV, Appellants argue the trial court erred by dismissing their unjust enrichment claim and request for a constructive trust because the petition alleged facts sufficient to establish Sugar Creek and Meramec were unjustly enriched by their acquisition of the property at Appellants' expense.

We affirm.

Factual and Procedural History

Park Ridge purchased the apartment complex in 2007. Park Ridge financed the purchase with a $12 million loan from the Missouri Housing Development Commission ("MHDC") and granted a deed of trust to U.M.B. U.M.B. became a trustee of the loan. Park Ridge secured the mortgage with a promissory note in favor of U.M.B.

On April 1, 2019 U.M.B. notified Park Ridge it was in default for failing to pay real estate taxes and failing to produce documents required by the loan. Under the deed of trust, defaulting parties were entitled to a thirty-day period to cure defaults. Park Ridge failed to cure and U.M.B., per the contractual agreements, accelerated the outstanding $7,351,478.65 debt on May 3, 2019. U.M.B. named Spenserv successor trustee in May 2019.[1] On June 24, 2019 Trustees notified Appellants the property would be auctioned on July 10, 2019.

Appellants requested and received a one-week stay of the auction to July 17, 2019 to allow the parties to negotiate a cure for their defaults. Appellants proposed a schedule requiring them to produce all missing documents and pay all outstanding taxes by September 15, 2019. Trustees rejected Appellants' proposal on July 16, 2019 and informed Appellants they could avoid foreclosure only by agreeing to pay down the debt to $3.9 million by September 15, 2019.[2] Appellants asked for an extension of time to consider the counteroffer on the morning of July 17, 2019. Trustees did not grant Appellants' extension request and Meramec purchased the property for $3.9 million later that day.

[1] The day Spenserv became successor trustee is disputed. Appellants claim Spenserv was named successor trustee on May 5, 2019 and Respondents claim Spenserv became successor trustee on May 20, 2019.

[2] The property was appraised at $3.9 million one week before the foreclosure sale. Appellants allege they were never given any documents associated with the appraisal.

Appellants sued on August 29, 2019. Respondents moved to dismiss, arguing Appellants failed to state a claim upon which relief could be granted. The trial court granted Respondents' motions to dismiss on January 3, 2020. Appellants filed their notice of appeal on February 11, 2020. This appeal follows.

Standard of Review

We review the grant of a motion to dismiss *de novo*. *Amalaco LLC v. Butero*, 592 S.W.3d 647, 650-51 (Mo. App. E.D. 2019). This Court "assumes all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Id*. We do not weigh the plaintiff's factual allegations to determine whether they are credible or persuasive. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). However, we will "disregard conclusions not supported by facts." *Gardner v. Bank of America*, 466 S.W.3d 642, 646 (Mo. App. E.D. 2015). A motion to dismiss is properly granted when a petition "does not contain the ultimate facts or any allegations from which to infer those facts." *Id*.

When the trial court does not provide reasons for its dismissal, we presume the dismissal was based on at least one of the grounds stated in the motion to dismiss. *Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 854 (Mo. App. E.D. 2008). We will affirm if the dismissal was appropriate on any grounds stated in the motion. *Id*.

Discussion

Points I & II: The Trial Court Properly Dismissed Appellants' Breach of Fiduciary Duty and Conspiracy Claims

A. No Breach of Fiduciary Duty

In Point I, Appellants claim they sufficiently pled facts that if proven, would show Trustees breached their fiduciary duty to act with "complete integrity, fairness, and impartiality

toward both the debtor and the creditor." The elements of breach of fiduciary duty are (1) the existence of a fiduciary duty between the parties, (2) breach of the duty, and (3) harm suffered because of the breach. *Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 15 (Mo. 2012).

It is undisputed trustees of a deed of trust owe a fiduciary duty to debtors to "exercise sound discretion and to conduct the sale in the manner which would render the sale most beneficial to the debtor at the best possible price." *Citizens Bank of Edina v. West Quincy Auto Auction, Inc.*, 742 S.W.2d 161, 165 (Mo. 1987). Trustees are required to exercise discretion in the manner and timing of sale to ensure it is beneficial to the debtor. *Id.*

The parties dispute whether Appellants adequately pled facts establishing Trustees breached their fiduciary duty. The determinative issue is whether Missouri's Credit Agreement Statute applies. MO. REV. STAT. § 432.047.[3] The statute applies to credit agreements, which include agreements to "lend or forbear repayment of money, to otherwise extend credit, or to make any other financial accommodation." *Id*. The statute prevents debtors in commercial transactions from bringing an action or defense related to a credit agreement "unless the credit agreement is in writing, provides for the payment of interest or for other consideration, sets forth the relevant terms and conditions, and the credit agreement is executed by the debtor and the lender." *Id*. The purpose of section 432.047 is to "eliminate all claims and defenses" based on alleged oral agreements or promises to modify commercial credit agreements. *BancorpSouth Bank v. Paramont Properties, LLC*, 349 S.W.3d 363, 367 (Mo. App. E.D. 2011).

Appellants argue section 432.047 does not apply because their claim is based on the Trustees' alleged misconduct in the foreclosure sale, not a credit agreement. Appellants argue Trustees breached their fiduciary duties because they did not negotiate a plan to avoid

[3] All statutory references are to Mo. Rev. Stat. (2019), unless otherwise indicated.

foreclosure in good faith the week before the property was sold. Appellants also claim Trustees colluded with Meramec to create a "sham" foreclosure between affiliated companies owned by the same person.

Trustees argue section 432.047 precludes Appellants' claims about UMB and Spenserv's pre-sale conduct. They note any agreement between the parties to avoid foreclosure or modify the loan agreement would have involved a "financial accommodation" and would have had to be in writing. Trustees further argue the public policy rationale of section 432.047 is to avoid misunderstandings by requiring the entire agreement and subsequent modifications between creditors and debtors to be in writing.

Trustees argue any verbal negotiations with Appellants to avoid foreclosure and sale were simply gratuitous and informal last-minute efforts to accommodate Appellants. Trustees note Appellants did not try to cure their defaults from April to June 2019 but only presented a plan to cure when the foreclosure sale was imminent. Trustees also argue section 432.047(2) precludes Appellants from claiming Trustees' counteroffer to avoid sale was unreasonable because Trustees had no obligation to offer Appellants any terms.

We agree with Trustees. Assuming Appellants' allegations are true, Appellants fail to explain why section 432.047(2) does not preclude their claims as a matter of law. Appellants identified no contractual basis to challenge Trustees' handling of Appellants' default, foreclosure, and sale. Appellants concede they received notice of default and the contractually required thirty-day curing period, implicitly conceding they failed to cure during that period. Appellants concede they received notice of acceleration and a demand for payment in full. Appellants also concede they had notice of the foreclosure sale and Trustees had the contractual

right to conduct a nonjudicial public sale. Appellants do not dispute the validity of the advertisement or procedure of the sale.

Instead of challenging Trustees' conduct under the contract, Appellants attempt to attack the foreclosure sale in precisely the manner precluded by section 432.047. Appellants presented no authority to suggest Trustees had any obligation to negotiate after the thirty-day curing period was over. Trustees' July demand for Appellants to pay their debt down to $3.9 million by September 15 may have been "unreasonable" considering Appellants' financial circumstances, but we find no authority to suggest Trustees had to offer Appellants a "reasonable" deal to avoid sale, or any deal. Similarly, Appellants presented no authority to suggest Trustees had any duty to share their appraisal of the property's value or accept Appellants' offers to cure after the close of the thirty-day curing period.

The contract between the parties permitted nonjudicial foreclosure sales and credit bidding. There was no prohibition of related entities bidding for ownership of the property.

Appellants' contention the foreclosure price of $3.9 million was unfair because it was less than the fair market value of the property fails as a matter of law. "Market value may be considered in determining the adequacy of a sale price but *it is not the measure of adequacy*." *Yokley v. Wian*, 877 S.W.2d 179, 182 (Mo. App. W.D. 1994) (emphasis in original). The test of adequacy is the price received in comparison with what the property would bring in a fair public sale. *Id*. Property sold at public sale after foreclosure will often not return fair market value. *Id*.

To set aside a foreclosure sale because of an inadequate return, this Court has stated the price must be "so gross that it shocks the conscience." *Reliance Bank v. Paramont Properties, LLC*, 425 S.W.3d 202, 209 (Mo. App. E.D. 2014). This Court has held foreclosure sale prices of

less than 50% of fair market value are not inadequate. *Id*. (citing *American First Fed., Inc. v. Battlefield Ctr., L.P.*, 282 S.W.3d 1, 9 (Mo. App. E.D. 2009)). The sale price here was approximately 52% of Appellants' alleged fair market value of the property. Appellants cite no authority to suggest we should find a foreclosure price of $3.9 million so gross as to shock the conscience.

We hold Appellants failed to plead facts giving rise to a breach of fiduciary duty claim because section 432.047 bars causes of action based on unwritten modifications to credit agreements and Appellants did not plead Trustees violated the written terms of the loan.

B. Conspiracy

In Point II, Appellants argue the trial court improperly dismissed their claim Trustees conspired with Sugar Creek and Meramec to breach their fiduciary duty. Appellants argue Respondents colluded to create an unfair foreclosure process that artificially depressed the foreclosure price of the property.

Civil conspiracy is an agreement or understanding between two or more parties to do an unlawful act or use unlawful means to do a lawful act. *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. App. E.D. 2008). Civil conspiracy can occur in "either the ends sought or the means used." *Id*. If the unlawfulness of the act is alleged, the elements of a civil conspiracy claim are (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds, (4) one or more unlawful acts, and (5) damages. *Id*. If the conspiracy is to use unlawful means to accomplish a lawful act, the elements are (1) two or more persons (2) an unlawful objective, (3) a meeting of the minds, (4) an act in furtherance of the conspiracy, and (5) damages. *Id*. Plaintiffs need not plead or prove the conspirators intended to harm them if they can show harm resulted. *Id*.

To properly plead a civil conspiracy case, plaintiffs must plead two things: the underlying unlawful act causing damages and the civil conspiracy. *Id*. "[A] conspiracy does not give rise to a civil action unless something is done pursuant to which, absent the conspiracy, would create a right of action against one of the conspirators." *Id*. "Civil conspiracy is not itself actionable in the absence of an underlying wrongful act or tort." *Hamilton v. Spencer*, 929 S.W.2d 762, 767 (Mo. App W.D. 1996). If the underlying wrongful act alleged fails to state a cause of action, the civil conspiracy claim fails. *Envirotech*, 259 S.W.3d at 586 (citing *Gettings v. Farr*, 41 S.W.3d 539, 542 (Mo. App. E.D. 2001)).

As we discussed in subsection A, Appellants failed to properly plead an underlying breach of fiduciary duty claim. Their conspiracy claim must therefore fail. *Hamilton*, 929 S.W.2d at 767; *Envirotech*, 259 S.W.3d at 586.

We conclude the trial court did not err as a matter of law in concluding Appellants failed to state claims for breach of fiduciary duty and conspiracy to breach fiduciary duty.

Points I and II are denied.

Point III: The Trial Court Properly Dismissed Appellants' Claim Respondents Breached the Implied Covenant of Good Faith and Fair Dealing

Appellants argue Respondents breached their duties of good faith and fair dealing during negotiations to avoid foreclosure. Appellants repeat their allegations Respondents colluded to "engineer" a foreclosure sale at an artificially reduced price in violation of Park Ridge's rights as a debtor. Appellants claim Respondents opportunistically exploited Appellants' default by (1) having the property appraised at an artificially low value and (2) using that low value to foreclose and purchase the property at a price below what Appellants believe the true value of

the property is. Appellants argue Trustees violated their duty of good faith and fair dealing by "favoring the creditor, assisting Sugar Creek in obtaining and suppressing the appraisal and then conducting the foreclosure sale in a manner that fell far short of 'scrupulous fidelity' to [Appellants]."

Respondents argue Appellants may plead a cause of action based on the covenant of good faith and fair dealing only if Appellants also alleged Respondents breached their contract. *Kroger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 413 (Mo. App. W.D. 2000). Respondents argue Appellants failed to plead Respondents violated any term of the contract. Respondents note Appellants conceded they were in default on the loan and the contract permitted the actions Respondents took. Respondents remind us the contract provided conditions of default, a grace period to cure default, and procedures for foreclosure and sale.

Respondents' argument is persuasive. Every contract contains an implied duty of good faith and fair dealing but there can be no breach when the contract expressly permits the actions being challenged, and the defendant acts under the express terms of the contract. *Arbors at Sugar Creek Homeowners Association v. Jefferson Bank & Trust Co., Inc.*, 464 S.W.3d 177, 185 (Mo. 2015). The covenant of good faith and fair dealing does not give rise to new obligations not otherwise contained in the contract's express terms. *Meridian Creative Alliance, LLC v. O'Reilly Automotive Stores, Inc.*, 519 S.W.3d 839, 845 (Mo. App. S.D. 2017). The covenant is not "an overflowing cornucopia of wished-for legal duties; indeed, the covenant cannot give rise to new obligations not otherwise contained in a contract's express terms." *Jennings v. Bd. of Curators of Mo. State. Univ.*, 386 S.W.3d 796, 798 (Mo. App. S.D. 2012). "The implied covenant simply prohibits one party from depriving the other party of its expected benefits under the contract." *Id.*

While Appellants claim the foreclosure sale was a "sham," they have identified no facts to support their assertion. As we discussed above, the contract allowed Trustees to hold a nonjudicial foreclosure sale and permitted credit bidding. Furthermore, Trustees had no duty to negotiate with Appellants to avoid foreclosure after the grace period elapsed and the debt was accelerated. Even taking Appellants' allegations as true, they did not allege Respondents violated any express term of the contract.

Point III is denied.

Point IV: The Trial Court Properly Dismissed Appellants' Unjust Enrichment Claim

Appellants argue the trial court erred by denying their unjust enrichment claims against Sugar Creek and Meramec. Appellants repeat their arguments the foreclosure process was "irregular and unfair," depriving them of a fair price for the property. To prove unjust enrichment, plaintiffs must prove "(1) defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit. *Central Parking System of Missouri v. Tucker Parking Holdings*, 519 S.W.3d 485, 498 (Mo. App. E.D. 2017). Appellants repeat their arguments Respondents colluded to create a sham foreclosure proceeding, satisfying elements (1) and (2). Appellants argue the pleadings satisfy element (3) because they alleged Respondents cooperated to allow Meramec to buy the property at an unreasonably low price to Appellants' detriment. Appellants argue the equitable solution would be for this Court to impose a constructive trust on the property and its rents.

Unjust enrichment does not require proof of legal wrongdoing or malicious intent. *Brown v. Brown*, 152 S.W.3d 911, 918 (Mo. App. W.D. 2005). Appellants note unjust

enrichment may occur when a party has abused its fiduciary relationship, exercised undue influence, or made a mistake. *Id*. However,

> [i]t is a well-settled principle of law that implied contract claims [such as unjust enrichment] arise only where there is no express contract. Accordingly, a plaintiff cannot recover under an equitable theory when [they have] entered into an express contract for the very subject matter for which [they seek] to recover.

Grisham v. Mission Bank, 531 S.W.3d 522, 538-39 (Mo. App. W.D. 2017) (internal citations omitted).

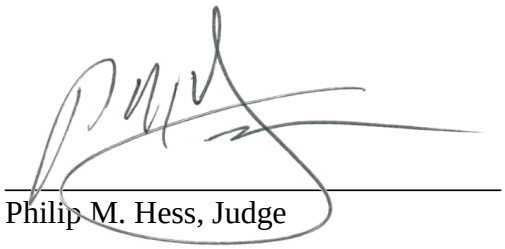
Appellants' arguments ignore the fact the contract explicitly permitted Respondents' conduct. Appellants are not entitled to an equitable remedy simply because Respondents took actions under the contract that Appellants did not like. *Id*. Like in *Grisham*, the parties entered an express contract that defined events of default and provided rights and remedies if default occurs. Further, we will not set aside a foreclosure sale on equitable grounds unless a party can "establish an inadequate sale price and other wrongful acts, such as fraud, unfair dealing, or mistake . . . ." *Reliance Bank*, 425 S.W.3d at 209.

As discussed above, the foreclosure sale price was greater than 50% of the value Appellants allege the property was worth. As a matter of law, Appellants failed to plead facts establishing the sale price was inadequate. *American First Fed., Inc.*, 282 S.W.3d at 9. Further, Appellants failed to plead facts establishing Respondents engaged in any behavior prohibited by the contract. Because Appellants failed to adequately plead either element justifying an equitable remedy, the trial court did not err by dismissing Appellants' cause of action.

Point IV is denied.

Conclusion

We have reviewed the record in the light most favorable to Appellants' case and made all reasonable inferences in their favor. We conclude the trial court did not err by granting Respondents' motion to dismiss because Appellants pled no facts that if established, would prove Respondents violated their duties to Appellants. The actions Appellants alleged were wrongful were explicitly permitted by the contract and Missouri law. The judgment of the trial court is affirmed.



Philip M. Hess, Judge

Gary M. Gaertner, Jr., P.J. and
Michael E. Gardner, J. concur.