



**In the Missouri Court of Appeals
Eastern District**

DIVISION ONE

| | | |
|--------------------------------|---|-------------------------------|
| DAVIS R. CONWAY AND SHERI |) | No. ED99836 |
| D. CONWAY, |) | |
| |) | |
| Appellants, |) | Appeal from the Circuit Court |
| |) | of St. Charles County |
| vs. |) | |
| |) | |
| CITIMORTGAGE, INC. AND FEDERAL |) | |
| NATIONAL MORTGAGE |) | |
| ASSOCIATION, INC., |) | Hon. Jon A. Cunningham |
| |) | |
| Respondents. |) | FILED: December 3, 2013 |

Davis Conway and Sheri Conway (“the Conways”) appeal from the judgment of the trial court that granted the joint motion of CitiMortgage, Inc. and the Federal National Mortgage Association (“Fannie Mae”) to dismiss the Conways’ First Amended Petition. Finding no error, we affirm.

In 2007 the Conways purchased real property located at 4156 Hueffmeier Road (“Hueffmeier Property”) in Wentzville, Missouri using a mortgage loan that they obtained from Pulaski Bank. The mortgage loan was secured by a Deed of Trust. Pulaski Bank assigned the mortgage loan to Fannie Mae. CitiMortgage, Inc. became the loan servicer for Fannie Mae for the mortgage loan. Neither Fannie Mae nor CitiMortgage were parties to the 2007 loan transaction between the Conways and Pulaski

Bank. At the time the Conways obtained the mortgage loan, they resided at 403 Quiet Field Court (“Quiet Field Property”) in St. Peters, Missouri.

The Conways never lived at the Hueffmeier Property, but rather continued to reside at the Quiet Field Property. They initially planned to renovate the Hueffmeier Property, but it was damaged in a fire in June 2008 and eventually torn down. As a result of the June 2008 fire, the Conways received \$150,000 in insurance proceeds, which sum was held in escrow by CitiMortgage as the loan servicer. The Conways attempted to build a new house at the Hueffmeier Property, and CitiMortgage released funds from the insurance proceeds to them as they submitted bills for the rebuilding. By August 1, 2009, only \$15,000 was left from the insurance proceeds. CitiMortgage informed the Conways that it could not release the remaining \$15,000 until the new house was complete. As of August 1, 2009, a great deal of work still needed to be done on the new house.

The Conways fell behind on the payments for the mortgage loan, and eventually went into default. By January 2011, the Conways had ceased work on the unfinished house at the Hueffmeier Property, and by April 2011, they were \$9,000 behind on the payments for the loan. CitiMortgage never released the remaining \$15,000 in insurance proceeds because the new house was never finished, and that sum remained in escrow. The Hueffmeier Property was foreclosed on and sold on April 21, 2011.

The Conways filed suit against CitiMortgage and Fannie Mae on December 21, 2011, subsequently amended on June 8, 2012. In their First Amended Petition, the Conways asserted one claim under the Missouri Merchandising Practices Act (“MPA”), in which they alleged that CitiMortgage and Fannie Mae used “fraud, false pretense, false promise, misrepresentation or unfair practice, and/or concealment, suppression, or

omission of a material fact” in connection with the sale of the 2007 mortgage loan by Pulaski Bank to them.

The Conways alleged that they never received proper notice of the foreclosure because the notice of sale was sent to the Hueffmeier Property, where they did not reside and did not normally receive mail. They also claimed that CitiMortgage had actual and constructive notice that they lived at the Quiet Field Property. The Conways averred that sending the notice of sale to the Hueffmeier Property instead of to the Quiet Field Property deprived them of the opportunity to redeem that property, and constituted a violation of the MPA by CitiMortgage and Fannie Mae. They additionally alleged that CitiMortgage and Fannie Mae acted in bad faith by failing to apply the last \$15,000 in insurance proceeds that were held in escrow to their arrearage on the mortgage loan, and that CitiMortgage and Fannie Mae failed to remit the \$15,000 held in escrow after the foreclosure on the Hueffmeier Property.

Thereafter CitiMortgage and Fannie Mae jointly filed a Motion to Dismiss for Failure to State a Claim. A hearing on this motion to dismiss was held on February 22, 2013. The trial court granted the Motion to Dismiss. It found that the First Amended Motion clearly stated that Pulaski Bank was the original lender and did not allege that either CitiMortgage or Fannie Mae was an original party to Conways’ purchase of the mortgage loan. It further found that the appellate opinions in State ex rel. Koster v. Portfolio Recovery Associates, LLC, 351 S.W.3d 661 (Mo. App. 2011), (*trans. denied*, December 6, 2011) and State ex rel. Koster v. Professional Debt Management, LLC, 351 S.W.3d 668 (Mo. App. 2011), (*trans. denied*, December 6, 2011) to be applicable and controlling. It found the primary case relied on by the Conways, Huffman v. Credit

Union of Texas, 2011 WL 5008309 (W.D. Mo.), to be distinguishable, as the defendant in that case was a party to the original transaction. The trial court concluded that the MPA “does not apply to post-sale transaction activity wholly unrelated to claims or representations made before or at the time of the transaction.” It further concluded that the First Amended Petition failed because it did not allege that CitiMortgage or Fannie Mae were original parties to the 2007 mortgage loan, and granted the Motion to Dismiss.

The Conways now appeal from that judgment.

We review a trial court’s grant of a motion to dismiss *de novo*. Ward v. West County Motor Company, Inc., 403 S.W.3d 82, 84 (Mo. banc 2013). When we review the dismissal of a petition for the failure to state a claim, the facts contained in the petition are assumed to be true and are construed in favor of the plaintiffs. Id. If the petition sets forth any set of facts which, if proven, would entitle the plaintiffs to relief, then the petition states a claim. Id.

In their sole point relied on the Conways contend that the trial court erred in granting the Motion to Dismiss because unlawful foreclosures do occur “in connection with” the initial extension of credit such that they stated a claim under the MPA.

The MPA supplements the common law definition of fraud. Id. It creates an individual cause of action for any person “who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020.” Section 407.025.1 RSMo 2000.¹ Section 407.020 provides that it is unlawful to use any unfair or deceptive practices “in connection with the sale or advertisement of any merchandise in

¹ All further statutory citations are to RSMo 2000 unless noted otherwise.

trade or commerce.” The MPA was drafted to be intentionally broad in scope to prevent “evasion by overly meticulous definitions.” Portfolio Recovery, 351 S.W.3d at 664 (quoting Clement v. St. Charles Nissan, Inc., 103 S.W.3d 898. 900 (Mo. App. 2003)).

The critical phrase at issue in this case is “in connection with the sale or advertisement of any merchandise” in section 407.020, as all of the purportedly unfair and illegal actions by CitiMortgage and/or Fannie Mae took place long after the Conways obtained the mortgage loan from Pulaski Bank in 2007, and did not relate to the initial sales transaction, namely the procurement of the mortgage loan.² Unfortunately, the MPA does not include the phrase “in connection with” in its set of definitions in section 407.010. In the absence of a statutory definition, we consider the plain and ordinary meaning of the words themselves. Id. at 665. “Connection” is defined as meaning “relationship in fact” in the *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/connection>, accessed November 18, 2013. Applying this definition, we look for such a “relationship in fact” between the advertising and sale of the merchandise at issue, namely the 2007 mortgage loan, in the Conways’ First Amended Petition and the alleged unfair practices by CitiMortgage and Fannie Mae. As in Portfolio Recovery, the alleged unfair practices as set forth in the First Amended Petition were not engaged in before or at the time of the advertising or purchase of the merchandise and did not relate to the initial sales transaction between the buyer and seller, the Conways and Pulaski Bank respectively.

This Court discussed this issue thoroughly in Portfolio Recovery, and held that actions that occurred after the initial sales transaction, which do not relate to any representations or claims made before or at the time of the initial sales transaction, and

² The MPA applies to services as well as goods. Portfolio Recovery, 351 S.W.3d at 665-66.

which are taken by someone who was not a party to the initial sales transaction, were not actions made “in connection with” the sale or advertisement of merchandise, which is required by the MPA. Id. at 667.³ Deceptive or unfair post-sale conduct is covered by the MPA, but only when such conduct relates directly to the advertisement or sale of merchandise. Id. The present case is not different, even though it involves foreclosing on a mortgage loan through a Deed of Trust rather than debt collection on a loan.

While no Missouri state court case has addressed this issue in the context of post-sales conduct involving the foreclosure of mortgage loan, a number of unpublished cases in the federal district courts of Missouri have addressed the situation. In Reitz v. Nationstar Mortgage, LLC, 2013 WL 3282875, at *19 (E.D.Mo. June 27, 2013), the district court held that a “loan servicer” who was not a party to the initial loan transaction and who may foreclose subsequently on that loan is not liable under the MPA. The district court went on to hold that the defendant in that case was a “stranger to the original mortgage loan transaction[.]” Id. It quoted with approval another federal district court opinion on that issue, ““Being foreclosed upon is not purchasing or leasing merchandise. Foreclosure is a legal proceeding for the termination of a mortgagor’s interest in property.”” Id. (quoting Wivell v. Wells Fargo Bank, 2013 WL 2089222, at *4 (W.D.Mo. May 14, 2013)). Other cases have similarly held that there was no claim under the MPA where the defendants were strangers to the initial loan transaction. See Wivell v. Wells Fargo Bank, 2013 WL 3665529 (W.D.Mo. July 12, 2013); Barnes v. Federal Home Loan Mortgage Corporation, 2013 WL 1314200 (W.D.Mo. March 28, 2013);

³ The significance of the fact that the alleged unfair practices were done by someone who was not a party to the original transaction is that this is evidence that the actions were not “in connection with” the advertisement or sale of merchandise. It does not mean that an assignee of a party to the original transaction could not be liable under the MPA.

Willis v. U.S. Bank, 2012 WL 3043023 (E.D.Mo. July 25, 2012); Hess v. Wells Fargo Home Mortgage, 2012 WL 872752 (E.D.Mo. March 14, 2012); Ball v. Bank of New York, 2012 WL 6645695 (W.D.Mo. Dec. 20, 2011) (holding that the plaintiffs' claim under the MPA failed because the actions of the defendants, which were strangers to the original loan transaction, were not sufficiently "in connection with" the relevant sale or advertisement.

The Conways cite no binding or controlling Missouri precedent that contradicts our holdings in Portfolio Recovery and Professional Debt. They do cite to several cases from federal courts in Missouri, all of which are distinguishable, and which would not be binding even if they were directly on point. See Doe v. Roman Catholic Diocese of St. Louis, 311 S.W3d 818, 823 (Mo. App. 2010). Huffman v. Credit Union of Texas, 2011 WL 5008309, at *1 (W.D.Mo. Oct. 20, 2011) is readily distinguishable because the plaintiff in that case alleged unfair practices in connection with the original loan transaction in addition to alleging unfair practices relating to the repossession of her car. In addition, the defendant in that case was not a stranger to the original transaction, but rather was a party to that transaction through its agent regarding the provision of financing. Id. at *6. Umbright v. Chase Home Finance, LLC, 2012 WL 2946617, at *4-5 (E.D.Mo. July 18, 2012) does not address the issue of "in connection with," but rather held that there was a material issue of fact in dispute regarding whether the plaintiff had been in default on her loan obligations.

The Conways also cite to In re Shelton, 481 B.R. 22, 32 (W.D.Mo. 2012) for support that they have stated a claim under the MPA. We note first that this is bankruptcy case. The debtor in that case pleaded that the alleged misdeeds of the loan

servicer were tied to violations of the terms of the Deed of Trust that incorporated federal regulations in the event of a default. The debtor also alleged that she did not receive the benefits for the premiums that she paid on mortgage insurance, an arguably separate sales transaction. The Conways make no such similar allegations. The bankruptcy court recognized the precedent of Professional Debt, 351 S.W.3d at 674 that held that “‘actions occurring after the initial sales transaction, which do not relate to any claims or representations made before or at the time of the initial sales transaction.’ are not made ‘in connection with’ the sale or advertisement as required by the [M]PA.” Shelton, 481 B.R. at 32. It then went on to constrain the holding in Professional Debt by distinguishing on the basis that the actions of an abusive third party debt collector in that case were different from the case before it, wherein “[t]he agreement at issue here involves a long-term relationship between the parties (and their successors) and expressly encompasses the possibility of such events as default and the exercise of rights on default.” However, this is true of any sort of financing arrangement, such as purchasing a car, and also assumes that mortgage loans will not be sold multiple times. The bankruptcy court recognized the problem with its interpretation when it explicitly recognized “the apparent disconnect between the initial transaction and later breaches of promise[.]” Its interpretation deprives the statutory phrase “in connection with” of any significant meaning. We find the bankruptcy court’s opinion on this issue to be neither binding nor persuasive.

The Conways also rely on Schuchmann v. Air Services Heating & Air Conditioning, Inc., 199 S.W.3d 228 (Mo. App. 2006) for the proposition that the MPA applies to post-sale conduct. This Court in Portfolio Recovery, 351 S.W.3d at 667,

distinguished Schuchmann, noting that in that case the improper conduct, failing to honor a lifetime warranty, occurred after the sale, but was clearly “in connection with” the sale of the lifetime warranty that was purchased at the same time as the air conditioning unit. We agreed with Schuchmann that the plain language of the MPA applies to post-sale conduct, “but only when such conduct directly relates to the sale or advertisement of merchandise.” Id.

This Court’s previous holdings in Portfolio Recovery and in Professional Debt correctly interpreted and applied section 407.020. The MPA does apply to deceptive or unfair post-sale conduct, but only when such conduct is “in connection with” the sale or advertisement of merchandise. Professional Debt, 351 S.W.3d at 674. It does not apply to actions that occur after the initial sales transaction that do not relate to any representations or claims made before or at the time of the initial sales transaction. Id. The trial court did not err in granting the Motion to Dismiss for Failure to State a Claim under the MPA. We do not address whether or not CitiMortgage and/or Fannie Mae engaged in improper actions, or whether the Conways might have other causes of actions against them under other federal or state statutes, or at common law.

The judgment of the trial court is affirmed.⁴



CLIFFORD H. AHRENS, Judge

Roy L. Richter, P.J., concurs.
Glenn A. Norton, J., concurs.

⁴ The Conways’ Motion for Attorney’s Fees is denied.