

DA 18-0018

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 11N

MICHAEL MUNOZ and AMY MUNOZ,

Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A., WELLS FARGO N.A.,
and ITS SUBSIDIARY WELLS FARGO HOME MORTGAGE,

Defendants and Appellees.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV 15-841
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Amy Munoz, Michael Munoz, self-represented, Dayton, Montana

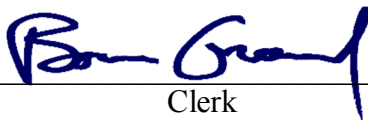
For Appellees:

Kenneth K. Lay, Crowley Fleck, PLLP, Helena, Montana

Submitted on Briefs: December 12, 2018

Decided: January 15, 2019

Filed:


Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellants Michael and Amy Munoz (the Munoz) appeal the entry of summary judgment and denial of their motion to compel and motion for sanctions by the Montana First Judicial District Court, Lewis and Clark County.

¶3 This case arises from the Munoz' attempts to secure a modification of their home loan, serviced by Wells Fargo, through the federal Home Affordable Modification Program (HAMP). In 2003, the Munoz obtained a loan from Wells Fargo for \$890,000, secured by a deed of trust on their property on Flathead Lake. In 2009, the Munoz sought a modification of this loan from Wells Fargo. The Munoz alleged that Wells Fargo advised them that, to qualify for a loan modification, they must intentionally fail to make a payment on their loan. Allegedly acting on this advice from Wells Fargo, the Munoz defaulted on the loan in 2009, leading to foreclosure in 2010. In late 2009 or early 2010, the Munoz' loan modification application was denied because the unpaid loan balance exceeded HAMP guidelines. Then, in March 2010, the Munoz' loan modification application was denied due to their failure to provide Wells Fargo with necessary documentation. The

Munoz' loan modification was again denied in April 2010 for the same reason. In late 2010, the Munoz brought their loan balance current, and the loan was reinstated.

¶4 The Munoz sought another loan modification from Wells Fargo in 2013. The Munoz allege that Wells Fargo again told them they must intentionally fail to make a loan payment to qualify for a modification. Allegedly acting on this advice, the Munoz defaulted on their loan in December 2013. In early 2014, the Munoz again applied to modify the terms of their loan. This loan modification was rejected in late 2014 because, according to Wells Fargo, the Munoz failed to provide necessary documentation.

¶5 The Munoz filed a lawsuit against Bank of America, N.A., Wells Fargo Bank, N.A., and Wells Fargo Home Mortgage in October 2015, alleging negligence and/or breach of the duty of good faith and fair dealing, negligent misrepresentation, constructive fraud, fraud, violations of Montana's Consumer Protection Act, and conspiracy, due to Wells Fargo's denial of their loan modification.¹ The Munoz also alleged, among other things, that Wells Fargo: (1) advised them to intentionally miss loan payments; (2) unfairly withheld information from them, including information about HAMP and other loan modification programs; and (3) attempted to coerce the Munoz into stealing confidential business information from their employers. The Munoz sought punitive damages and injunctive relief.

¹ Bank of America was named as a defendant, but all allegations regarding communications with the Munoz and the handling of their loan modification requests were made against Wells Fargo.

¶6 In November 2016, the Munoz filed a motion to compel against Wells Fargo for production of various communications and information, including other complaints against Wells Fargo where Wells Fargo told individuals to miss their loan payments, and tax returns of Wells Fargo and Bank of America, which the District Court denied. In December 2016, the Munoz sought discovery sanctions against Wells Fargo for wrongfully withholding “discoverable audio recordings,” which the District Court also denied. Wells Fargo then moved for partial summary judgment on Amy Munoz’ claims, which the District Court granted in April 2017, reasoning that “Amy testified she was ‘not sure’ whether she and her husband sought to modify their home loan and that she had never completed an application for a loan modification. Notably, [Wells Fargo’s] actions related to servicing [the Munoz’] mortgage and home loan modification applications are the entire basis of this lawsuit.” Wells Fargo then moved for summary judgment on all claims, which the District Court granted in May 2017, reasoning that the evidence submitted by the Munoz in support of their claims was “insufficient to establish a genuine issue of material fact” and that Wells Fargo was entitled to judgment as a matter of law. The Munoz appeal, seeking reversal of the orders regarding summary judgment, their motion to compel, and their request for sanctions.

¶7 “We review de novo a district court’s grant or denial of summary judgment, applying the same criteria as the district courts.” *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 19, 345 Mont. 262, 191 P.3d 389 (citation omitted). “Summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on

file,’ together with any affidavits demonstrate that no genuine issue exists as to any material fact and that the party moving for summary judgment is entitled to judgment as a matter of law.” *Modroo*, ¶ 19 (citing M. R. Civ. P. 56(c)). “We view the evidence in the light most favorable to the party opposing summary judgment, and we draw all reasonable inferences in favor of the party opposing summary judgment.” *Modroo*, ¶ 19.

¶8 “We employ an abuse of discretion standard in reviewing a district court’s imposition of sanctions for discovery abuse.” *Peterman v. Herbalife Int’l, Inc.*, 2010 MT 142, ¶ 14, 356 Mont. 542, 234 P.3d 898. In considering whether an abuse of discretion occurred, we defer to the district court “because it is in the best position to determine both whether the party in question has disregarded the opponent’s rights, and which sanctions are most appropriate.” *Johnson v. Booth*, 2008 MT 155, ¶ 13, 343 Mont. 268, 184 P.3d 289 (citation and quotation omitted). Finally, “we review a district court’s denial of a motion to compel discovery for abuse of discretion.” *Citizen Advocates for a Livable Missoula, Inc. v. City Council*, 2006 MT 47, ¶ 37, 331 Mont. 269, 130 P.3d 1259.

¶9 The Munoz argue the District Court erred by granting Wells Fargo’s motion for summary judgment and denying their motions to compel and for sanctions, asserting they presented genuine issues of material fact and credible evidence of discovery abuses. Three of the Munoz’ claims are rooted in negligence. To prevail in an action for negligence, a plaintiff must demonstrate “a duty, breach of that duty, causation, and damages.” *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 33, 375 Mont. 38, 324 P.3d 1167 (citation omitted). “The existence of a duty is a question of law for determination by the court. . . . Once a

duty has been established, the breach of that duty is a question of fact to be resolved by a jury.” *Morrow*, ¶ 33 (citations omitted).

¶10 Generally, “a bank has no duty to modify or renegotiate a defaulted loan.” *Morrow*, ¶ 34 (citation omitted). Moreover, the relationship between a bank and its customer generally does not give rise to a fiduciary duty; rather, it is usually “described as that of a debtor and creditor.” *Morrow*, ¶ 34 (quoting *Deist v. Wachholz*, 208 Mont. 207, 216, 678 P.2d 188, 193 (1984) (internal citation omitted)). “However, where a bank goes beyond the ordinary role of a lender of money and actively advises customers in the conduct of their affairs, the bank may owe a fiduciary duty.” *Morrow*, ¶ 34 (citation omitted).

¶11 While the Munoz allege that Wells Fargo loan officers instructed them to miss payments in 2009 and 2013, the Munoz provided no evidence of this beyond their own uncertain assertions. Nor did they offer any evidence demonstrating that Wells Fargo otherwise actively advised them “in the conduct of their affairs.” *Morrow*, ¶ 34. In the audio files and transcripts of phone conversations between the Munoz and Wells Fargo, no one instructed the Munoz to miss loan payments. In depositions, the Munoz could not recall whether they were directly told by Wells Fargo to miss payments—rather, the Munoz asserted that it was their “understanding” and “interpretation” that they needed to miss payments. These unsupported, conclusory statements are insufficient to raise genuine issues of material fact. *Abraham v. Nelson*, 2002 MT 94, ¶ 22, 309 Mont. 366, 46 P.3d 628. Thus, the Munoz have failed to satisfy their burden to establish that Wells Fargo owed them a duty. Because Wells Fargo did not owe a duty to the Munoz, they could not have

breached their duty to the Munoz. Thus, the Munoz' claims of negligence, negligent misrepresentation, and breach of duty of good faith and fair dealing fail, and the District Court did not err by entering summary judgment for Wells Fargo.

¶12 Even if the Munoz could prove duty and breach, they did not establish that Wells Fargo was the cause-in-fact of their alleged injury—the denial of their loan modifications—because the Munoz did not produce evidence demonstrating that, but for Wells Fargo's conduct, they would have been otherwise eligible for a loan modification. In order to defeat the motion for summary judgment, the Munoz must have offered “evidence of a substantial nature” demonstrating that a genuine issue of material fact existed. *McGinnis v. Hand*, 1999 MT 9, ¶ 18, 293 Mont. 72, 972 P.2d 1126.

¶13 Here, Wells Fargo produced an affidavit from a banking expert, explaining that the Munoz could not have qualified for a loan modification because the loan obligation exceeded HAMP program limits. Moreover, the Munoz had other debts, including a \$2 million loan, which put the Munoz' debt-to-income ratio above HAMP program limits. The Munoz offered no evidence contradicting Wells Fargo's expert, aside from their own conclusory statements, which are insufficient to raise genuine issues of material fact. *Abraham*, ¶ 22. Indeed, the Munoz acknowledged in a deposition that they did not qualify for a loan modification. The Munoz offered no credible evidence demonstrating that Wells Fargo was the cause-in-fact of their injury, and as such, no conflict in material facts existed and summary judgment was appropriate.

¶14 The Munoz also allege that Wells Fargo failed to evaluate them for other assistance programs, resulting in their claimed injury. However, the Munoz offered no evidence beyond their own speculations that Wells Fargo failed to evaluate them for other assistance programs, or any evidence that they would have qualified for any other assistance programs had they been evaluated. Thus, the Munoz failed to establish that but for Wells Fargo's conduct, they would have qualified for some other assistance program. Because the Munoz failed to demonstrate a genuine issue of material fact related to causation, summary judgment was warranted.

¶15 As to the Munoz' claims for fraud, violation of the Montana Consumer Protection Act, and civil conspiracy, the Munoz again fail to present evidence establishing a genuine issue of material fact. In support of these claims, the Munoz only offer unsupported statements, which are insufficient to defeat a motion for summary judgment. *Abraham*, ¶ 22.

¶16 The Munoz also argue the District Court erred by denying their motion to compel and motion for sanctions based on alleged discovery abuses by Wells Fargo. To support these allegations, the Munoz point to irregularities in Wells Fargo's production of audio recordings of telephone conversations between the Munoz and Wells Fargo. In response, Wells Fargo argues these errors were simple oversight and were not intended to be misleading, and that they eventually produced all available non-privileged audio recordings, including transcripts of those recordings. Wells Fargo supplemented their initial discovery responses five times. We recognize that the Munoz, as pro se litigants,

would find it frustrating to adequately prepare for their case without initially possessing the audio recordings, and that the errors by Wells Fargo may well have looked to them like intentional withholding of discovery, but the District Court found that there was no evidence of discovery abuse by Wells Fargo. While Wells Fargo could have exercised better care in answering the Munoz' discovery requests, its oversight did not affect the outcome of the case. Montana Rule of Civil Procedure 37(c) provides for the imposition of sanctions when a party fails to disclose requested, discoverable information, or fails to timely supplement an earlier discovery response. Here, the record indicates that Wells Fargo disclosed the audio recordings and supplemented their earlier discovery responses with the audio recordings and transcripts. The Munoz' claims that Wells Fargo intentionally withheld, destroyed, or altered responsive documents is unsupported. Thus, the District Court did not abuse its discretion by denying the Munoz' motion for sanctions.

¶17 As to the motion to compel, the Munoz sought the production of several categories of information—including complaints against Wells Fargo where Wells Fargo told individuals to miss their loan payments, and Wells Fargo and Bank of America tax returns—which the District Court found to be irrelevant, cumulative, or vague. The court found that Wells Fargo had already satisfied discovery obligations as to this information, or that discovery of the requested information was inappropriate. We conclude the District Court did not abuse its discretion by denying the Munoz' motion to compel.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the

Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's conclusions of law were correct.

¶19 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH

/S/ DIRK M. SANDEFUR

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON