NO. COA12-1246
NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2013

TAMERA COLLINS DAVIS, KEVIN S. DAVIS, KIMESHA SPINKS, and MARCIE JONES,
Plaintiffs,

v. Randolph County
No. 11 CVS 2696

CHASE HOME FINANCE, LLC, JPMORGAN CHASE BANK, N.A., and BROCK & SCOTT, PLLC, Substitute Trustee,
Defendants.

Plaintiffs appeal from orders entered 19 March 2012 and 31 May 2012 by Judge John O. Craig, III in Randolph County Superior Court. Heard in the Court of Appeals 11 March 2013.

Barry Snyder for plaintiffs-appellants.

Bell, Davis & Pitt, P.A., by Bradley C. Friesen, for defendants-appellees.

HUNTER, Robert C., Judge.

In 2004, plaintiffs-appellants Tamera and Kevin Davis signed a promissory note in the amount of $268,000.00 ("the note") secured by a deed of trust on the Davis's residential real estate in Archdale, North Carolina ("the subject

property"). Defendant-appellee JP Morgan Chase Bank, N.A. ("Chase Bank")[1] is now the holder of the Davis's promissory note. The Davises separated, moved out of the home, and stopped making payments on the note in late 2009 or early 2010. Tamera retained real estate agent Marcie Jones ("Jones") to sell the home in a short sale. In the listing agreement, Tamera acknowledged that any party holding a lien on the house was not obligated to approve a short sale.

Tamera informed Chase Bank that she was attempting to sell the house and had a buyer willing to pay $210,000.00 for the property; the prospective buyer was plaintiff Kimesha Spinks ("Spinks"). Tamera sought approval from Chase Bank for a "work out option" whereby Tamera and Tamera's father would pay any difference between the sale price of the home paid by Spinks and the amount due on the Davis's note. Chase Bank did not agree to this arrangement.

Tamera and Kevin Davis, Spinks, and Jones (collectively "plaintiffs") filed the underlying complaint on 25 October 2011 against Chase Home Finance, LLC, Chase Bank, and Brock & Scott,

[1] JP Morgan Chase Bank, N.A. is the surviving entity of the merger of Chase Home Finance, LLC and JP Morgan Chase Bank, N.A.

PLLC, the substitute trustee[2]. Plaintiffs' original complaint alleged five claims against defendants: (1) unfair and deceptive trade practices, (2) unfair debt collection practices, (3) promissory estoppel, (4) unjust enrichment, and (5) sought injunctive relief pursuant to N.C. Gen. Stat. § 45-21.34.

Chase Bank moved for dismissal of plaintiffs' original complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure alleging plaintiffs' complaint failed to state a claim upon which relief could be granted; plaintiffs moved to amend their complaint. Chase Bank's motion to dismiss was granted as to plaintiffs' five claims in the original complaint, but plaintiffs were permitted to amend the complaint to add two additional claims: (6) breach of contract, and (7) breach of servicer participation agreements.

Chase Bank moved for attorneys' fees and for dismissal of plaintiffs' amended complaint pursuant to Rule 12(b)(6) alleging that the amended complaint filed to state a claim upon which relief could be granted. Plaintiffs filed motions to reconsider, to amend the judgment, and to alter or amend the judgment pursuant to Rules 52, 59, and 60 of the North Carolina Rules of Civil Procedure.

---

[2] Plaintiffs voluntarily dismissed their claims against Brock & Scott, PLLC.

On 31 May 2012, the trial court entered an order dismissing plaintiffs' amended complaint, denying defendant's motion for attorneys' fees, and denying plaintiffs' motions to reconsider, amend, or alter the judgment. Plaintiffs appeal.

Discussion

Plaintiffs raise several arguments alleging that the trial court erred in granting Chase Bank's motion to dismiss plaintiffs' claims for failure to state a claim for which relief could be granted. We disagree.

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

> Although it is true that the allegations of plaintiffs['] complaint are liberally

> construed and generally treated as true, the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint. Furthermore, the trial court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."

Laster v. Francis, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citations omitted).

In the original and amended complaints, plaintiffs asserted seven claims for relief: (1) unfair and deceptive trade practices, (2) unfair debt collection practices, (3) promissory estoppel, (4) unjust enrichment, (5) injunctive relief pursuant to N.C. Gen. Stat. § 45-21.34, (6) breach of contract, and (7) breach of servicer participation agreements. Plaintiffs have failed to present any argument in their brief as to how the trial court erred in dismissing the first five claims of their original complaint. Accordingly, plaintiffs' appeal from the dismissal of these five claims is deemed abandoned. N.C. R. App. P. 28(b)(6) (2012); *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein.").

Breach of Contract

Plaintiffs allege the trial court erred in dismissing their claim for breach of contract as, they contend, Chase Bank breached its contractual obligation under the promissory note by refusing to allow Tamera to prepay the note in full. We disagree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (citation and quotation marks omitted). If a complaint alleges these elements "it is error to dismiss a breach of contract claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)." *Id.*

In support of their argument, plaintiffs cite paragraph 4 of the note which provides that:

> I[, borrower,] have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.

Chase Bank argues that it has not breached this term of the contract because plaintiffs have not tendered payment by actual

production of the balance due under the note in the form of cash, check, or money order: "[T]ender imports not merely the readiness and the ability to pay or perform, but also the actual production of the thing to be paid or delivered over, and an offer of it to the person to whom the tender is to be made." *Parks v. Jacobs*, 259 N.C. 129, 130, 129 S.E.2d 884, 885 (1963).

In *Parks*, the plaintiff attempted to exercise an option to purchase real property by offering to make a payment to the defendants of the balance due under the option contract. *Id.* The *Parks* Court concluded that the defendants' obligation under the contract was conditioned on the plaintiff's payment of the amount due and execution of a promissory note and deed of trust. *Id.* The execution of the note and deed of trust were not in dispute, but the plaintiff "had the burden of showing payment or a tender and refusal to accept." *Id.* "The fact that plaintiff was able to pay, standing alone, was not sufficient to bind defendants." *Id.* Similarly, here, plaintiffs have not alleged that they have paid Chase Bank in full or Chase Bank refused plaintiffs' tender of full payment. Plaintiffs have merely alleged that Tamera "offered an arrangement" whereby she would sell the home in a short sale and thereafter pay any deficiency due under the note.

Furthermore, the deed of trust securing the note provides that Chase Bank must release its security interest in the home "[u]pon payment of all sums" secured by the deed of trust. Plaintiffs point to no provision in the note or deed of trust that requires Chase Bank to release its lien before receiving payment in full. Plaintiffs have not alleged that "all sums" have been paid under the note. Accordingly, plaintiffs failed to state a claim of relief for breach of contract, and the trial court's dismissal of the claim was not error.

Breach of Servicer Participation Agreements

Plaintiffs claim that Chase Bank's actions were a breach of the Servicer Participation Agreements ("SPAs"). We disagree.

Plaintiffs allege that the SPAs is an agreement between Chase Bank and the federal government by which Chase Bank agreed that its services would (1) comply with state and federal laws designed to prevent unfair lending practices and (2) conform to high professional standards of care using qualified individuals with suitable training and experience to perform those services. Plaintiffs allege that Chase Bank's actions violated this agreement resulting in damages to plaintiffs.

To the extent that plaintiffs contend that their claim that Chase Bank breached the SPAs is supported by plaintiffs' breach

of contract claim, we have already concluded that the trial court did not err in dismissing plaintiffs' breach of contract claim. Plaintiffs also contend that the trial court's remarks that defendants were a bunch of "bureaucratic nincompoops" and "obviously didn't do a good job of customer service" establish that defendants failed to meet their obligations under the SPAs. We note that despite the trial court's unfavorable characterization of Chase Bank's actions, the trial court dismissed plaintiffs' claims. As we are not required to accept as true plaintiffs' allegations "that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Laster*, 199 N.C. App. at 577, 681 S.E.2d at 862, we conclude the trial court did not err in dismissing plaintiffs' claim.

Equitable Right of Redemption

Plaintiffs contend Tamera and Kevin are entitled to exercise their equitable right of redemption by paying Chase Bank in full for the amount due under the note in exchange for title to the home. We disagree.

Plaintiffs cite *Lamberth v. McDaniel*, 131 N.C. App. 319, 321-22, 506 S.E.2d 295, 297 (1998), in which this Court affirmed that the defendants in an installment land sale contract were entitled to exercise a right to redeem title to the property

that was the subject of the contract after the defendants had defaulted on the contract: "[U]pon default, vendee-mortgagors have the right to redeem their interest under the contract to prevent forfeiture." We held that the trial court properly determined that the defendants were entitled to redeem the property "by the payment to the plaintiffs of the balance due of the purchase price, plus interest and ad valorem taxes." *Id.* at 322, 506 S.E.2d at 297. Plaintiffs' reliance on *Lamberth*, however, is misplaced as the defendants in that case alleged they had tendered the entire balance due under the installment land sale contract upon being served with the plaintiffs' complaint. *Id.* at 320, 506 S.E.2d at 296. Here, as discussed above, plaintiffs have not tendered or alleged that they have tendered payment of the balance due under the mortgage and deed of trust. Consequently, the trial court did not err in dismissing their claim. *See id.* at 322, 506 S.E.2d at 297 ("[U]til a vendee has made full payment he is not in condition [sic] to demand conveyance of the land." (citation and quotation marks omitted)).

The SAFE Act

Plaintiffs cite the North Carolina Secure and Fair Enforcement (S.A.F.E.) Mortgage Licensing Act ("the SAFE Act"),

N.C. Gen. Stat. §§ 53-244 through 53-244.121 (2012). Specifically, plaintiffs quote section 53-244.110, which provides the duties required of a "mortgage servicer engaged in the mortgage business," and N.C. Gen. Stat. § 53-244.111, which proscribes specific acts related to residential mortgage loan transactions. The arguments plaintiffs make regarding these statutes are that Chase Bank violated the SAFE Act in that it (1) refused to negotiate a short sale and (2) that it improperly influenced the appraisal of the subject property. However, plaintiffs did not allege a breach of the SAFE Act in their original or amended complaint. As such, these claims are not properly before this Court. *See Iadanza v. Harper*, 169 N.C. App. 776, 781, 611 S.E.2d 217, 222, *disc. review denied*, 360 N.C. 63, 621 S.E.2d 624 (2005).

Motions for Reconsideration and to Amend Judgment

As Chase Bank notes, plaintiffs have provided no argument in support of their appeal from the trial court's order denying plaintiffs' motions for reconsideration and to amend the judgment filed pursuant to Rules 52, 59, and 60. Accordingly, plaintiffs' appeal from that order is deemed abandoned. N.C. R. App. P. 28(b)(6).

Conclusion

For the reasons stated above, we affirm the trial court's orders.

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).