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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-334

Filed: 15 November 2016

Orange County, No. 15 CVS 1063

KATHLEEN SPITZER-TREMBLAY, Plaintiff,

v.

WELLS FARGO BANK, N.A., Defendant.

Appeal by plaintiff from order entered 15 December 2015 by Judge Paul C. Ridgeway in Orange County Superior Court. Heard in the Court of Appeals 21 September 2016.

Hastings Law & Counsel, PLLC, by Taylor S. Hastings, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, LLP, by B. Chad Ewing, for defendant-appellee.

ENOCHS, Judge.

Plaintiff Kathleen Spitzer-Tremblay ("Plaintiff") appeals the order granting the motion to dismiss of Defendant Wells Fargo Bank, N.A. ("Bank"). For the reasoning outlined below, we must affirm the trial court's dismissal of each of the Plaintiff's claims for failure to state a claim for which relief may be granted.

Factual Background

On 11 July 2007, Plaintiff obtained an equity line of credit from the Bank, secured with a second-priority lien on her home. On 7 November 2008, Plaintiff and the Bank entered into a modification agreement that temporarily lowered her monthly loan payment because she was unable to pay the minimum monthly amount due on the loan. Even after the loan modification agreement, Plaintiff was still having financial difficulties, and she initiated a Chapter 7 bankruptcy case in the United States Bankruptcy Court for the Middle District of North Carolina on 25 March 2009. As part of her petition for bankruptcy, Plaintiff filled out a "Chapter 7 Individual Debtor's Statement of Intention" with respect to the Bank's loan indicating that she intended to keep the property secured by the Bank's loan as exempt property, and would continue making loan payments.

Plaintiff's sworn statement on the "Statement of Intention" indicated that she was aware that her monthly payment of $315.00 resulting from her modification agreement with the Bank was temporary (lasting 12 months) and would increase approximately $800.00 in December 2009. Plaintiff subsequently obtained her bankruptcy discharge, and on 20 July 2009 a final bankruptcy decree was entered.

After December 2009, the month when Plaintiff acknowledged her loan payments were to increase approximately $800.00, Plaintiff continued to pay only $315.00 per month. On 25 February 2010, the Bank sent Plaintiff a required pre-foreclosure letter explaining that, even though she had continued to pay $315.00 a

month, she was in default on the loan. Plaintiff alleges that she called the Bank and was told to ignore the notice and continue making payments as outlined in the alleged "Bankruptcy Order."[1]

Twice more, Plaintiff received a letter from the Bank informing her that she was in default, and twice more she allegedly called the Bank and was told to ignore the notices and continue to make payments in the amount she had been paying. Plaintiff continued making these payments and retired from employment in 2014.

On 9 September 2014, the Bank sent Plaintiff a notice, informing her that her new monthly payment would now total $924.45, at an 8.25% interest rate, starting on 25 December 2014. When she failed to make a payment in the new amount, the Bank sent her a Notice of Right to Cure Default. When she did not cure her default, the Bank tried to work with her and offered her a "Temporary Payment Plan." To take advantage of this plan, Plaintiff would be required to obtain CitiMortgage's consent to subordinate its first priority lien interest in Plaintiff's home to the Bank's interest. Plaintiff believed that this was impossible and she would not be able to comply with this demand. Finally, on 9 July 2015, the Bank notified the Plaintiff that the information provided to her in her previous communications with its bankruptcy department was incorrect and the result of an error.

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[1] Throughout the Plaintiff's Complaint and Appellate Brief the Plaintiff continues to call the "Statement of Intention" the Bankruptcy Order. Plaintiff even entered the "Statement of Intention" into the Appellate Record for this case calling it a Bankruptcy Order.

Plaintiff filed a verified complaint in Orange County Superior Court on 19 August 2015 against the Bank. The Bank filed a motion to dismiss in response to Plaintiff's complaint on 23 October 2015 and it was heard on 7 December 2015 before the Honorable Paul C. Ridgeway. The trial court entered an order granting the Bank's motion to dismiss on 15 December 2015. Plaintiff timely appealed.

Analysis

"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) (internal citation omitted). Legal conclusions, however, are not entitled to a presumption of validity and dismissal is proper when one of the following three conditions is satisfied: " '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (quoting *Guyton v. FM Lending Servs., Inc.,* 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009)).

"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).

I. Unfair & Deceptive Trade Practice

To establish a prima facie claim under N.C. Gen. Stat. § 75-1.1(a) (2015), a plaintiff must show: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Id.* While the scope of "commerce" under N.C. Gen. Stat. § 75.1-1(a) is broad, "it is not intended to apply to all wrongs in a business setting." 353 N.C. at 657, 548 S.E.2d at 711. " 'Moreover, [s]ome type of *egregious or aggravating* circumstances must be alleged and proved before [section 75-1.1(a)'s] provisions may [take effect].' " *Phelps Staffing, LLC v. C.T. Phelps, Inc.*, 226 N.C. App. 506, 512, 740 S.E.2d 923, 928 (2013) (quoting *Dalton*, 353 N.C. at 657, 548 S.E.2d at 711).

The one item listed in Plaintiff's first claim for relief that could be construed to be an unfair and deceptive trade practice is that the Bank "fraudulently obtained a promissory note through making unlawful threats[.]" What Plaintiff seems to allege

is that the Bank threatened foreclosure to induce Plaintiff into signing the temporary payment plan that renegotiated her terms and rate of interest. However, her complaint alleges that the Bank already had the mortgage or "promissory note" from when the original secured lien was created. Furthermore, the threat of foreclosure was not unethical or unscrupulous because it was a legal remedy that the Bank and Plaintiff had contracted to allow in the event of Plaintiff's default. "[T]he threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se*, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971). In this case, the "threat" was directly related to the subject of the proceedings because the Plaintiff's default gave the Bank the contractual right to begin foreclosure proceedings. Therefore, Plaintiff did not allege sufficient facts to support a claim for unfair and deceptive trade practices. Thus, the trial court did not err in dismissing this claim.

II. <u>Fraud/Constructive Fraud</u>

Fraud can be divided into two categories: actual and constructive. "Actual fraud is the more common type, arising from arm's length transactions." *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). The elements of fraud are as follows: " '(1) That defendant made a representation relating to some material past

or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation and acted upon it; and (6) that plaintiff thereby suffered injury.' " *In re Baby Boy Shamp*, 82 N.C. App. 606, 612, 347 S.E.2d 848, 852 (1986) (quoting *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E.2d 444, 446 (1955)).

"[T]o establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the [alleged] misrepresentation and allege that he 'was denied the opportunity to investigate or that he could not have learned [. . . the true facts] by exercise of reasonable diligence.' " *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.* 368 N.C. 440, 454, 781 S.E.2d 1, 11 (2015) (quoting *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 369, 760 S.E.2d 263, 267 (2014)). "Reliance is not reasonable if a plaintiff fails to make any independent investigation or fails to demonstrate he was prevented from doing so." *Id.* at 449, 781 S.E.2d at 8 (internal citation and quotation marks omitted). "Further, a plaintiff must establish that the lender proximately caused his injury." *Id.*

In this case, Plaintiff did not allege enough facts to show that she made an independent inquiry or investigation or that she was denied the opportunity to do so. Because she did not satisfy this element, her allegation of fraud must fail.

Constructive fraud, on the other hand, is less common and arises in circumstances where a confidential relationship exists. Charging actual fraud is "more exacting" than charging constructive fraud. *Patuxent Dev. Co. v. Bearden*, 227 N.C. 124, 128, 41 S.E.2d 85, 87 (1947).

To survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage in order to benefit himself, and (3) that plaintiff was, as a result, injured. *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003). Intent to deceive is not an element of constructive fraud. *Link*, 278 N.C. at 192, 179 S.E.2d at 704.

Again, in this case, Plaintiff's claim must fail. Plaintiff did not allege that there was a relationship of trust and confidence between her and the Bank. While it could be assumed that there was such a relationship, it must be pled for her claim to survive a motion to dismiss. Therefore, the trial court was correct in granting the Bank's motion to dismiss regarding the fraud and constructive fraud claims.

III. Breach of Fiduciary Duty

"This Court has held that a '[b]reach of fiduciary duty is a species of negligence or professional malpractice.' " *Carlisle v. Keith*, 169 N.C. App. 674, 682, 614 S.E.2d

542, 548 (2005) (quoting *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990)). Consequently, " 'these claims require[] proof of an injury proximately caused by the breach of duty.' " *Farndale Co. v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006) (quoting *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 601, 534 S.E.2d 233, 237 (2000)).

Regarding a fiduciary duty between a creditor and debtor, the Supreme Court said:

> In an ordinary debtor-creditor transaction, the lender's duties are defined by the loan agreement and do not extend beyond its terms. This Court has held on many occasions that [o]ne who executes a written instrument is ordinarily charged with knowledge of its contents. A fiduciary duty generally arises when one reposes a special confidence in another, and the other in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. [T]he law does not typically impose on lenders a duty to put borrowers' interests ahead of their own, though it is possible, at least theoretically, for a particular bank-customer transaction to give rise to a fiduciary [relationship] given the proper circumstances. Here plaintiffs fail to allege any special circumstances that could establish a fiduciary relationship. Plaintiffs' allegations establish nothing more than a typical debtor-creditor relationship, wherein any duty would be created by contract through the loan agreement.

Arnesen, 368 N.C. at 449, 781 S.E.2d at 8 (internal citations and quotation marks omitted). *Arnesen* is exactly on point for the situation in the present case. Here Plaintiff did not sufficiently allege facts that would establish any duty beyond that of two parties operating at arm's length as creditor and debtor. Therefore, her claim for

breach of fiduciary duty must fail, and we hold the trial court did not err in dismissing this claim.

IV. Negligent Misrepresentation

"North Carolina expressly recognizes a cause of action in negligence based on negligent misrepresentation." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 483, 593 S.E.2d 595, 600 (2004) (internal quotation marks omitted). "It has long been held in North Carolina that '[t]he tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care.' " *Simms v. Prudential Life Ins. Co. of. Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (internal brackets omitted) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991)).

Based on our above discussion of reasonable or justifiable reliance, we similarly hold that Plaintiff did not reasonably rely on the information provided by the Bank because she did not make any independent investigation as to what the Bank was communicating to her, or allege why she could not do so. Therefore, Plaintiff's claim for negligent misrepresentation was correctly dismissed by the trial court.

V. North Carolina Debt Collection Act Violation

The North Carolina Debt Collection Act ("NCDCA") contains three threshold requirements before a claim based upon alleged unfair debt collection practices may be considered. First, the party alleging the claim must be a "[c]onsumer." N.C. Gen. Stat. § 75-50(1) (2015). Second, the obligation incurred must be a "[d]ebt." N.C. Gen. Stat. § 75-50(2). Third, the party against whom the claim is alleged must be a "[d]ebt collector." N.C. Gen. Stat. § 75-50(3). NCDCA does not limit the definition of debt collector only to those collecting debts on behalf of others; any person engaging in debt collection from a consumer falls within the statutory definition. *Id.*

"Once these three threshold requirements are satisfied . . ., [we] next apply the more generalized requirements of all unfair or deceptive trade practice claims: (1) an unfair act (2) in or affecting commerce (3) proximately causing injury." *Davis Lake Cmty. Ass'n v. Feldmann*, 138 N.C. App. 292, 296, 530 S.E.2d 865, 868 (2000); *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998).

In this case, because her unfair and deceptive trade practice claim was properly dismissed, Plaintiff was unable to allege sufficient facts to establish a NCDCA violation. Therefore, the trial court did not err in dismissing this claim.

VI. <u>Breach of Duty of Good Faith and Fair Dealing</u>

" 'In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the

benefits of the agreement.' " *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (quoting *Harrison v. Cook*, 312 Cal. App. 2d 527, 530, 29 Cal. Rptr. 269, 271 (1963)). However, if there is not any allegation of breach of contract, then "it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts." *Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (2012).

Finally, this claim was properly dismissed because Plaintiff did not allege that the Bank breached any contract between the two parties. In her complaint, Plaintiff did not allege a single fact tending to show that the Bank breached any term of the lending contract between the parties. Therefore, this claim was properly dismissed by the trial court.

Conclusion

For the forgoing reasons, the order of the trial court dismissing all of Plaintiff's claims was without error. Therefore, the order is affirmed.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).