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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-592

Filed: 20 November 2018

Catawba County, No. 16-CVS-1395

STEVE D. BRYANT, Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC and SUBSTITUTE TRUSTEE SERVICES, INC.,
Defendants.

Appeal by plaintiff from judgment entered 10 October 2016 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 9 January 2018.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiff-appellant.

McGuire Woods, LLP, by Nathan J. Taylor, for Defendant-Appellee Nationstar Mortgage, LLC.

Hutchens Law Firm LLP, by Lacey Moore Duskin, for Defendant-Appellee Substitute Trustee Services, Inc.

BERGER, Judge.

Steve D. Bryant (“Plaintiff”) appeals the dismissal of several claims for relief he had asserted against Nationstar Mortgage, LLC (“Defendant Nationstar” or

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“Nationstar”) and Substitute Trustee Services, Inc. (“Defendant Substitute Trustee Services” or, collectively with Nationstar, “Defendants”). For the reasons stated below, we affirm the trial court’s dismissal of Plaintiff’s complaint.

Factual and Procedural Background

Because the judgment here under review dismissed Plaintiff’s complaint for failure to state claims for which relief can be granted, our review is restricted to the facts as alleged in the complaint. Generally, Plaintiff’s claims arose from alleged actions by Defendants in their foreclosure of Plaintiff’s property located in Hickory, North Carolina, which he had owned since December 21, 2005.

On April 5, 2007, Plaintiff refinanced his property by granting an initial deed of trust with a principal amount of \$584,000.00, and also an equity line of credit deed of trust with a principal amount of \$73,000.00. Through a series of assignments, Defendant Nationstar came to hold both deeds of trust.

On August 30, 2009, Plaintiff contracted with an insurance company to insure the property against “all direct physical loss or damage to the extent of \$649,000.00” for a term ending August 30, 2010. During that term, the dwelling situated on the property was destroyed by fire. To recoup its loss to its security for the debt, Defendant Nationstar filed suit against the property’s insurer and settled that suit for \$445,000.00 on May 29, 2013. Plaintiff alleged that both this “secret lawsuit” and the amount for which it was settled had been fraudulently hidden from him so that

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the proceeds of the settlement could be kept by Defendant Nationstar and not applied to Plaintiff's debt balance. Plaintiff alleged that had this amount been applied to the debt, his debt would have been satisfied.

Plaintiff further alleged that Defendant Substitute Trustee Services had a fiduciary duty owed to Plaintiff under which it should have enforced the terms of the deeds of trust. Defendant Substitute Trustee Services allegedly had a duty to investigate the lawsuit settlement amount and protect Plaintiff's interests in the foreclosure proceedings that were initiated by Defendant Nationstar at some point after the insurance settlement.

Defendant Nationstar initiated foreclosure proceedings by representing that Plaintiff owed a debt of \$764,037.96 and was in default, despite the fact that Nationstar had allegedly received \$445,000.00 that should have been applied to the balance of the loan. Plaintiff alleged that Defendant "Nationstar initiated and fraudulently continued with the foreclosure by fraudulently concealing the Settlement Amount." However, after a second foreclosure hearing before the Catawba County Clerk of Superior Court, "Nationstar and Substitute Trustee were informed that Nationstar could have been owed no more than \$197,970.67, and Nationstar and Substitute Trustee breached fiduciary duties to Bryant by continuing to proceed with the foreclosure."

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Plaintiff further alleged that on November 25, 2014, Defendant Nationstar allegedly “purchased the [p]roperty pursuant to a credit bid of \$391,332.04 [] that required [Defendant] Nationstar to apply th[is amount] to any amount Nationstar asserted Bryant owed.” Plaintiff also alleged that a surplus of \$193,361.37 should have been submitted to the Catawba County Clerk of Court, and then credited to him.

The complaint containing these allegations above asserted claims for fraud, constructive fraud, unjust enrichment, unfair and deceptive trade practices, breaches of a fiduciary duty, and breaches of contract including implied covenants of good faith and fair dealing; a claim for violations of the North Carolina statutes governing foreclosure; and a claim for violations of the North Carolina Debt Collections Act. In an order entered October 10, 2016, the trial court dismissed all claims included in Plaintiff’s complaint with prejudice. Plaintiff timely appeals.

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) (citations omitted). However, “conclusions of law or unwarranted deductions of fact are not admitted.” *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted). “This

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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 Products, 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).

"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." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007) (citation and quotation marks omitted).

In his complaint, Plaintiff alleged claims against Defendants for fraud, constructive fraud, breach of fiduciary duty, breach of contract, violation of North Carolina's Debt Collection Act, unjust enrichment, violation of North Carolina's statute governing foreclosure actions, and unfair and deceptive trade practices. Plaintiff contends the trial court erred in granting Defendants' motion to dismiss all of Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim for which relief can be granted. We disagree, and address each argument in turn.

I. Fraud, Constructive Fraud & Breach of Fiduciary Duty Claims

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“Fraud can . . . be broken 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 “essential elements of actual fraud are: (1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” *Id.*, 302 N.C. at 83, 273 S.E.2d at 677.

“In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” N.C. Gen. Stat. § 1A-1, Rule 9(b) (2017). “The particularity required cannot be satisfied by using conclusory language or asserting fraud through mere quotes from the statute.” *Terry*, 302 N.C. at 85, 273 S.E.2d at 678. “The particularity required by the rule generally encompasses the time, place and contents of the fraudulent representation, the identity of the person making the representation and what was obtained by the fraudulent acts or representations.” *Id.* (emphasis removed).

Here, in his complaint, Plaintiff did not allege that Defendants made any false representation or concealment of material fact that is considered by North Carolina law to fulfill this required element. On appeal, Plaintiff argues Defendants had a “duty to disclose” the filing of a separate lawsuit. However, Plaintiff is unable to establish that this particular duty, and its application to Defendants’ actions, is recognized by the law of our State. Plaintiff further asserts that Nationstar’s filing

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of a Form 1099-C with the United States Internal Revenue Service constituted fraudulent misrepresentation to Plaintiff. This also is unsupported by any articulable legal theory, and we decline to implement such a standard. Accordingly, without allegations recognized here as sufficient to fulfill a requisite element of fraud, Plaintiff's claim fails as a matter of law. Thus, the trial court did not err in dismissing Plaintiff's claim for fraud.

“Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less exacting than that required for actual fraud. When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit.” *Head v. Gould Killian CPA Grp., P.A.*, ___ N.C. ___, ___, 812 S.E.2d 831, 837 (2018) (citations and quotation marks omitted). “Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* (citation and quotation marks omitted). “Ordinary borrower-lender transactions, by contrast, are considered arm's length and do not typically give rise to fiduciary duties.” *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014) (citation omitted). “[T]he law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms

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of their contract and the Uniform Commercial Code.” *Id.* at 368, 760 S.E.2d at 267 (citations omitted).

Here on appeal, Plaintiff alleges Defendants committed constructive fraud because Defendants had “intentionally concealed the Secret Lawsuit and Settlement Agreement, did not apply the Settlement Amount as required by the Deed of Trust, fraudulently represented that the Loan was uncured to initiate foreclosure, continued foreclosure[,] and caused foreclosure.” However, Plaintiff failed to allege in his complaint an ongoing fiduciary duty owed him by Defendants. The ordinary borrower-lender relationship between the parties as alleged did not amount to a fiduciary duty. *See Dallaire*, 367 N.C. at 368, 760 S.E.2d at 266-67; *Head*, ___ N.C. at ___, 812 S.E.2d at 837.

Further, Plaintiff’s allegations in his complaint rely on the “secret” filing of a separate lawsuit by Nationstar, against N.C. Grange Mutual Insurance Company in 2012, in an erroneous attempt to establish a duty owed by Defendant. However, Plaintiff did not allege a duty, fiduciary or otherwise, under which Defendants were required to disclose to him the existence of other lawsuits to which Plaintiff is not a named party. Additionally, Plaintiff uses this alleged duty to try to make a claim pursuant to N.C. Gen. Stat. § 45-21.31, alleging that Defendants owed a fiduciary duty to Plaintiff, which they breached when they failed to determine a surplus after the foreclosure proceeding and pay this surplus to the Clerk of Court. Again, because

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Plaintiff did not allege a fiduciary duty recognized in North Carolina, both this claim and Plaintiff's claim for constructive fraud were properly dismissed.

II. Breach of Contract and Unjust Enrichment Claims

Plaintiff contends the trial court erred by dismissing his claim for breach of contract and unjust enrichment. Plaintiff alleged in his complaint that Defendants had breached the contractual terms contained in the Deed of Trust. Plaintiff also alleged that Defendant Nationstar was unjustly enriched by its receipt of \$445,000.00 paid them in settlement for damages to the property, but not applying this amount against monies owed by Plaintiff. Plaintiff's claims are predicated upon alleged errors in the power of sale foreclosure on the Property. However, Plaintiff is collaterally estopped from re-litigating the validity of the power of sale foreclosure because he did not seek to appeal or enjoin the foreclosure when he had that opportunity before it became final, and because a proper foreclosure was conducted by the Clerk of Court. Therefore, his claims for breach of contract and unjust enrichment were properly dismissed by the trial court.

During the foreclosure proceedings, the Clerk of Court found Plaintiff had defaulted under the Deed of Trust. Plaintiff did not appeal from the Foreclosure Order or seek to enjoin the foreclosure proceedings between the foreclosure hearing and the sale of the Property. Section 45-21.16(d) provides the requirements necessary for the Clerk of Court to conduct a power of sale foreclosure:

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The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. . . . However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents.

N.C. Gen. Stat. § 45-21.16(d) (2017). As part of the hearing, the clerk of court must make findings of fact limited to the following:

(1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) the existence of default; (3) the trustee's right to foreclose under the instrument; (4) the sufficiency of notice of hearing to the record owners of the property; (5) the sufficiency of pre-foreclosure notice under section 45-102 and the lapse of the periods of time established by Article 11, if the debt is a home loan as defined under section 45-101(1b); and (6) the sale is not barred by section 45-21.12A.

In re Foreclosure of Young, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013).

After these findings have been made, a party can appeal a Section 45-21.16 hearing “to the superior court for a *de novo* hearing, [and] the inquiry before a judge of superior court is also limited to the same issues.” *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 422, 775 S.E.2d 1, 6 (2015) (citation and quotation marks omitted). While Section 45-21.16(d) precludes a party's ability to raise affirmative defenses directly, Section 45-21.34 provides an avenue through which equitable relief may be sought by enjoining the foreclosure. *See id.* at 423, 744 S.E.2d at 6 (citation omitted); *In re Foreclosure of Goforth Properties*, 334 N.C. 369, 374, 432

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S.E.2d 855, 859 (1993) (citation omitted) (“Equitable defenses to foreclosure . . . may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34.”).

Section 45-21.34 provides the following remedy:

Any owner of real estate . . . having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed . . . to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner[.]

N.C. Gen. Stat. § 45-21.34 (2017).

Here, the Catawba County Clerk of Court held a foreclosure hearing on October 30, 2014. The Clerk of Court made all findings required by Section 45-21.16 and entered an order finding that Plaintiff was in default. Plaintiff did not appeal from the Clerk of Court’s order for a *de novo* hearing pursuant to Section 45-21.16(d1). On November 25, 2014 at 12 p.m., a power of sale foreclosure was properly conducted on the Property. Defendant Nationstar purchased the Property for \$391,332.04. No upset bids were placed, and the Final Report and Account of Foreclosure Sale was entered on December 16, 2014. Plaintiff had the opportunity to enjoin the sale pursuant to Section 45-21.34, but chose not to do so. Thus, the Clerk of Court’s order constituted a final judgment of foreclosure. Because Plaintiff did not seek to appeal the foreclosure pursuant to Section 45-21.16, or file an action to enjoin the foreclosure

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pursuant to Section 45-21.34, Plaintiff is barred from collaterally attacking the foreclosure in a separate action. *Howse v. Bank of Am., N.A.* ___ N.C. App. ___, ___, 804 S.E.2d 552, 557 (2017) (“an equitable action pursuant to N.C.G.S. § 45-21.34 must be commenced prior to the time the rights of the parties become fixed [pursuant to Section 45-21.29A].” (citation and quotation marks omitted)). “[T]he language of N.C. Gen. Stat. § 45-21.34 contemplate[s] that a party seeking to avoid a foreclosure sale will take such action as is necessary to prevent the sale from becoming final.” *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 264, 704 S.E.2d 1, 4 (2010) (citation and quotation marks omitted).

Because Plaintiff did not seek a *de novo* hearing in Catawba County Superior Court and did not file an injunction pursuant to Section 45-21.34, the rights of the parties became fixed pursuant to Section 45-21.29A. Thus, any claims collaterally attacking the foreclosure of the Property are barred by collateral estoppel, and cannot be prosecuted by a separate and distinct action. *Funderburk*, 241 N.C. App. at 423, 775 S.E.2d at 7. Accordingly, the trial court did not err in dismissing Plaintiff’s breach of contract and unjust enrichment claims because these claims were improper collateral attacks.

III. Unfair and Deceptive Trade Practices Claim

“In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) the defendant committed an unfair or deceptive act or practice, (2) the

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action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (brackets and citation omitted). “A practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Walker v. Branch Banking & Tr. Co.*, 133 N.C. App. 580, 583, 515 S.E.2d 727, 729 (1999) (citation omitted).

Under N.C. Gen. Stat. § 75-1.1, “a mere breach of contract does not constitute an unfair or deceptive act. Egregious or aggravating circumstances must be alleged before the provisions of the Act may take effect.” *Harty v. Underhill*, 211 N.C. App. 546, 552, 710 S.E.2d 327, 332 (2011) (citations omitted). “[I]t is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.” *Watson Elec. Constr. Co. v. Summit Companies, LLC*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003) (citations omitted).

Plaintiff alleges the following in his complaint for a Chapter 75 claim:

115. Nationstar’s acts and omissions are in and affecting commerce in the [S]tate of North Carolina.
116. Upon information and belief, Nationstar engaged and/or paid either Substitute Trustee and/or the law firm acting on behalf of Substitute Trustee.

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117. Substitute Trustee's acts and omissions are in and affecting commerce in the [S]tate of North Carolina.
118. Nationstar's conduct in seeking to initiate foreclosure, and Substitute Trustee's breaches of contract and duties in continuing the foreclosure were unfair and deceptive.
119. Nationstar directing that other collections agents claim that \$764,037.96 was owed and seek to recover that amount amounts [*sic*] to an unfair and deceptive representation, intending to intimidate and intimidating Plaintiff.
120. Nationstar and Substitute Trustee requiring payment of attorney fees as part of the Final Report and Accounting was deceptive and unfair.
121. Nationstar (i) attempting to foreclose of the Property after the debt was materially cured and/or satisfied, (ii) continuing to send debt collection notices in violation of North Carolina's Debt Collection Act; and (iii) continuing foreclosure proceedings amount to unconscionable means prohibited by N.C.G.S. § 75-55.
122. Nationstar's breaches of covenants of good faith and fair dealing were accompanied by substantial aggravating factors including fraud, breaches of fiduciary duties and deception.
123. Plaintiff has incurred emotional distress and anxiety regarding potential outstanding amounts owed to Nationstar and potential tax liability in 2016.
124. Nationstar's acts omissions and practices were unfair, offended established public policy, were immoral, unethical, and unscrupulous and/or had the tendency and/or capacity to deceive.

125. Plaintiffs are entitled to all actual and consequential damages, including attorney fees and all other damages qualifying for trebling to be trebled, as well as attorney's fees as allowed by N.C.G.S. § 75-16.1.

These allegations from Plaintiff's complaint do not allege sufficient facts to sustain an unfair and deceptive trade practices claim under Chapter 75. The allegations are not distinct from the purported breach of contract, breach of covenants of good faith and fair dealing, or breach of fiduciary duty claims. Additionally, the complaint does not allege actions of Defendants that demonstrate "[e]gregious or aggravating circumstances." *Harty*, 211 N.C. App. at 552, 710 S.E.2d at 332. Further, Plaintiff's claims for attorney's fees and trebled damages do not allege that Nationstar's "action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1 (2017). Plaintiff's complaint also does not contain facts demonstrating that Defendants' actions were intended to deceive or that a fiduciary duty existed. Further, the majority of Plaintiff's Chapter 75 claim relies on the validity of the foreclosure proceeding which is not before this Court. Accordingly, Plaintiff's Chapter 75 claim is insufficient; and thus, the trial court did not err in granting Defendant's motion to dismiss on this claim.

IV. Violations of North Carolina Debt Collections Act

Plaintiff alleged in his complaint that Nationstar violated the North Carolina Debt Collections Act in its communications regarding the default and foreclosure of the Property. Specifically, Plaintiff alleged violations of North Carolina General

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Statute §§ 58-70-95(5) and 58-70-115. As an exhibit to his complaint, Plaintiff attached a communication from Nationstar's attorney notifying Plaintiff of the foreclosure proceedings as evidence of threats and coercion prohibited by Section 58-70-95(5), and also includes a general allegation that Defendant submitted false information concerning the debt owed in violation of Section 58-70-115.

As part of the North Carolina Debt Collections Act, Section 58-70-95(5) provides:

No collection agency shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

- (5) Representing that nonpayment of an alleged debt may result in the arrest of any person[.]

N.C. Gen. Stat. § 58-70-95(5) (2017).

The communication from Nationstar was attached to the complaint as Exhibit 5. Plaintiff alleged it violated the North Carolina Debt Collections Act by threatening arrest if the debt was not paid. From examination of Exhibit 5, it is clear that there is no language in the letter that states or implies a threat of arrest, and Plaintiff failed to allege specific facts in his complaint showing the threat of arrest. Section 59-70-130 provides that debt collectors may not attempt to collect any debt in a multitude of ways. However, Plaintiff failed to allege facts in his complaint sufficient to show a violation of this Section of the North Carolina Debt Collection Act.

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Therefore, Plaintiff's claim for violations of the North Carolina Debt Collection Act is without merit, and the trial court did not err in dismissing it.

Conclusion

For the reasons stated above, the trial court did not err in dismissing each of Plaintiff's claims for relief. Therefore, we affirm the judgment.

AFFIRMED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).