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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-166

Filed: 17 September 2019

Durham County, No. 17-CVS-4268

DANIEL COLTON, Plaintiff,

v.

BANK OF AMERICA CORPORATION and BANK OF AMERICA, N.A., Defendants.

Appeal by Plaintiff from an order entered 13 November 2018 by Judge Keith O. Gregory in Durham County Superior Court. Heard in the Court of Appeals 21 August 2019.

Daniel Meier for Plaintiff-Appellant.

McGuireWoods LLP, by Scott I. Perle and Bradley R. Kutrow, for Defendants-Appellees.

INMAN, Judge.

Plaintiff Daniel Colton appeals from an order dismissing his complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff argues on appeal that the trial court erroneously concluded his complaint failed to state valid claims for fraudulent inducement and unfair and deceptive trade practices ("UDTP"). After careful review, we affirm the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following factual allegations and procedural history:

In 2005, Plaintiff purchased a home in Raleigh, North Carolina, with a mortgage financed by Defendant Bank of America, N.A. ("BOA"). Plaintiff was eventually unable to make timely payments on the mortgage and, in 2009, began considering bankruptcy. Plaintiff decided to contact BOA first to see if he could refinance his mortgage. BOA agreed to consider refinancing the mortgage, and Plaintiff submitted his request for a loan modification to a process that spanned the next several years.

Seven years later, in 2012, while Plaintiff's loan modification request remained pending, BOA entered into a consent judgment with the United States federal government, 49 states, and the District of Columbia to resolve litigation concerning BOA's mortgage servicing practices (the "National Mortgage Settlement" or "NMS").

After the National Mortgage Settlement, BOA informed Plaintiff that it would not agree to refinance his mortgage, though it had previously indicated it was planning to do so. Plaintiff responded to BOA's rejection by informing them he intended to declare bankruptcy. BOA, in turn, informed Plaintiff of the National Mortgage Settlement and encouraged him to pursue modification under its provisions in lieu of bankruptcy.

Plaintiff then met with a BOA representative, Joan August, to pursue refinancing under the NMS. The parties began the modification process anew pursuant to the NMS. BOA, however, failed to abide by the terms of the NMS and, at some unspecified time, denied Plaintiff refinancing and initiated foreclosure proceedings.

Plaintiff then pursued a short sale through his loan servicer, Ocwen Loan Servicing, LLC ("Ocwen"). Plaintiff located a buyer that met Ocwen's approval requirements; however, on 1 August 2013, Plaintiff was informed that BOA was unwilling to accept anything less than full payment of the mortgage, thwarting the short sale. Per Ocwen, BOA refused to approve the short sale because a "Bank of America investor" believed Plaintiff had fraudulently omitted a federal felony conviction for conspiracy to violate campaign finance laws relating to commercial real estate development projects from a Dodd Frank Certification form filed as part of the short sale package. Plaintiff tried explaining to Ocwen and BOA that he believed the conviction was not required to be disclosed in pursuing the short sale, but his attempts failed and the short sale was never completed.

BOA eventually foreclosed on Plaintiff's home following several delays. BOA sent Plaintiff a 1099 for the imputed income derived from the sale.

On 11 October 2017, Plaintiff filed suit against BOA and Defendant Bank of America Corporation, BOA's parent company, alleging claims including fraud and

unfair and deceptive trade practices. Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) in lieu of filing an answer; in response, Plaintiff filed a motion to amend his complaint. Defendants withdrew their motion to dismiss without prejudice and, on 12 September 2018, Plaintiff filed an amended complaint. In his amended complaint, Plaintiff alleged that Defendants: (1) fraudulently induced him to forego bankruptcy in favor of the NMS process to which BOA had no intention of adhering; and (2) committed unfair and deceptive trade practices in both fraudulently inducing him to engage in the NMS process and denying his short sale in bad faith.[1] Plaintiff also sought punitive damages.

Defendants filed another motion to dismiss on 20 September 2018 pursuant to Rule 12(b)(6). Defendants' motion asserted, among other things, that Plaintiff lacked standing to enforce the NMS and failed to state valid causes of action for fraud and UDTP. After a hearing at which the trial court considered the pleadings, the parties' briefing, and additional public documents,[2] the trial court dismissed Plaintiff's complaint on 13 November 2018. Plaintiff filed notice of appeal on 12 December 2018.

[1] Plaintiff's complaint does not seek recovery for violation of the NMS itself, and no such argument is made on appeal. Plaintiff acknowledged before the trial court that "the NMS is relevant to Plaintiff's claim only as an instrument of Defendant's fraud, not as granting an independent cause of action."

[2] Documents referenced at the hearing include the NMS, documents relating to Plaintiff's mortgage loan from BOA, and Plaintiff's guilty plea to conspiracy to commit federal campaign finance violations. Neither party contends that the trial court's consideration of these documents converted the proceeding to one for summary judgment, and we note that "it is clear that judicial notice can be used in rulings on . . . motions to dismiss for failure to state a claim." *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979); *see also Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52,

II. ANALYSIS

A. Standard of Review

This Court reviews a dismissal pursuant to Rule 12(b)(6) *de novo*. *Holton v. Holton*, ___ N.C. App. ___, ___, 813 S.E.2d 649, 655 (2018). "In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quotation marks omitted). A claim is subject to dismissal if: "(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." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). In other words:

> [T]he sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. In testing the legal sufficiency of the complaint the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted.

60, 554 S.E.2d 840, 847 (2001) ("[A] trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing. . . . [A] court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.").

Boyce v. Boyce, 60 N.C. App. 685, 687, 299 S.E.2d 805, 806-07 (1983).

B. Fraudulent Inducement

A valid fraud claim must allege, as a factual matter, five essential elements: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (2007) (citation omitted). Rule 9 of our Rules of Civil Procedure imposes a heightened pleading standard for fraud claims, requiring that "the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2019). Rule 9 provides that a party must "alleg[e the] time, place and content of the fraudulent representation, [the] identity of the person making the representation and what was obtained as a result of the fraudulent acts or representation." *Powell v. Wold*, 88 N.C. App. 61, 64, 362 S.E.2d 796, 797 (1987) (citation omitted). A valid claim must include "an allegation of *facts* to support the five elements of fraud." *Terry v. Terry*, 302 N.C. 77, 82-83, 273 S.E.2d 674, 677 (1981) (emphasis added). If a fraud claim is premised on a promissory representation, "facts must be alleged from which a court and jury may reasonably infer that the defendant did not intend to carry out such representations *when they were made*." *Whitley v. O'Neal*, 5 N.C. App. 136, 139, 168 S.E.2d 6, 8 (1969) (emphasis added).

Plaintiff's complaint fails to allege facts demonstrating that BOA's alleged fraudulent misrepresentation resulted in actual injury. *See, e.g., Speller v. Speller*, 273 N.C. 340, 343, 159 S.E.2d 894, 896 (1968) (noting that "[i]n order to establish fraud, there must be a showing of actual loss, injury or damage[,]" and holding a plaintiff's complaint failed to state a valid claim for fraud when it "d[id] not allege any loss" and "d[id] not allege sufficient facts upon which to base a cause of action . . . for damages"). Although Plaintiff's complaint alleges that he was induced to forego bankruptcy in 2012 when BOA offered the NMS refinancing process and that he eventually lost his home to foreclosure when that process fell through, it fails to allege that he would have been able to avoid foreclosure or the loss of other assets had he filed bankruptcy in 2012. Nor does the complaint allege that, after BOA denied refinancing under the NMS and began foreclosure proceedings, any attempt at bankruptcy would have been less advantageous than in 2012. Plaintiff argues in his brief that "bankruptcy would allow him to limit and control his debt before default and to potentially keep his home[,]" but this allegation is found nowhere in his complaint. The complaint's general allegation that "Plaintiff was damaged by Defendants' misrepresentations . . . in an amount in excess of twenty-five thousand dollars" fails to identify any injury to which it relates. In short, there is no indication from the factual allegations in the complaint or materials considered by the trial court in ruling on the motion to dismiss that Plaintiff suffered a cognizable injury as a

result of Defendants' purported fraud. Because actual damage is an essential element of a claim for fraudulent inducement and Plaintiff's complaint fails to allege facts supporting that element, *Speller*, 273 N.C. at 343, 159 S.E.2d at 896, we hold the trial court did not err in dismissing this claim under Rule 12(b)(6).

B. UDTP

The only conduct Plaintiff identifies on appeal in support of his UDTP claim is Defendants' "refusal to give good faith consideration to [his] loan modification," and their acts "encouraging him to forego bankruptcy."[3] Plaintiff's complaint fails to allege actual injury as a result of BOA's allegedly fraudulent conduct—and actual injury is a necessary element of a valid UDTP claim. *See, e.g., Walker v. Sloan*, 137 N.C. App. 387, 399, 529 S.E.2d 236, 246 (2000) ("Recovery will not be had [on an UDTP claim] . . . where the complaint fails to demonstrate that the act of deception proximately resulted in some adverse impact or actual injury to the plaintiffs." (citation omitted)). For the same reason we affirm the trial court's dismissal of Plaintiff's fraud claim, we hold that the trial court did not err in dismissing the UDTP claim.

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[3] Plaintiff does not argue that Defendants' conduct in denying a short sale supports his UDTP claim, so that issue is not before us. *See* N.C. R. App. P. 28(b)(6) (2019) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

III. CONCLUSION

Plaintiff's complaint fails to allege all necessary elements of a valid fraud claim, as it does not allege facts demonstrating actual injury. Further, because Plaintiff's sole argument in support of his UDTP claim on appeal relates to that purportedly fraudulent conduct—and a valid UDTP claim likewise requires allegations demonstrating actual injury—we hold his UDTP claim also fails to allege a valid claim. The trial court, therefore, did not err in granting Defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6).

AFFIRMED.

Judges HAMPSON and BROOK concur.

Report per Rule 30(e).