[Cite as *U.S. Bank, Natl. Assn. v. Parker*, 2016-Ohio-3113.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

US BANK , NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE GSAA HOME EQUITY TRUST 2007-3

Plaintiff-Appellee

-vs-

RICKY L. PARKER, ET AL.

Defendants-Appellants

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 15-CA-16

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Common Pleas Court
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 16, 2016

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, J.

{¶1} Defendants-appellants Ricky and Tamela Parker appeal the August 17, 2015 Judgment Entry entered by the Knox County Court of Common Pleas granting summary judgment in favor of U.S. Bank and the December 30, 2014 Order dismissing Third-party defendants Countrywide Home Loans, Inc., Bank of America and BAC Home Loans Servicing, LP.

STATEMENT OF FACTS AND CASE

{¶2} On November 22, 2006, Appellant Ricky Parker signed an Adjustable Rate Balloon Note, in the amount of $192,000, with a 6.875% interest rate and monthly payments of $1,175.76 in favor of Colony Mortgage Corporation. Appellant Tamela Parker did not sign the note. On the same date, Colony Mortgage Corporation endorsed the note over to Greenpoint Mortgage Funding, Inc.

{¶3} On December 2, 2006, Ricky and Tamela Parker signed a Mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Colony Mortgage Corporation. On December 11, 2006, the Mortgage was recorded with the Knox County, Ohio, Recorder's Office.

{¶4} On or before January 11, 2007, Greenpoint Mortgage Funding, Inc. endorsed the note in blank. Greenpoint handled the servicing of the loan and the Parkers made payments to Greenpoint.

{¶5} In November of 2008, Ricky Parker fell behind in payments. The Parkers sent a letter to Countrywide Home Loans, Inc. seeking relief. As a result, Countrywide discussed modifications of the amount of monthly payments due under the terms of the note. As a result, the monthly payment was reduced to $806.00 per month beginning in

October of 2009. The modification was pursuant to a Home Affordable Modification Program, Trial Period Plan or "HAMP, TPP." Appellants admit they never received a countersigned copy of the agreement. Ricky Parker testified the term of the modification was for a period of three months.

{¶6} On April 2, 2010, Bank of America sent Appellants a document stating, "the installment due under the Special Forbearance agreement, dated December 23, 2009, has been credited to the above referenced account." The document further stated, "Thank you for fulfilling this commitment and bringing the account current."

{¶7} Appellant again defaulted under the terms of the note on September 1, 2010.

{¶8} On December 2, 2011, the Mortgage was assigned from MERS to U.S. Bank. The Mortgage assignment was recorded with the Knox County, Ohio, Recorder's Office on December 12, 2011.

{¶9} Appellants admit to having in their possession at least two notices of intent to accelerate dated April 4, 2013, and July 5, 2013. Appellants admit they never cured the default following receipt of the notices of intent to accelerate.

{¶10} On November 12, 2013, Appellants received notice servicing of their loan would be transferred to Ocwen Loan Servicing, LLC effective December 1, 2013, and all future payments should be sent to Ocwen. However, Appellants continued to send payments to Bank of America, as the prior loan servicer, in the reduced amount, pursuant to the terms of the temporary loan modification. The payments were repeatedly returned to Appellants.

{¶11} U.S. Bank, as Trustee for the Holders of the GSAA Home Equity Trust 2007-3, filed a complaint in foreclosure on October 17, 2013, in the Knox County Court of Common Pleas.

{¶12} Appellants filed an answer, counterclaim and third party claims against Bank of America and BAC Home Loans Servicing, LP,[1] pursuant to the agreed modification under the terms of the underlying loan and payment terms reached in 2009.

{¶13} On October 23, 2014, Bank of America and BAC Home Loans Servicing LP moved to dismiss the third-party claims pursuant to Civil Rule 12(B)(6). Appellants opposed the motion by memorandum contra on November 24, 2014. The trial court signed the Order granting the motion to dismiss on December 30, 2014.

{¶14} U.S. Bank filed a motion for summary judgment on January 5, 2015, on both its claims and Appellants' counterclaims. The trial court granted the motion for summary judgment in favor of U.S. Bank on August 27, 2015, and entered a Decree of Foreclosure. The trial court found the amount due and owing to U.S. Bank on the note equals the principal balance of $187,847.91, plus interest thereon at a rate of 6.875% per year from August 1, 2010, subject to adjustment as set forth in the note, together with advances made pursuant to the terms of the Mortgage for real estate taxes and hazard insurance premiums, and for fees, costs, and other charges as allowed by law and the terms of the note and mortgage.

{¶15} Appellants appeal, assigning as error,

[1] The Parkers refer to Countywide Home Loans, Inc. in their new party claims, but they do not identify Countywide as a New Party Defendant.

{¶16} "I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO PLAINTIFF US BANK ON ALL CLAIMS.

{¶17} "II. THE TRIAL COURT ERRED BY DISMISSING THE CLAIMS AGAINST THIRD PARTY DEFENDANTS PURSUANT TO CIV. R. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED."

I.

{¶18} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, this Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

{¶19} Civ.R. 56 provides summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶20} It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265. The standard for granting summary judgment is delineated in *Dresher v. Burt* (1996), 75 Ohio St.3d 280 at 293, 662 N.E.2d 264: " * * * a party seeking summary judgment, on the ground that the nonmoving

party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 309 N.E.2d 924.

US Bank Standing

{¶21} Initially, Appellants assert US Bank lacks standing to assert the claims herein as it has not demonstrated its interest in the note and mortgage.

{¶22} As set forth in the affidavit of Crystal Kearse, Senior Loan Analyst for Ocwen, attached in support of US Bank's motion for summary judgment, Ocwen acted as the Servicing Agent for US Bank, as Trustee for the Holders of the GSAA Home Equity Trust 2007-3. Kearse averred she had authority to make the affidavit on behalf of Ocwen,

and made the affidavit of her own knowledge and upon personal review of relevant business records.

{¶23} Kearse stated US Bank held the original note endorsed in blank by Greenpoint since at least January 11, 2007. A copy of the original note was attached to the complaint for foreclosure herein. Accordingly, US Bank has standing as "holder" of the note, as it had physical possession of the note, endorsed in blank, at the time the action was filed.

{¶24} US Bank is also the assignee of the mortgage as recorded in the Knox County Recorder's Office on December 2, 2011. Accordingly, US Bank has standing to assert its claims as to both the note and mortgage herein.

Parkers Default and Decree of Foreclosure

{¶25} Appellants assert they have not breached the terms of the note, as the terms of the original note had been modified by a subsequent agreement with third-party defendants Countrywide and Bank of America.

{¶26} Ricky Parker testified at deposition he entered into a loan modification agreement with Countrywide and Bank of America pursuant to which the monthly payments due and owing on his note and mortgage were reduced. He testified he does not have a copy of the modified agreement as he never received a countersigned copy of the agreements in return from Bank of America. At his deposition herein, Ricky Parker testified he had never received the loan modification documents he signed back from Bank of America. He further testified he did not receive an offer for a permanent modification.

{¶27} Parker testified the documents he executed were similar to those introduced as Exhibit 15 at his deposition. Tr. at 130-131. Exhibit 15 is entitled a Home Affordable Modification Trial Period Plan or HAMP, TPP, and provides for a three month trial period under the Federal Government's Home Affordable Modification Program. Ricky Parker himself testified the trial period plan was to be for a period of three months according to his own understanding.

{¶28} Exhibit 15 provides, in relevant part, the Servicer will return a signed copy of the document, should the borrower qualify for the offer. The document provides the plan does not take effect unless and until both the borrower and Servicer sign the document and the Servicer provides a copy of the Plan with the Servicer's signature. Finally, Exhibit 15 states if the Servicer does not provide the borrower with a fully executed copy of the Plan and the Modification Agreement, the Loan Documents will not be modified and the Plan will terminate. Further, the Exhibit states the Plan is not a modification, and the Loan Documents will not be modified unless and until the borrower receives a fully executed copy of the Modification Agreement.

{¶29} The Parkers testified they never received a fully executed, countersigned copy of the document from Bank of America. Under the terms of the HAMP, TPP herein, in order for a modification to occur, Appellant was required to receive a fully executed copy of the modification agreement, which they did not.

{¶30} Appellants received a letter on December 23, 2009, citing a "Special Forbearance Agreement" which the Parkers interpret to mean their loan was current in June 2010. However, the letter does not preclude the alleged default after August 2010. Further, any alleged loan modification was temporary as set forth above; therefore,

Appellant's have continued to make insufficient payments. The Parkers had in their possession two notices of acceleration relative to their loan and mortgage, and did not cure the default.

{¶31} As further evidence the modification was not permanent and not in effect, Bank of America returned some of Appellant's payments as insufficient, and Appellant's payments were returned following transfer of service of the loan to Ocwen. Therefore, it is immaterial Bank of America accepted reduced payments from Appellant's herein, as the terms of the Mortgage provide the Lender may accept any payment or partial payment, although insufficient, to bring the loan current, without waiver of any rights or prejudice.

{¶32} Accordingly, we find the trial court did not err in granting summary judgment in favor of US Bank herein, as no genuine issues of material fact remain and US Bank is entitled to judgment as a matter of law.

{¶33} Appellants' first assignment of error is overruled.

II.

{¶34} In the second assigned error, Appellants maintain the trial court erred in dismissing their third-party claims against Countrywide Home Loans, Inc., Bank of America, and BAC Home Loans Servicing, LP, for failure to state a claim, pursuant to Civil Rule 12(B)(6).

{¶35} When reviewing a judgment granting a Civil Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, an appellate court must independently review the complaint to determine whether dismissal is appropriate. The non-moving party bears the burden to set forth facts, which if proven, establish its claim

for relief. Id. While a non-moving party's factual allegations must be presumed as true, the same does not apply to unsupported conclusions. *Mitchell v. Lawson Milk Co.,* 40 Ohio St.3d 190, 532 N.E.2d 753 (1988).

{¶36} In the third-party claims, the Parkers assert causes of action for breach of contract, civil conspiracy and abuse of process/malicious process, fraud and/or negligent misrepresentation, violations of the Ohio Consumer Sales Practices Act, breach of fiduciary duty and bad faith, violation of the Ohio Mortgage Broker Act, violations of the Fair Debt Collection Practices Act, violations of the Fair Credit Reporting Act, and slander.

{¶37} The Parkers assert subsequent to signing the note and mortgage for a residential home loan, Ricky Parker entered into a new and different agreement with U.S. Bank and new party defendants Countrywide Home Loans, Inc. and BAC Home Loans Servicing, LP under which the Parkers would pay a reduced loan payment each month. They further assert the short term arrangement was intended to become permanent.

{¶38} Bank of America moved to dismiss the claims on October 23, 2014, asserting Appellants did not attach the purported agreement to their pleading, nor did they provide a reason for failing to do so pursuant to Civil Rule 10(D)(1).

{¶39} Civil Rule 10(D)(1) provides,

> When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

{¶40} To state a valid claim for breach of contract, a complainant must establish: (1) the existence of a contract; (2) performance by them; (3) breach by the other party;

and (4) damage as a result. *Blake Homes, Ltd. v. First Energy Corp.,* 173 Ohio App.3d 230, 2007 Ohio 4606.

{¶41} The Parkers failed to establish the existence of the modified agreement with Bank of America. They did not attach the purported agreement to their third party claim, nor did they specify the terms thereof in their pleadings. Further, pursuant to Civil Rule 10(D)(1), they failed to provide a reason for not attaching the purported agreement to the third party claim. Rather, the Parkers made conclusory assertions an agreement existed and was breached by Bank of America.

{¶42} Without having established an agreement with Bank of America, and the breach thereof; the remainder of Appellants claims against Bank of America necessarily fail.

{¶43} The cause of action for conspiracy failed as the Parkers assertion of a conspiracy was conclusory and there was no underlying tort. Bank of America further argues the Parkers' cause of action for abuse of process and malicious prosecution failed as a matter of law as they failed to plead the requisite elements of those claims.

{¶44} Bank of America asserted the cause of action for fraud was insufficiently pled under Civil Rule 9(B), requiring "the circumstances constituting fraud or mistake shall be stated with particularity." The claim for negligent misrepresentation could not succeed as Bank of America, as ordinary lender, did not owe the Parkers a duty of care.

{¶45} The Ohio Consumer Sales Practices Act failed as a matter of law as the Act does not apply to loan servicers. The claim for breach of fiduciary duty and bad faith also failed as Bank of America did not owe the Parkers a duty of care. Further, Ohio law does not recognize a claim for bad faith in the mortgage context, nor does Ohio law recognize

an independent claim for breach of good faith and fair dealing apart from a breach of contract claim.

{¶46} Finally, Bank of America claims it is not a mortgage broker, thus the claim for violation of the OMBA also failed. Appellants have not established a violation of the act. The cause of action for violation of the FDCPA failed because the Parkers did not allege any act or omission committed by Bank of America in the course of collection activities. The violation of the FCRA failed because there is no private right of action regarding furnishing of credit reports under the act. The slander of title cause of action fails as it is time barred and inadequately pled.

{¶47} Accordingly, we find the trial court did not err in granting Bank of America's motion to dismiss the third-party claims for failure to state a claim, pursuant to Civil Rule 12(B)(6).

{¶48} The second assignment of error is overruled.

{¶49} The judgment of the Knox County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Wise, J. concur