[Cite as *Wright Safety Co. v. U.S. Bank, N.A.*, 2009-Ohio-6428.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

THE WRIGHT SAFETY CO., et al.	C. A. No. 24587
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
U. S. BANK, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 2008-02-1015

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

BELFANCE, Judge.

{¶1} Plaintiffs-Appellants The Wright Safety Company, The Wright Rental Company, Save a Life, Inc. (collectively "Wright Companies"), and Richard E. Wright, Jr. ("Mr. Wright") appeal the judgment of the Summit County Court of Common Pleas dismissing their amended complaint against Defendants-Appellees U.S. Bank, N.A. and its employees Martin Durkin, Greg Ferrence, and John Doe Defendants one through ten. For reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} Beginning in December 1996, U.S. Bank entered into a revolving loan agreement/line of credit with Wright Safety Company for the sum of $650,000. The loan was secured by Wright Safety Company's inventory, accounts, and equipment, as well as a business guaranty by Mr. Wright, and a life insurance policy covering Mr. Wright. The loan was subsequently extended on several occasions when it reached maturity. In February 1999, Wright

Safety Company, Wright Rental Company and U.S. Bank entered into loan agreement whereby U.S. Bank agreed to continue extending the revolving loan to Wright Safety Company and extended a $300,000 term loan to Wright Rental Company. The 1999 loan was secured by the inventory, chattel paper, accounts, equipment and general intangibles of both Wright Safety Company and Wright Rental Company, and by the commercial guaranty of Mr. Wright.

{¶3} In 2005, U.S. Bank informed the Wright Companies and Mr. Wright that the term of the revolving loan would not be extended and that the final promissory note would mature by its terms. U.S. Bank gave the Wright Companies ninety days notice, which was later extended to one hundred twenty days. The revolving loan matured on October 31, 2005. Wright Companies looked for financing elsewhere but were unable to obtain it. As of April 5, 2006, $301,050 was outstanding on the revolving loan and the term loan had been paid in full.

{¶4} Apparently at some point Wright Safety Company began using funds from the revolving loan to capitalize Save a Life, in violation of the loan agreement. The parties then entered into a forbearance agreement whereby U.S. Bank agreed to waive the violation if Save a Life would also guaranty the revolving loan. Further, Wright Companies and Mr. Wright requested that the term of the loan be extended. U.S. Bank agreed to extend the term of the revolving loan, however at a reduced amount. Before U.S. Bank would extend the loan, Wright Safety Company was required to pay down the balance of the loan by $200,000, and from that point forward, the amount of the loan would be only for $100,000 and would be non-revolving. On April 26, 2006, the parties signed the forbearance agreement and a cognovit promissory note for $100,000 which was secured by a guaranty from Save a Life and an interest in Save a Life's assets, as well as a mortgage on a property owned by Mr. Wright. The forbearance agreement included a waiver stating that the Wright Companies and Mr. Wright "hereby release [U.S.]

Bank and its officers, directors, employees, agents, attorneys, affiliates, subsidiaries, successors and assigns from any liability, claim, right or cause of action which now exists, or hereafter arises, whether known or unknown, arising from or in any way related to the facts in existence as of the date hereof."

{¶5} The loan matured on September 30, 2006 with approximately $45,000 of principal unpaid. In May 2007, U.S. Bank sued on the cognovit note and judgment was entered in June 2007 in favor of U.S. Bank for $58,388.36, which included attorney fees, as well as interest at the contract rate, costs and additional attorney fees. In July 2007, Wright Companies and Mr. Wright filed a Civ.R. 60(B) motion for relief from cognovit judgment, along with an answer and counterclaim. The trial court denied the requests. Mr. Wright then attempted to sell the property subject to the mortgage and was informed that U.S. Bank was asserting $17,500 in legal fees. Wright Companies and Mr. Wright subsequently paid the full amount of the cognovit judgment in order to close on the sale of Mr. Wright's property. Wright Companies and Mr. Wright then appealed to this Court. We dismissed the appeal as moot as Wright Companies and Mr. Wright paid the cognovit judgment.

{¶6} In February 2008, Wright Companies and Mr. Wright filed a complaint against U.S. Bank, Martin Durkin, Greg Ferrence, and John Doe Defendants one through ten for (1) lender liability; (2) denial of due process; (3) conspiracy; (4) intentional interference with business relation; (5) disparate treatment; (6) violation of duty of good faith; and (7) punitive damages. U.S. Bank filed a motion to dismiss pursuant to Civ.R. 12(B)(6). Wright Companies and Mr. Wright then filed an amended complaint, which contained the same seven counts. U.S. Bank again filed a motion to dismiss, which Wright Companies and Mr. Wright opposed. Wright Companies and Mr. Wright filed affidavits as supplements to their brief in opposition and

additionally filed a second amended complaint without leave of court. The trial court granted U.S. Bank's motion to dismiss stating that "all of the allegations of the Complaint are DISMISSED as either waived, or for otherwise failing to state a claim upon which relief could be granted."

{¶7} Wright Companies and Mr. Wright have raised seven assignments of error for our review.

II.

{¶8} We review de novo a trial court's decision granting a motion to dismiss pursuant to Civ.R. 12(B)(6). *Hopper v. City of Elyria*, 9th Dist. No. 08CA009421, 2009-Ohio-2517, at ¶5. In ruling on a Civ.R. 12(B)(6) motion to dismiss, the trial court must only grant the motion "if it appears beyond a doubt that the petitioner can prove no set of facts that would entitle him [or her] to relief." Id. "[T]he trial court must review only the complaint, accepting all factual allegations as true and making every reasonable inference in favor of the nonmoving party." Id.

III.

ASSIGNMENT OF ERROR I.

> "THE TRIAL COURT ERRED, TO THE PREJUDICE OF WRIGHT SAFETY, BY RULING THAT THE ACTIONS ALLEGED BY WRIGHT SAFETY WITHIN ITS PLEADINGS DID NOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR LENDER LIABILITY AND VIOLATION OF THE DUTY OF GOOD FAITH."

{¶9} Wright Companies and Mr. Wright conceded in the trial court that their claims for lender liability and violation of the duty of good faith were in fact one claim. As such, they will be addressed concurrently here as well. Wright Companies and Mr. Wright argue that the trial court erred in dismissing their claims for lender liability and the violation of the duty of good faith. We agree.

{¶10} Wright Companies and Mr. Wright allege in their amended complaint that Wright Safety Company had been in business for eighteen years and had a ten-year relationship with U.S. Bank. At one time, it had an outstanding balance of $650,000 on all loans with U.S. Bank. As of June 2005, Wright Companies had paid all installments on its loans and had never been late on a payment to U.S. Bank. The amended complaint further provides in the lender liability count that U.S. Bank, via its employees, "[w]ithout warning or adequate explanation" informed Wright Companies and Mr. Wright that the line of credit would not be extended and ultimately gave them one hundred twenty days to find new financing, which they were unable to do. Mr. Durkin, a U.S. Bank employee, without provocation increased the interest rate and began charging "unjustified" fees and threatened and "forced" Wright Companies and Mr. Wright to enter into a workout agreement, which appears to be the forbearance agreement and cognovit promissory note. In addition, Mr. Durkin coerced Wright Companies and Mr. Wright into over-collateralizing the loan, causing them to be unable to use certain assets and caused Wright Companies to suffer "significant loss of business." U.S. Bank harmed Wright Companies' reputation, violated the duty of good faith contained in R.C. 1301.14, and "charged improper interest, late charges and attorneys' fees, not authorized by any written agreement."

{¶11} In their count alleging violation of the duty of good faith, Wright Companies and Mr. Wright allege U.S. Bank and its employees breached their duty of good faith, engaged in intentional actions for the purpose of ruining Wright Companies' businesses, treated Wright Companies and Mr. Wright "in a disparate manner," required Wright Companies and Mr. Wright to hire counsel to negotiate the promissory note, imposed illegal penalties, and asserted an attorney conflict so that Wright Companies and Mr. Wright would be referred to an attorney favorable to U.S. Bank. Wright Companies and Mr. Wright further allege that U.S. Bank and its

employees, "knew, or should have know, that their conduct would cause damage to [Wright Companies and Mr. Wright]."

{¶12} U.S. Bank and its employees argued in its motion to dismiss that the waiver contained in the forbearance agreement released all of Wright Companies' and Mr. Wright's claims that occurred prior to the signing of the agreement, and that whatever claims were not waived, were barred by res judicata by the cognovit judgment entered in U.S. Bank's favor. The trial court held that the lender liability and violation of the duty of good faith claims "fail[ed] to state a claim upon which relief could be granted *because* [Wright Companies and Mr. Wright] waived these claims when they executed the Forbearance Agreement." (Emphasis added.)

{¶13} "This Court has previously held that only those affirmative defenses specifically listed under Civ.R. 12(B) may serve as the basis for dismissing a cause of action because: (1) the burden to plead an affirmative defense is on the defendant, not the plaintiff; (2) pursuant to Civ.R. 8(C), a defendant must plead his affirmative defenses in his responsive pleading; and (3) Civ.R. 12(B) contains seven specific, enumerated defenses that may be raised by motion prior to a defendant's responsive pleading." *Yovanno v. Ryder Sys., Inc.*, 9th Dist. No. 21528, 2003-Ohio-6824, at ¶10. The seven listed defenses do not include waiver, release, or res judicata. Civ.R. 12(B). We have also stated that defenses not listed in Civ.R. 12(B) cannot be the subject of a Civ.R. 12(B) motion to dismiss. *Yovanno* at ¶10; see, also, *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109 ("Civ.R. 12(B) enumerates defenses that may be raised by motion and does not mention res judicata. Accordingly, we hold that the defense of res judicata may not be raised by motion to dismiss under Civ.R. 12(B).").

{¶14} U.S. Bank and its employees argue that we can apply the doctrines of waiver/release and res judicata because Wright Companies and Mr. Wright attached all the

necessary documents to the amended complaint. U.S. Bank and its employees correctly point out that Civ.R. 10(C) provides that "[a] copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Thus, the documents Wright Companies and Mr. Wright attached to the amended complaint become part of the complaint itself and can be considered on a motion to dismiss. See id. and *Hopper* at ¶5. Nonetheless, we have previously held that res judicata is "not properly decided in a motion to dismiss[,]" *Hamrick v. Daimler-Chrysler Motors,* 9th Dist. No. 02CA008191, 2003-Ohio-3150, at ¶7, even when "the prior judgment was incorporated into the pleadings[.]" Id. at ¶5. Further, given that Wright Companies and Mr. Wright allege that they were forced and coerced into signing the workout agreement, essentially challenging the validity of the those documents, it would be inappropriate to dismiss on the grounds of waiver in this case, when it appears there is an argument that the waiver may not have been valid.

{¶15} Having determined that the trial court erred in granting U.S. Bank's and its employees' motion to dismiss Wright Companies' and Mr. Wright's lender liability and violation of the duty of good faith claims based upon waiver, and having also concluded that the motion could not be granted based upon res judicata, "we decline to address the remaining arguments under the first assignment of error and take no position regarding the merits of those arguments." Id. at ¶8.

IV.

ASSIGNMENT OF ERROR II.

> "THE TRIAL COURT ERRED, TO THE PREJUDICE OF WRIGHT SAFETY, BY RULING THAT THE ACTIONS ALLEGED BY WRIGHT SAFETY WITHIN ITS PLEADINGS DID NOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR ABUSE OF PROCESS."

{¶16} Initially we note that the Wright Companies' and Mr. Wright's claim is actually titled as one for "Denial of Due Process." The trial court, pursuant to a request by Wright Companies and Mr. Wright, re-characterized the claim as one for abuse of process. Wright Companies and Mr. Wright maintain that the trial court erred in dismissing their claim for abuse of process for failure to state a claim. We disagree.

{¶17} Wright Companies and Mr. Wright allege in their "abuse of process" claim the following: (1) Mr. Wright acquiesced to U.S. Bank placing a mortgage on a property he owned as collateral concerning the cognovit promissory note; (2) U.S. Bank filed a cognovit complaint in May 2007 and judgment was awarded to U.S. Bank which provided for additional unspecified attorney fees; (3) Wright Companies and Mr. Wright filed a motion for relief from judgment and a motion to file an answer and counterclaim, which the trial court denied; (4) Mr. Wright attempted to sell the property subject to the mortgage held by U.S. Bank prior to paying the cognovit judgment and was unable to close the sale as he discovered that U.S. Bank placed a lien on the property asserting attorney fees that were not itemized in the judgment; (5) the trial court refused to grant Wright Companies and Mr. Wright injunctive relief; (6) Wright Companies and Mr. Wright appealed; (7) Mr. Wright paid the judgment in order to close on the sale of the property in order to remain in business; (8) as a result of paying the judgment, we dismissed Wright Companies' and Mr. Wright's appeal as moot; and (9) that Wright Companies and Mr. Wright suffered damages as a result of U.S. Bank's coercion.

{¶18} The cognovit complaint, attached to the amended complaint, requested a total of $58,388.36, plus accrued interest and charges from May 8, 2007, as well as "additional attorney's fees and the cost of this action." The $58,388.36 amount included $45,000 in principal, $91 in interest and charges accrued as of May 8, 2007, and $13,297.24 in legal

expenses as of March 12, 2007. The trial court's judgment entry in the cognovit action, also attached to the amended complaint, awarded U.S. Bank $58,388.36, "together with accrued interest and charges from May 8, 2007 * * * , additional attorney's fees and the cost of this action."

{¶19} The elements of the tort of abuse of process are "'(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.'" *Edward D. Jones & Co., L.P. v. Wentz,* 9th Dist. No. 23535, 2007-Ohio-3237, at ¶9, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298. "'Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order.'" *Wentz* at ¶9, quoting *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St.3d 264, 271.

> "'The tort of abuse of process arises when one maliciously misuses legal process to accomplish some purpose not warranted by law. The key to the tort is the purpose for which process is used once it is issued. Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or 'abuse,' of process. * * * Thus, if one uses process properly, but with a malicious motive, there is no abuse of process, though a claim for malicious prosecution may lie[.] * * * The tortious character of the defendant's conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]'" *Levey & Co. v. Oravecz,* 9th Dist. No. 21768, 2004-Ohio-3418, at ¶8, quoting *Miller-Wagenknecht v. Munroe Falls* (Dec. 5, 2001), 9th Dist. No. 20342, at *4.

{¶20} The trial court concluded in its entry that Wright Companies and Mr. Wright failed to state a claim for abuse of process, as they failed to set forth facts satisfying the last two elements of the cause of action. Specifically, the trial court stated that "[t]he Compl[ai]nt does not allege that the judicial process in the prior Cognovit Action was perverted or corrupted in

order to accomplish an ulterior purpose. Nor does the Complaint address the extent of damage alleged to have occurred as a result of an abuse of process."

{¶21} In the amended complaint Wright Companies and Mr. Wright clearly allege that they were damaged; thus, the trial court's conclusion that this element was absent from the amended complaint is without merit. Wright Companies and Mr. Wright do not allege that the cognovit proceeding was instituted without probable cause, and no language in the amended complaint indicates that they are asserting that the proceeding was improperly instituted. In addition, absent from the amended complaint are allegations that "the proceeding ha[d] been perverted to attempt to accomplish an ulterior purpose for which it was not designed." *Wentz* at ¶9, quoting *Yaklevich*, 68 Ohio St.3d at 298. Wright Companies' and Mr. Wright's amended complaint states essentially that when Mr. Wright went to sell the home he discovered from the escrow agent that U.S. Bank was asserting $17,500 in legal fees which were not itemized in the cognovit judgment. Wright Companies and Mr. Wright petitioned the court in the cognovit proceeding for an injunction, which was denied. Wright Companies could not stay in business absent the sale of the home. Therefore, Wright Companies and Mr. Wright allege they were coerced into paying the cognovit judgment including the $17,500 in fees not itemized in the cognovit judgment. Further, by satisfying the judgment, Wright Companies' and Mr. Wright's appeal became moot.

{¶22} There are no allegations that U.S. Bank knew of Wright Companies' and Mr. Wright's need to sell the house to stay in business nor are there allegations that the $17,500 in additional legal fees sought by U.S. Bank exceeded that which was due to U.S. Bank. While Wright Companies and Mr. Wright might possibly have intended to imply in the amended complaint that U.S. Bank knew Wright Companies and Mr. Wright were in a desperate situation

and that U.S. Bank was not owed $17,500, they did not actually include such allegations in the complaint. Thus, we fail to see how Wright Companies and Mr. Wright have alleged that U.S. Bank used the cognovit proceeding to accomplish an ulterior purpose. *Wentz* at ¶9, quoting *Yaklevich*, 68 Ohio St.3d at 298. Wright Companies and Mr. Wright's assignment of error is without merit

V.

ASSIGNMENT OF ERROR III.

> "THE TRIAL COURT ERRED, TO THE PREJUDICE OF WRIGHT SAFETY, BY RULING THAT THE ACTIONS ALLEGED BY WRIGHT SAFETY WITHIN ITS PLEADINGS DID NOT STATE A CLAIM UPON WHICH RELEIF MAY BE GRANTED FOR INENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS."

{¶23} Wright Companies and Mr. Wright argue that the trial court erred in dismissing their claim of intentional interference with business relationships for failure to state a claim. We disagree.

{¶24} Wright Companies and Mr. Wright essentially allege in their claim for intentional interference with business relationships that the actions of U.S. Bank and its employees "have made it extremely difficult for [Wright Companies and Mr. Wright] to obtain a standard banking relationship on commercially reasonable terms with a new lender, due to the [Wright Companies' and Mr. Wright's] decreased credit rating." They further allege that U.S. Bank's and its employees' actions were intentional and caused Wright Companies and Mr. Wright damage.

{¶25} In concluding that Wright Companies and Mr. Wright failed to state a claim for intentional interference with business relationships, the trial court stated that "[t]he business relationship(s) alleged are not specific, rather they appear to be attempted to possible

relationships with other commercial lending institutions, there are insufficient facts to impute knowledge of these attempted business relationship to [U.S. Bank and its employees], nor is it alleged that [U.S. Bank or its employees], without justification, intentionally procured termination of the attempted business relationship(s)." While we do not entirely agree with the trial court's reasoning, we do agree with the result.

{¶26} "The Ohio Supreme Court has held that tortious interference with business relationships occurs 'when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another.'" *Chuparkoff v. Farmers Ins. of Columbus, Inc.*, 9th Dist. No. 22712, 2006-Ohio-3281, at ¶36, quoting *A & B-Abell Elevator Co. v. Columbus Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 14. Even when reviewed in a light most favorable to Wright Companies and Mr. Wright, their amended complaint only states that U.S. Bank's and its employees' interactions with Wright Companies and Mr. Wright caused them damage. The amended complaint does not state that U.S. Bank and its employees contacted or interacted with any prospective or current business relation of Wright Companies and Mr. Wright. The amended complaint itself states that it is Wright Companies' and Mr. Wright's decreased credit rating that has caused them to be unable to obtain "commercially reasonable" financing. While it may be true that U.S. Bank's and its employees' actions partially caused Wright Companies' and Mr. Wright's credit rating to decrease, such actions even if improper, do not amount to intentional interference with Wright Companies' and Mr. Wright's relations with another institution when there are no allegations that U.S. Bank or its employees had any interactions with another institution. Wright Companies' and Mr. Wright's third assignment of error is overruled.

VI.

ASSIGNMENT OF ERROR IV.

> "THE TRIAL COURT ERRED TO THE PREJUDICE OF WRIGHT SAFETY, BY RULING THAT THE ACTIONS ALLEGED BY WRIGHT SAFETY WITHIN ITS PLEADINGS DID NOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR DISPARATE TREATMENT."

{¶27} Wright Companies and Mr. Wright argue that the trial court erred in dismissing their claim for disparate treatment. We disagree.

{¶28} Wright Companies and Mr. Wright allege in their claim for "disparate treatment" that U.S. Bank and its employees treated Wright Companies and Mr. Wright "in a disparate manner from other borrowers[,]" and Wright Companies and Mr. Wright "were forced to execute documents in the guise of a renewal agreement, when the true purpose was to impose illegal penalties, manufacture a default, and create a situation that would deprive [Wright Companies and Mr. Wright] of their right to judicial review of [U.S. Bank's and its employees'] improper conduct."

{¶29} In dismissing Wright Companies' and Mr. Wright's claim for disparate treatment, the trial court concluded that "'Disparate Treatment' is a term of art involving discrimination – any person making such a claim must be a member of a protected class. * * * [T]here is no allegation that [Wright Companies and Mr. Wright] are members of a protected class."

{¶30} Disparate treatment is defined as "[t]he practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age or disability." Black's Law Dictionary (8 Ed.Rev. 2004) 504. While Wright Companies and Mr. Wright have alleged they were treated differently than others, they have not alleged in their amended complaint that the discriminatory treatment was because of any of the characteristics listed above. As Wright Companies and Mr. Wright have not alleged facts that fall within the

broad, general definition of disparate treatment, they necessarily have failed to allege facts that would assert a particular type of disparate treatment recognized under the law. As such, the trial court properly dismissed their claim.

VII.

ASSIGNMENT OF ERROR V.

> "THE TRIAL COURT ERRED, TO THE PREJUDICE OF WRIGHT SAFETY, BY RULING THAT THE ACTIONS ALLEGED BY WRIGHT SAFETY WITHIN ITS PLEADINGS DID NOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR CIVIL CONSPIRACY."

{¶31} Wright Companies and Mr. Wright argue that the trial court erred in dismissing their claims for civil conspiracy. We agree.

{¶32} To establish a cause of action for civil conspiracy, plaintiffs must establish: "(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself." *Gibson v. City Yellow Cab Co.* (Feb. 14, 2001), 9th Dist. No. 20167, at *3. "[T]he underlying unlawful act must be a tort." *Avery v. Rossford Ohio Transp. Dist.* (2001), 145 Ohio App.3d 155, 165; see, also, *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 221-222. The sole reason the trial court dismissed the claim was that "[h]aving found that all of the other tort liability allegations in the Amended Complaint were waived by release or have otherwise failed to state a claim upon which relief could be granted, Count III [for civil conspiracy] also fails to state a claim upon which relief could be granted – as there is no 'underlying unlawful act' by the alleged conspirators."

{¶33} We note that from the trial court's judgment entry it is unclear if the trial court would have reached a similar result if it had found that any of Wright Companies' and Mr. Wright's claims survived the motion to dismiss in the absence of the written waiver.

Additionally, it does not appear from the entry that the trial court considered the possibility that the Wright Companies' and Mr. Wright's civil conspiracy claim itself might have included allegations constituting an independent tort, and thus satisfying that element of a civil conspiracy claim. Wright Companies and Mr. Wright allege in their civil conspiracy claim that "[U.S. Bank and its employees] applied payments received from [Wright Companies and Mr. Wright] in an improper manner in order to maximize U.S. Bank's receipt of default interest and in order to cause a default on the Promissory Note" and that such action taken in concert with John Doe Defendants numbers one through ten "constitute[s] a conspiracy in order to bring about an unlawful default." Thus, we sustain Wright Companies' and Mr. Wrights' assignment of error and remand the issue to the trial court so that it can properly consider the civil conspiracy claim.

VIII.

ASSIGNMENT OF ERROR VI.

> "THE TRIAL COURT ERRED, TO THE PREJUDICE OF WRIGHT SAFETY, BY RULING THAT THE ACTIONS ALLEGED BY WRIGHT SAFETY WITHIN ITS PLEADINGS DID NOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED FOR PUNITIVE DAMAGES."

{¶34} As to Wright Companies' and Mr. Wright's claim for punitive damages, the trial court found that "[a] claim for punitive damages is not an independent cause of action[,]" and therefore dismissed their claim, having dismissed all other pending causes of action. Pursuant to statute, punitive damages can only be recovered when "(1) the defendant acted with either malice or aggravated or egregious fraud and (2) the trier of fact awards the plaintiff compensatory damages." *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, at ¶12, citing R.C. 2351.21(C). Further, "'[p]unitive damages are awarded as punishment for causing compensable harm and as a deterrent against similar action in the future. No civil cause of action in this state may be maintained simply for punitive damages.'" Id. at ¶13, quoting *Bishop v.*

Grdina (1985), 20 Ohio St.3d 26, 28, superseded by rule on other grounds. Initially we note that we determined above that the trial court erred in dismissing Wright Companies' and Mr. Wright's tort claim for civil conspiracy. Additionally, Wright Companies' and Mr. Wright's remaining claims for lender liability and breach of the duty of good faith contain allegations that U.S. Bank via its employees interfered with Wright Companies' and Mr. Wright's attempt to secure new financing in a "willful and malicious" manner. It is further alleged in the amended complaint that the actions by U.S. Bank involved threats and that the actions were "intentional and were undertaken to ruin the business of [Wright Companies and Mr. Wright]." Whether these allegations will be proven is not before us. As these allegations if proven, might amount to malice, it was error for the trial court to dismiss Wright Companies' and Mr. Wright's claim for punitive damages at this early stage of the proceeding.

IX.

ASSIGNMENT OF ERROR VII.

> "THE TRIAL COURT ERRED, TO THE PREJUDICE OF WRIGHT SAFETY, BY REFUSING TO CONSIDER THE AFFIDAVITS OF RICHARD E. WRIGHT, JR., AND JOHN NASSOS, AND THE SECOND AMENDED COMPLAINT."

{¶35} In this assignment of error Wright Companies and Mr. Wright argue that the trial court erred in failing to consider their second amended complaint and the attached affidavits. Specifically, Wright Companies and Mr. Wright appear to argue that they had a right to amend their complaint a second time since a responsive pleading was not yet filed. They also seem to imply that the filing of their amended complaint was not by right, but was by leave of court, thus preserving their amendment of right under Civ.R. 15. We conclude the trial court did not commit reversible error.

{¶36} Civ.R. 15(A) provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * * [.] Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party." In the instant matter, Wright Companies and Mr. Wright filed their initial complaint on February 1, 2008. U.S. Bank and its employees filed a motion to dismiss on March 12, 2008. A motion to dismiss is not a responsive pleading as contemplated by Civ.R. 15(A). See *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 549. Thus, anytime before a responsive pleading was filed, Wright Companies and Mr. Wright could amend their complaint *once* "as a matter of course." Civ.R. 15(A). The trial court indicated in its May 14, 2008 entry that it was denying U.S. Bank's and employees' motion to dismiss and allowing Wright Companies and Mr. Wright the opportunity to amend their complaint as requested. Subsequently, the trial court granted to Wright Companies and Mr. Wright an extension until June 16, 2008 to file their amended complaint. Wright Companies and Mr. Wright filed the amended complaint on June 20, 2008, after the deadline set by the court. Thus, assuming without deciding, that the amended complaint by the very nature of it being filed before a responsive pleading was not "as a matter of course,"[1] the trial court could have reasonably concluded that it became filed "as a matter of course" when Wright Companies and Mr. Wright

[1] In *Tatman v. Fairfield Cty. Bd. of Elections*, 102 Ohio St.3d 425, 2004-Ohio-3701, before a responsive pleading was filed, Plaintiff Tatman filed an amended complaint *and* a motion for leave to file the amended complaint. Id. at ¶5. The Court declined to rule on his motion to amend, noting that "[b]ecause Tatman amended his complaint before the board filed a responsive pleading, his amendment was 'as a matter of course' and no motion was necessary." Id. at ¶8. From this, it could be derived that an amended complaint filed prior to the filing of a responsive pleading is always "as a matter of course," even if a motion to amend has been filed and granted. However, as can we resolve the issue without extending *Tatman* to our facts, we leave the decision of whether we would do so for another day.

filed it outside the deadline set by the trial court. Therefore, in order to file a second amended complaint, Wright Companies and Mr. Wright would have needed to seek leave of court. Civ.R. 15(A). As they did not do so, it was not unreasonable for the trial court to not consider the second amended complaint and the attached affidavits when ruling on U.S. Bank's and employees' motion to dismiss. Wright Companies' and Mr. Wright's seventh assignment of error is overruled.

X.

{¶37} In light of the foregoing, we sustain Wright Companies' and Mr. Wright's first, fifth, and sixth assignments of error and overrule their second, third, fourth, and seventh assignments of error.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

SIDNEY N. FREEMAN, Attorney at Law, for Appellants.

COLIN G. SKINNER, Attorney at Law, for Appellees.