

Opinion issued July 28, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00412-CV

RICHARD M. OWEN AND MARSHA LONG OWEN, Appellants

V.

**OPTION ONE MORTGAGE CORPORATION, A/K/A SAND CANYON
CORPORATION, Appellee**

**On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 2007-73275**

MEMORANDUM OPINION

Appellants, Richard M. Owen and Marsha Long Owen (“the Owens”), appeal the trial court’s dismissal of their tort claims against appellee, Option One Mortgage Corporation, a/k/a Sand Canyon Corporation (“Option One”), and they

also appeal the trial court's award of an injunction bond to Option One. In three issues, the Owens argue that the trial court erred (1) in sustaining Option One's second special exceptions because they were impermissibly vague and failed to identify with specificity the inadequacies in the Owens' petition and because the Owens did allege an independent tort; (2) in striking portions of their fraud claims and dismissing those claims prior to trial; and (3) in ordering the temporary injunction bond released to Option One.

We modify the judgment and affirm as modified.

Background

On July 12, 2001, the Owens entered into an adjustable rate home equity loan serviced by Option One. In 2003, the Owens fell behind on their payments and Option One initiated foreclosure proceedings. Richard Owen then filed for Chapter 13 bankruptcy protection. The bankruptcy court lifted the automatic stay for Option One to proceed with foreclosure.

The Owens then filed this suit on December 3, 2007, and sought temporary injunctive relief to prevent Option One from foreclosing on their house. The trial court signed an agreed temporary restraining order and ordered the Owens to post a \$5,000 bond.

The Owens' original petition alleged that, following their bankruptcy filing, they made all further payments on the house pursuant to the bankruptcy plan

approved by the bankruptcy court and that all real estate taxes were to be paid pursuant to the bankruptcy plan. The Owens alleged that, without their knowledge, Option One also paid the real estate taxes, resulting in “unnecessary fees and interests against [the Owens] and highly inflating the amount charge[d] against them.”

The Owens attempted to refinance their home with the authorization of the bankruptcy court. They alleged that Option One “failed to provide a timely payoff statement to the new lender,” resulting in their being unable to refinance their home.

In their second amended petition, the Owens also alleged that they attempted to sell their home, again with the authorization of the bankruptcy court, and that Option One again failed to provide a timely payoff statement, thus causing them to lose the sale of their home. They also alleged that “prior to the pending foreclosure, [they] had requested at least one reinstatement number from [Option One] pursuant to the Loan Documents [the Deed of Trust and Promissory Note]. The reinstatement number provided [to the Owens] was highly inflated and contained fees and expenses which were not owed by [the Owens].”

The Owens sought a declaratory judgment, asking the court for

- (1) A judicial determination that [Option One] violated the Loan Documents by charging excessive fees and expenses in the reinstatement numbers provided to [the Owens];

- (2) A judicial determination that [Option One] violated the Loan Documents by charging excessive fees and expenses in the payoff numbers provided to [the Owens];
- (3) A judicial determination that [Option One] violated the Loan Documents by failing to timely provide a payoff number in connection with [the Owens'] refinancing; and
- (4) An order setting out the rights and liabilities of the parties as it relates to the Loan Documents.

The Owens also alleged a cause of action for breach of contract. They alleged that Option One “breached the Loan Documents when it paid [the Owens'] debts, which were already being paid under the terms of Mr. Richard M. Owen’s Chapter 13 Bankruptcy Plan” and that Option One failed to provide them with a proper accounting of the charges owed and unreasonably delayed providing a payoff amount in connection with the attempted refinancing and with the attempted sale.

The second amended petition also alleged promissory estoppel based on the Owens’ allegation that Option One “made material representations” recklessly and “without any knowledge of the truth” regarding the Owens’ account, including that “it would timely provide a payoff statement” and that “the amount of the payoff statement provided was accurate,” and that the Owens justifiably relied on the representations to their detriment. The Owens alleged common law fraud, arguing that Option One made “false material representations to [the Owens] regarding the amount of the balance owed under the Loan Documents” and that it “materially and falsely represented to [the Owens] that [Option One] made a \$6,463.26

payment to the Harris County Tax Collector for real estate taxes owed on the property.” Finally, the Owens sought exemplary damages and attorney’s fees.

Option One filed special exceptions and its first amended answer. Option One specially excepted to the Owens’ fraud claim on the basis that the Owens failed to plead what the false material “representations were or when they were made”; that the Owens failed “to allege an intentional tort (fraud) that is independent of their claim for breach of contract” because the Owens’ allegations of fraud related to Option One’s performance under the contract, and, thus, Option One needed “to know . . . the facts that give rise to a tort claim independent of the allegations supporting [the Owens’] breach of contract claim”; that the Owens failed to provide a factual statement supporting each element of common law fraud; and that the Owens’ allegations were conclusory and factually insufficient.

The trial court sustained these special exceptions, and the Owens subsequently filed their third amended petition. Regarding their common law fraud claim, the Owens specified that, “On October 1, 2008, one day before the scheduled foreclosure sale on [the Owens’] home, [Option One’s] counsel, Ms. Lisa Cockrell, stated to Mr. Owen that the outstanding balance due on the Loan Documents was \$491,952.85” and that unless Owen “provided a hand written confirmation of the payoff settlement in the amount . . . [Option One] would proceed with the foreclosure sale.”

The third amended petition added a cause of action for “common law fraud by nondisclosure.” They alleged,

[W]hen [the Owens] attempted to refinance their Home with another mortgage company to pay off [Option One] and the Loan Documents, [Option One] failed to disclose a proper accounting of the charges owed and delayed unreasonably in providing a payoff amount in connection with [the Owens’] refinancing. . . . Further, when [the Owens] attempted to sell their home to another buyer . . . , [Option One] failed to timely provide a payoff statement and failed to disclose a proper accounting of charges. . . . And prior to the pending foreclosure, [the Owens] had requested at least one reinstatement and payoff numbers from [Option One] pursuant to the Loan Documents. The reinstatement and payoff numbers provided [to the Owens] was highly inflated and contained fees and expenses which were not owed by [the Owens]. These reinstatement and payoff numbers were inflated, at least in part, by [Option One’s] misrepresentation that it made a payment in the amount of \$6,463.26 to [the] Harris County Taxing Authority for property taxes on [the Owens’] home. . . . [Option One had a duty to disclose to [the Owens] an accurate accounting of the amounts due on the Loan Documents. The accurate accounting of the charges, fees and interest[] due on the Loan Documents were facts material to [the Owens] and [Option One] knew [the Owens] were ignorant of these facts and did not have an equal opportunity to discover the facts. [Option One] remained deliberately silent when it had a duty to speak. By failing to disclose [an] accurate accounting of the charges, fees, and interest[] due on the Loan Documents, [Option One] intended to induce [the Owens] into paying charges, fees and interest not owed or lose their Home in a foreclosure sale. . . .

The Owens’ third amended petition also added a negligence cause of action.

The Owens alleged that Option One owed them a duty of care in performing services and exercising its rights under the Loan Documents, that Option One breached this duty by failing to provide them with a proper accounting in

connection with the refinancing and attempted sale and by misrepresenting to them that it made a payment on the real estate taxes, and that these breaches caused the Owens harm by preventing them from completing the refinancing and sale and by causing them to incur fees and interest they did not owe.

Option One filed its second special exceptions. Option One argued that the Owens' pleadings failed to allege an intentional tort—fraud—that was independent of their claim for breach of contract, and it cited cases supporting the proposition that “before tort damages accrue from a contractual matter, liability must arise independent of the fact that a contract exists between the parties.” Option One also specially excepted on the ground that the Owens' fraud and negligence claims, because they alleged breach of a duty that arose under a contract, “failed to allege a tort independent of the contract” between the parties. Option One also stated that the pleadings for fraud failed to state a cause of action because the Owens failed to plead facts supporting each and every element of common law fraud and negligence. Option One's special exceptions concluded, “Plaintiffs' pleadings do not involve a tort claim independent of their contract claim and Plaintiffs have failed to state a cause of action for common law fraud, fraud by nondisclosure and negligence because the allegations are conclusory and factually insufficient as discussed above. . . .”

The trial court sustained Option One's second special exceptions, and the Owens amended their petition for the fourth time. The fourth amended petition contained the same causes of action for declaratory judgment and breach of contract as the previous petitions.

The Owens amended their common law fraud cause of action in the fourth amended petition to allege that Option One had made a false material representation to them regarding its payment of \$6,463.26 in real estate taxes and that it had included charges for that amount as part of their outstanding balance, that Option One knew that its representation was false and made the representation with the intent of making them pay the improper amount, that they justifiably and reasonably relied on Option One's representation, and that they were harmed by the representation because it "inflated" their payoff amount and caused them to lose the sale on the home. The Owens' fourth amended petition also alleged common law fraud based on Option One's misrepresentations about the outstanding balance due in providing payoff amounts and based on statements made by Cockrell, Option One's attorney, regarding the outstanding loan balance.

The fourth amended petition also contained an amended cause of action for common law fraud by nondisclosure, in which the Owens alleged that Option One concealed material facts regarding the accurate accounting of the charges, interest, and fees owed under the Loan Documents when it failed to properly provide the

payoff amount in connection with the Owens' attempts to refinance and sell the home. The Owens alleged that Option One had a duty to disclose the payoff amount and that it deliberately stayed silent.

Regarding the Owens' negligence claims, the fourth amended petition alleged that Option One owed a duty of care in performing services and exercising its rights in collecting the debt owed by the Owens under the Loan Documents, that Option One breached its duty by failing to provide a proper accounting of its charges and by including in a payoff statement amounts the Owens did not owe, including the money Option One paid toward real estate taxes and related fees, and that the Owens were harmed by being unable to refinance or sell their home. Finally, the fourth amended petition contained requests for exemplary damages and attorney's fees, just as the prior amended petition had.

The case proceeded to trial, and at a pre-trial hearing, Option One moved to strike the Owens' tort claims from the fourth amended petition. Option One argued that all of the conduct alleged by the Owens related to their dealings with each other under the terms of the Loan Documents and that the Owens had failed to plead a basis for their tort claims independent of the breach of contract claims. Specifically, Option One argued that all of the alleged misrepresentations and fraud related to the payoff amounts and other aspects of the mortgage. The Owens responded that in some circumstances, a party to a contract can owe an

independent duty not to make fraudulent misrepresentations. The trial court dismissed all of the Owens' tort claims from their fourth amended petition, except for the Owens' claim that Cockrell, Option One's bankruptcy counsel, misrepresented the payoff amount to the Owens with the intention of inducing them to pay off the loan at a higher amount than was proper. The parties proceeded to trial primarily on the Owens' breach of contract and declaratory judgment claims.

After the Owens presented their case, Option One sought a directed verdict as to the breach of contract claims and the claim of fraud involving Cockrell's alleged misrepresentation of the payoff amount to the Owens during the bankruptcy proceedings. The Owens objected to the directed verdict on the breach of contract claim, but, regarding the fraud claim, their attorney stated, "I will acknowledge that Ms. Cockrell did not seem to have direct knowledge of the payoff statement." The trial court granted a directed verdict on the remaining fraud claim. The jury found that Option One did not fail to comply with the Loan Documents, and the trial court entered a take-nothing judgment against the Owens and awarded the \$5,000 injunction bond to Option One.

Special Exceptions

In their first issue, the Owens argue that the trial court erred in sustaining Option One's second special exceptions to the Owens' tort claims because the

special exceptions were impermissibly vague and failed to point out with specificity the inadequacies of the Owens' amended petition and because the Owens' third amended petition did allege an independent tort. In their second issue, the Owens argue that the trial court erred in striking portions of their fraud claims and dismissing those claims prior to trial, and thus improperly limited the Owens' remaining fraud claim to only the attorney's knowledge of the correctness of the payoff number.

A. Standard of Review

A party is generally required to file a special exception to challenge a defective pleading. *Connolly v. Gasmire*, 257 S.W.3d 831, 839 (Tex. App.—Dallas 2008, no pet.); *see also* TEX. R. CIV. P. 90 (providing that “[g]eneral demurrers shall not be used” and that any “defect, omission or fault in a pleading” is waived if not presented in writing to trial court prior to instruction or charge to the jury or, in non-jury case, prior to trial court signing the judgment). Texas Rule of Civil Procedure 91 provides:

A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

TEX. R. CIV. P. 91. The purpose of special exceptions is to furnish a party with a medium to force clarification of an adverse party's pleadings when they are not clear or sufficiently specific. *Connolly*, 257 S.W.3d at 839. Special exceptions

may also be used to determine whether the plaintiff has stated a cause of action permitted by law. *Mowbray v. Avery*, 76 S.W.3d 663, 677 (Tex. App.—Corpus Christi 2002, pet. denied) (citing TEX. R. CIV. P. 91).

When reviewing a trial court’s dismissal of a cause of action following the sustaining of special exceptions, we review the propriety of both the trial court’s decision to sustain the special exceptions and the trial court’s order of dismissal. *Perry v. Cohen*, 285 S.W.3d 137, 142 (Tex. App.—Austin 2009, pet. denied) (citing *Cole v. Hall*, 864 S.W.2d 563, 566 (Tex. App.—Dallas 1993, writ dism’d w.o.j.) (en banc)).

We review the pleadings to determine whether the trial court abused its discretion in granting special exceptions. *Id.* (citing *Cole*, 864 S.W.2d at 566 and *Muecke v. Hallstead*, 25 S.W.3d 221, 224 (Tex. App.—San Antonio 2000, no pet.)). The trial court has broad discretion in granting special exceptions to order more definite pleadings as a particular case may require. *Id.* (citing *Burgess v. El Paso Cancer Treatment Ctr.*, 881 S.W.2d 552, 554 (Tex. App.—El Paso 1994, writ denied)). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Id.* (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). When reviewing the trial court’s decision on special exceptions, we accept as true all the material factual allegations and

statements reasonably inferred from the allegations set forth in the pleadings. *Id.* (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 240 (Tex. 1994)).

If we determine that the trial court’s decision to grant the special exceptions was proper, we then review whether the decision to dismiss was appropriate. *Connolly*, 257 S.W.3d at 838 (citing *Cole*, 864 S.W.2d at 566).

B. Vagueness

The Owens first argue that the trial court erred in granting Option One’s second special exceptions because they were impermissibly vague.

Rule 91 requires that special exceptions “point out intelligibly and with particularity” the alleged defect or omission in the pleadings. TEX. R. CIV. P. 91. If special exceptions lack specificity in pointing out how the plaintiff’s allegations are faulty, they constitute a general demurrer, and general demurrers are prohibited by the Rules of Civil Procedure. *See* TEX. R. CIV. P. 90; *see also Castano v. San Felipe Ag., Mfg., & Irrigation Co.*, 147 S.W.3d 444, 453 (Tex. App.—San Antonio 2004, no pet.) (holding that special exceptions failed “to state with specificity the elements lacking in [plaintiff’s] petition” and thus was general demurrer prohibited under rules and that grant of those special exceptions “would . . . permit the [defendants] to circumvent the protective features of the special exception procedure”).

The Owens rely on *Muecke v. Hallstead* to support their contention that Option One's special exceptions were impermissibly vague. In *Muecke*, the defendant's special exceptions stated that the petition "'fails to state any cause of action sufficient to give fair notice to [Defendant] of the claim(s) involved,' fails to state 'the circumstances constituting such an allegation with . . . any particularity,' and 'fail[s] to plead any of the elements constituting a cause of action for fraud or any other cognizable claim.'" 25 S.W.3d at 224. The court concluded that the special exceptions were not properly granted because they did not comply with Rule 91's particularity requirement. *Id.*

Here, however, Option One's second special exceptions went beyond a general allegation that the Owens failed to state a cause of action or plead sufficient facts. Option One's second special exceptions identified specific causes of action and argued that the Owens' pleadings failed to allege an intentional tort that was independent of their claim for breach of contract. Option One cited cases supporting its proposition that "before tort damages accrue from a contractual matter, liability must arise independent of the fact that a contract exists between the parties." Option One also specially excepted on the ground that the Owens' fraud and negligence claims, as they alleged breach of a duty that arose under a contract, "failed to allege a tort independent of the contract" between the parties. This argument from Option One's second special exceptions was

sufficiently specific to “point out intelligibly and with particularity” the alleged defects in the Owens’ fourth amended petition. *See* TEX. R. CIV. P. 91; *see also* *Mowbray*, 76 S.W.3d at 677 (holding that special exceptions may be used to determine whether plaintiff has stated cause of action permitted by law).

C. Properly Pled Independent Tort

The Owens also argue that the trial court erred in sustaining Option One’s second special exceptions because their third amended petition properly pled an independent tort.

“Although a party’s actions may breach duties in tort, contract, or both, Texas jurisprudence has long recognized that ‘mere nonfeasance under a contract creates liability only for breach of contract.’” *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 301 (Tex. App.—Dallas 2009, no pet.) (quoting *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 13 (Tex. 1996)). Generally, tort damages are not recoverable unless the plaintiff suffered an injury that is independent and separate from the economic losses recoverable under a breach of contract claim. *Id.* (citing *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 45–47 (Tex. 1998)).

The Owens cite *Formosa Plastics* to argue that Texas law recognizes an “independent legal duty, separate from the existence of the contract itself, preclud[ing] the use of fraud to induce a binding agreement.” *See* 960 S.W.2d at

47. They argue that their third amended petition alleged that Option One intentionally misrepresented the amount due on the mortgage and “used that misrepresentation to induce the Owens into signing an agreement containing an inflated payoff amount so that Option One would cease the foreclosure process.” The Owens reference the portion of their third amended petition in which they allege that Option One, through its attorney, provided the Owens with an inaccurate payoff amount and that Option One’s attorney required Richard Owen to sign a handwritten document agreeing to the payoff amount.

However, these statements do not allege that Option One committed fraud to induce a binding agreement because the pleadings do not allege that the handwritten note was a separate binding contract independent from the Loan Documents that bound the Owens to anything or subjected them to contractual liability. As alleged by the Owens’ third amended petition, Option One’s and the Owens’ duties all ran from the official Loan Documents. Because the Owens did not plead any fraud in the inducement of those documents, they did not allege an independent tort. *See Formosa Plastics*, 960 S.W.2d at 47.

We conclude that the trial court did not err in sustaining Option One’s second special exceptions.

We overrule the Owens’ first issue.

D. Dismissal of Fraud Claims in Fourth Amended Petition

In their second issue, the Owens argue that the trial court erred in striking their fraud and negligence claims from their fourth amended petition prior to trial. They further argue that by striking portions of their fraud claims, the trial court improperly limited their remaining fraud claim based on Cockrell's misrepresentation to only the attorney's knowledge of the correctness of the payoff number.

If the trial court properly granted special exceptions, and the plaintiff refused or failed to amend its petition in compliance with the trial court's order, there is no error in the trial court's dismissal of the cause of action. *Perry*, 285 S.W.3d at 142 (citing *Cole*, 864 S.W.2d at 566 and *Sanchez v. Hunstville Indep. Sch. Dist.*, 844 S.W.2d 286, 290–91 (Tex. App.—Houston [1st Dist.] 1992, no writ)). Furthermore, a party does not have a right to multiple opportunities to amend in the face of repeated grants of special exceptions, and the right to amend exists only if the defect is curable. *See Ford v. Performance Aircraft Servs., Inc.*, 178 S.W.3d 330, 335 (Tex. App.—Fort Worth 2005, pet. denied); *Mowbray*, 76 S.W.3d at 678. When a trial court dismisses a case upon special exceptions for failure to state a cause of action, we review the issue of law under a de novo standard. *Boales v. Brighton Builders, Inc.*, 29 S.W.3d 159, 163 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

As we have already discussed, the trial court correctly sustained Option One's second special exceptions on the ground that the Owens failed to allege an independent tort underlying its fraud claims in the third amended petition or losses separate from those related to the failure to perform under the initial Loan Documents. The Owens' had another opportunity to amend their pleadings and filed their fourth amended petition. However, Option One moved to strike the fraud and negligence portions of the Owens' fourth amended petition because it still failed to properly state a cause of action on the Owens' tort claims, and the trial court agreed and dismissed the majority of those claims.

The majority of the Owens' pleadings in their fourth amended petition allege various acts of nonfeasance under the Loan Documents. Option One's alleged duty to provide accurate and timely payoff information and other financial information regarding the mortgage, its option to pay overdue real estate taxes and seek reimbursement from the Owens for the taxes, fees, and interest incurred in that process, and its obligation to act as a reasonable loan servicer all arose out the Loan Documents. The Owens failed to plead any injury other than those that arose from Option One's or their own alleged breach of contract. *See Esty*, 298 S.W.3d at 301 (holding that "mere nonfeasance under a contract creates liability only for breach of contract" and that tort damages are not recoverable unless plaintiff

suffered injury that is independent and separate from economic losses recoverable under breach of contract claim).

The Owens' fourth amended petition constituted their second attempt to amend their pleadings in compliance with the trial court's grant of special exceptions for failure to plead an independent tort, and the causes of action that were dismissed by the trial court again failed to adequately state independent causes of action for fraud and negligence. Thus, the Owens refused or were unable to amend their petition in compliance with the trial court's order and dismissal of these claims was proper.¹ *See Perry*, 285 S.W.3d at 142; *Ford*, 178 S.W.3d at 335; *Mowbray*, 76 S.W.3d at 678.

We overrule the Owens' second issue.

Injunction Bond

In their third issue, the Owens argue that the trial court erred in ordering the judgment bond released to Option One because Option One never pleaded or proved any damages resulting from the issuance of the temporary restraining order.

¹ Regarding the fraud claim based on Cockrell's alleged misrepresentation in the bankruptcy proceeding, which the trial court excluded from its ruling granting Option One's pre-trial motion to strike and allowed to proceed to trial, the Owens do not challenge the trial court's grant of directed verdict on that claim. In fact, their attorney agreed to the trial court's directed verdict on the record at trial when his only statement in response to Option One's directed verdict motion on this issue was, "I will acknowledge that Ms. Cockrell did not seem to have direct knowledge of the payoff statement."

Option One concedes this point in its appellate brief and agrees that the trial court's judgment should be modified to release the bond to the Owens. Therefore, we modify the judgment of the trial court by deleting the portion of the judgment stating "ORDERED, ADJUDGED and DECREED that the Bond in the amount of FIVE THOUSAND DOLLARS (\$5,000.00) is awarded to Defendant, OPTION ONE MORTGAGE CORPORATION and its attorneys for the preparation and attendance of this trial." We add the following statement in its place: "ORDERED, ADJUDGED and DECREED that the Bond in the amount of FIVE THOUSAND DOLLARS (\$5,000.00) is released to Plaintiffs, RICHARD M. OWEN and MARSHA LONG OWEN."

Conclusion

We modify the judgment of the trial court to release the temporary injunction bond, and we affirm the judgment as modified.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Bland.