

[Cite as *Murphy v. Ditech Fin., L.L.C.*, 2018-Ohio-5041.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106896

VONCEIL MURPHY

PLAINTIFF-APPELLANT

vs.

DITECH FINANCIAL, L.L.C., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-880343

BEFORE: Stewart, J., McCormack, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 13, 2018

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MELODY J. STEWART, J.:

{¶1} Plaintiff-appellant Vonceil Murphy brought this action against defendants-appellees Ditech Financial, L.L.C. and its legal counsel Cooke Demers, L.L.C., alleging that they abused process by bringing meritless foreclosure actions against her and committed violations of the Ohio Consumer Sales Practices Act by attempting to collect a debt she did not owe, and foreclose on real property. Murphy alleged that the foreclosure actions were meritless because her debt on an outstanding note had been discharged in bankruptcy and she was no longer in possession of the property.

{¶2} Ditech and Cooke Demers filed a Civ.R. 12(B)(6) motion to dismiss the complaint for failure to state a claim upon which relief could be granted. They argued that Murphy's complaint failed to allege that the defendants filed the foreclosure actions with an intent to accomplish an ulterior motive. They further argued that the consumer sales practices act did not apply to collateral services that are solely associated with the sale of real estate.

{¶3} The court granted the motion to dismiss. The court found that Murphy alleged that the abuse of process claim was based on the fact that Ditech and Cooke Demers filed in rem foreclosure actions against her. Noting that the mere filing of an action cannot constitute abuse of process, the court held that a viable claim of abuse of process must show an ulterior purpose in the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. Finding that Murphy did not allege that Ditech and Cooke Demers used the foreclosure actions as coercion to obtain some collateral advantage, it found that Murphy's complaint did not allege a viable claim for abuse of process.

{¶4} With respect to the consumer sales practices act claim, the court held that Ditech was not a “supplier” and that, in any event, the consumer sales practices act does not apply to collateral services that are solely associated with the sale of real estate and are necessary to effectuate a pure real estate transaction. The court also found that when an attorney represents a financial institution in a transaction that is exempted from the statute, the attorney is similarly exempted from liability under the act.

{¶5} Murphy’s sole assignment of error contests the dismissal as to both counts of her complaint. This is an assignment of error we review de novo by accepting all of the allegations in the complaint as true and deciding whether those facts prove beyond any doubt that the plaintiff is not entitled to relief. *LGR Realty, Inc. v. Frank & London Ins. Agency*, 152 Ohio St.3d 517, 2018-Ohio-334, 98 N.E.3d 241, ¶ 10.

I. Abuse of Process

{¶6} 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.” *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 1994-Ohio-503, 626 N.E.2d 115, paragraph one of syllabus. Unlike a claim of malicious prosecution where a plaintiff has no reasonable chance of winning, an abuse of process claim is properly instituted, but used to coerce the defendant in order to obtain some collateral advantage. *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271, 1996-Ohio-189, 662 N.E.2d 9. In other words, the “ulterior motive” component of an abuse of process claim “occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order.” *Id.*

{¶7} The complaint alleged that Murphy financed a real property purchase in 2006 by signing a promissory note. In 2008, a federal court declared Murphy bankrupt (despite her being current on the note) and held that “she was relieved of any and all personal liability” on the note. Murphy continued to live in the house and alleged that she “continued making monthly payments and remained current on the mortgage on her residence well into calendar year 2014.” Second Amended Complaint at ¶ 10. In March 2014, Murphy “conveyed title” to the property to VAT Management.¹ As a result of this conveyance, she claimed to have “no legal or equitable interest in the subject property.”

{¶8} The complaint alleged that Ditech either acquired the note and/or the servicing of the note in October 2014. That same month, Ditech brought a foreclosure action in the court of common pleas against Murphy and an unnamed codefendant (the second foreclosure action was styled as “Vonceil Murphy, et al.”). Nevertheless, the complaint alleges that in January 2015, the court dismissed Ditech’s action for failure to state a claim upon which relief could be granted.

{¶9} In February 2015, Ditech filed a second foreclosure action against Murphy. The court again dismissed the action, but the dismissal entry does not state why.

{¶10} In February 2017, Ditech filed a third foreclosure action against VAT Management. The third foreclosure complaint did not name Murphy and alleged that “Vonceil Murphy has been relieved of any personal liability on the Note due to her Bankruptcy discharge” and that “Vonceil Murphy conveyed the premises subject to the mortgage to VAT Management, LLC by Quit Claim Deed * * *.”

¹ The court’s dismissal entry states that “VAT Management is a single member L.L.C. of which Murphy is the single member.” Whether this is true or not, it is not an allegation contained in the four corners of the complaint, nor incorporated into the complaint. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 1997-Ohio-274, 673 N.E.2d 1281, fn. 1.

{¶11} These allegations do not show that Ditech instituted legal proceedings against Murphy to accomplish an ulterior purpose for which those proceedings were not designed. If the gravamen of coercion is using the court for that which it is powerless to order, *Robb*, 75 Ohio St.3d at 271, 1996-Ohio-189, 662 N.E.2d 9, Murphy failed to show coercion. She alleged that Ditech filed the foreclosure actions “to attempt to force plaintiff to have to needlessly incur the costs and expenses of defense in a matter where she had neither any personal liability to defendant nor interest * * *.” This purpose was not “ulterior” to the object of the foreclosure action. At all events, Ditech was attempting to collect on a note. This was a legal remedy that the court was empowered to give. That Murphy had to incur the cost of defending those actions did not rise to the level of an abuse of discretion. *Sivinski v. Kelley*, 8th Dist. Cuyahoga No. 94296, 2011-Ohio-2145, ¶ 36-37; *Capital One Bank (USA), NA v. Reese*, 11th Dist. Portage No. 2014-P-0034, 2015-Ohio-4023, ¶ 72 (no ulterior motive shown in foreclosure case because bank’s ulterior motive in seeking foreclosure “was to get money, which the trial court had the power to grant (and did grant)”). As to both Ditech and Cooke Demers, the court did not err by dismissing the abuse of process claim contained in Count 1 of the complaint.

II. Ohio Consumer Sales Practices Act

{¶12} Count 2 of the complaint, Murphy’s consumer sales act claim, is premised in part on her allegation that Ditech is a supplier as defined by R.C. 1345.01(C) and, as such, committed an unfair trade practice by attempting to collect a \$140,605.40 debt that it knew or should have known that she did not owe. She also alleged that Ditech made false, misleading, and deceptive statements in its complaint stating that she was in default of a note and could be held personally liable for any deficiency balance not realized from the sale of the property.

{¶13} Murphy brought her consumer sales practices act claims under R.C. 1345.02(A) and 1345.03(A). Those sections provide that “[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction,” R.C. 1345.02(A), and that “[n]o supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.” R.C. 1345.03(A).

{¶14} Although a “supplier” generally means a seller engaged “in the business of effecting or soliciting consumer transactions,” in connection with a consumer transaction for a residential mortgage, a “‘supplier’ does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code.” R.C. 1345.01(C).

{¶15} As a matter of law, “[t]he servicing of a borrower’s residential mortgage loan is not a ‘consumer transaction’ as defined in R.C. 1345.01(A)” and “[a]n entity that services a residential mortgage loan is not a ‘supplier’ as defined in R.C. 1345.01(C).” *Anderson v. Barclay’s Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997, paragraphs one and two of the syllabus. The rationale for this law is that “one essential element of R.C. 1345.01(A) is not met: there is no sale, lease, assignment, award by chance, or other transfer of a service to a consumer.” *Id.* at ¶ 12. Murphy’s complaint alleged that Ditech “allegedly acquired the mortgage loan account and/or the servicing of same prior to October 28, 2014.” If Ditech was nothing more than a loan servicer, the court would have correctly dismissed the complaint on the authority of *Anderson*.

{¶16} Murphy argues that her complaint alleged that Ditech is more than a loan servicer; she maintains that it is a nonbank mortgage lender by virtue of having acquired the mortgage loan account by assignment.

{¶17} The consumer sales practices act generally excludes real estate transactions with banks. *See* R.C. 1345.01(A). However, the statute expressly exempts from this exception “transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers * * *.” *Id.* A “nonbank mortgage lender” is defined as, among other things, “any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States[.]” R.C. 1345.01(K). The act states that consumer transactions include “transactions in connection with residential mortgages between * * * nonbank mortgage lenders and their customers * * *.” R.C. 1345.01(A).

{¶18} In *Powers v. Green Tree Servicing, L.L.C.*, 8th Dist. Cuyahoga No. 102753, 2015-Ohio-3355, we granted a Civ.R. 12(B)(6) dismissal of Powers’s consumer sales act claim against Green Tree Servicing (whom Murphy alleges was Ditech’s predecessor in interest). Powers alleged that Green Tree violated the act by sending a collection letter on a debt that had been discharged in bankruptcy. Noting that the consumer sales practices act distinguishes banks from “nonbank mortgage lenders and their customers,” R.C. 1345.01(A), we rejected Green Tree’s argument that it was merely a mortgage servicer but we held that Green Tree, which took assignment of a note from the original mortgagor, was a nonbank mortgage lender and not a mere mortgage servicer. *Id.* at ¶ 14. Finding that the “interaction” between Powers and Green Tree fell within the act, we held that the trial court erred by dismissing the complaint because Powers asserted a viable claim that fell within the consumer sales practices act. *Id.* at ¶ 18.

{¶19} Ditech argues that any reliance on *Powers* is misplaced because *Powers* did not reject the exemption for mortgage servicers and Murphy does not dispute that Ditech is the mortgage servicer to her mortgage loan. It is true that *Powers* did not reject the exemption for mortgage servicers. It is only partially true, however, that Murphy alleged that Ditech is a mortgage servicer — the complaint stated that Ditech “allegedly acquired the mortgage loan account and/or the servicing of same prior to October 28, 2014.” The use of the word “acquired” allows for the possibility that Ditech actually owned the loan account, as opposed to merely servicing the loan. If true, Ditech, like Green Tree in the *Powers* decision, was the assignee of the mortgage and “steps into the shoes of the original lender.” *Id.* at ¶ 14. And whether that allegation is accurate is a matter beyond the scope of Civ.R. 12(B)(6) because we are obligated to accept the factual allegations of Murphy’s complaint as true. Consistent with *Powers*, we find that the court erred by dismissing Count 2 of Murphy’s complaint against Ditech.

{¶20} The court likewise erred by dismissing Count 2 as it related to Cooke Demers. Cooke Demers was representing Ditech, which is not an exempt financial institution and thus within the scope of the consumer sales practices act. *See Lee v. Javitch, Block & Rathbone, L.L.P.*, 522 F.Supp.2d 945, 956 (S.D.Ohio 2007); *Floyd v. Bank of Am., N.A.*, N.D.Ohio No. 1:13-cv-2072, 2014 U.S. Dist. LEXIS 101932, 19 (July 25, 2014) (noting that consumer sales practices act does not apply to law firms directly representing “an exempt financial institution in debt collection”).

{¶21} Judgment affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellees and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR