[Cite as *FirstMerit Bank, N.A. v. Burdine*, 2014-Ohio-1670.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

FirstMerit Bank, N.A.

Plaintiff

v.

Jess R. Burdine

Appellant

v.

Protective Life Ins. Co., et al.

Third-Party Defendant

[Steinle GMC Cadillac, Inc.—Appellee]

Court of Appeals No. OT-13-008

Trial Court No. 12-CV-297H

DECISION AND JUDGMENT

Decided: April 18, 2014

* * * * *

Wesley M. Miller Jr., for appellant.

Peter C. Munger and Thomas G. Mackin, for appellee.

* * * * *

JENSEN, J.

Statement of Facts and Procedural History

{¶ 1} This case concerns the 2006 purchase of an automobile from appellee, Steinle GMC Cadillac, Inc. (hereinafter "Steinle") in Fremont, Ohio. On June 20, 2006,

appellant, Jess Burdine, accompanied his son, Craig Burdine, to Steinle. Appellant's purpose that day was to "assist" his son in looking for a truck. Craig Burdine selected a pre-owned 1996 Chevrolet S10 truck.

{¶ 2} Appellant and Craig discussed purchasing the truck with a Steinle representative. During the course of the discussion, the representative was on the telephone. After the phone call, he informed Craig Burdine that, in order to secure a car loan, Craig would need someone to co-sign on the loan. Appellant agreed to co-sign on the loan.

{¶ 3} A series of documents were then presented to Craig and appellant. The purchase agreement identified Craig Burdine and appellant as the purchasers, with a purchase price of $8,439. Both signed the purchase agreement.

{¶ 4} Financing for the truck was provided by FirstMerit Bank. FirstMerit's "promissory note and security agreement" listed several figures: $8,862.65 was identified as the "amount financed;" $1,798.03 was the "finance charge, the dollar amount the credit will cost" to borrow; and $10,660.68 was the total amount paid after all scheduled payments. The note identified Craig Burdine and appellant as the borrowers, and both signed it.

{¶ 5} Another document purportedly signed by appellant was a "notice to cosigner" which states, in part, "you are being asked to guarantee this debt. Think carefully before you do. If the buyer doesn't pay the debt, you will have to. * * * If this

debt is ever in default, that fact may become a part of *your* credit record." (Emphasis sic.) Appellant has no memory of signing the notice, but does not dispute its authenticity.

{¶ 6} Craig Burdine and appellant were each offered optional credit life insurance from Protective Life Insurance Company. The purpose of the policy was to insure the debt in the event the insured died before the loan was paid in full. Craig accepted and purchased the insurance; appellant declined the insurance.

{¶ 7} At some point during the meeting, appellant noticed the "total amount paid" figure of $10,660.68 on the note. Appellant described what happened next: "Well, I told [the representative], 'you know what, the price is not 10,000 bucks, a ten year old truck, that needs a thousand dollars worth of repairs on it, no way am I going to go along with this.' I said, 'I'm out of here.'" Appellant claims that the representative walked away and said he would return shortly. Appellant, however, left the meeting in a "huff" and walked outside to the car lot, leaving his son on his own. Appellant never returned to the meeting and does not know what occurred. Appellant never asked that any of the signed documents be given to him or destroyed. Appellant felt that the representative "had an obligation to tear up my signature papers," but he never followed up to see if that was done.

{¶ 8} Thirty minutes later, Craig came outside and announced that he had purchased the truck. Appellant did not ask how Craig was able to secure financing.

{¶ 9} On August 11, 2007, 14 months after purchasing the vehicle, Craig Burdine died accidentally. Appellant was named as executor to Craig's estate. As executor,

appellant made a claim for death benefits from Protective Life Insurance Company. The insurance company denied the claim, citing Craig Burdine's misinformation on the insurance application.

{¶ 10} In the meantime, FirstMerit continued to send billing statements to Craig Burdine and then to the estate of Craig Burdine. Neither the estate, nor appellant as cosigner on the loan, made any payments toward the loan.

{¶ 11} On September 13, 2011, FirstMerit sued appellant in his personal capacity in the Ottawa County Municipal Court for the amount owed on the note, $5,760.43. Appellant filed an answer and a third-party complaint, joining Protective Life Insurance Company and Steinle as third-party defendants.

{¶ 12} After it was joined in the lawsuit, Protective Life Insurance accepted the insurance claim and paid the balance owed on the loan to FirstMerit Bank. On March 1, 2012, FirstMerit dismissed its complaint against appellant and sent him the title to the truck. On March 5, 2012, appellant dismissed the third-party complaint against Protective, leaving appellant and Steinle as the only remaining parties in the case.

{¶ 13} On April 5, 2012, appellant filed an amended complaint against Steinle. Appellant claimed that he had "rescinded his signature" to the transaction and accused Steinle of "fraudulently misrepresenting [appellant] as a cosigner" to the loan. Appellant argued that Steinle's actions violated the Ohio Consumer Sales Practice Act, R.C. 1345.01 et seq. (Count I), the federal Truth-in-Lending-Act, Section 1601, Title 15, U.S.

Code, et seq. (Count II), and the Ohio common law prohibiting fraud (Count III). Appellant claims that Steinle's actions damaged his credit.

{¶ 14} On May 31, 2012, the case was transferred to the Ottawa County Court of Common Pleas based upon the amount of plaintiff's demand, which exceeded the jurisdictional limit of the municipal court.

{¶ 15} On August 10, 2012, Steinle moved for summary judgment as to all claims asserted against it. By order dated January 22, 2013, the trial court granted Steinle's motion. It found that appellant "is time barred from bringing his claims against Steinle * * *."

{¶ 16} Appellant filed a notice of appeal on February 20, 2013. In his single assignment of error, appellant alleges,

{¶ 17} "ASSIGNMENT OF ERROR I. THE TRIAL COURT ERRED AS A MATTER OF JUDGMENT. LAW [SIC] WHEN IT GRANTED THE STEINLE CADILLAC GMC INC.'S MOTION FOR SUMMARY [SIC]"

Analysis

{¶ 18} Appellate review of a summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). An appellate court conducts an independent review of the record and stands in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445, 666 N.E.2d 316 (5th Dist.1995)

{¶ 19} A reviewing court is required to examine the evidence to determine whether, as a matter of law, no genuine issue exists for trial. A court may only grant

summary judgment when: (1) there is no genuine issue as to any material fact; (2) as a matter of law, the moving party is entitled to judgment; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the non-moving party, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978).

{¶ 20} When seeking summary judgment, the moving party must specifically delineate the basis upon which the motion is brought. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988), syllabus. The movant must also identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, the adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 21} Count I raises a claim under the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq. "The Act is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed * * *." *Einhorn v. Ford Motor Co.*, 48 Ohio St.3d 27, 29, 548 N.E.2d 933 (1990).

{¶ 22} Appellant's amended complaint failed to identify how Steinle violated the CSPA or point to any particular section of the Act. In his appellate brief, appellant argues that "it could be inferred from the allegations in the complaint" that Steinle violated R.C. 1345.03(A). That provision prohibits a supplier from committing "an unconscionable act or practice in connection with a consumer transaction." Appellant argues that it was unconscionable for Steinle to "ignore [appellant's] rescission as co-signer on the loan and to not [sic] inform him of its action."

{¶ 23} R.C. 1345.10(C) sets forth a statute of limitations for claims brought under the CSPA. It provides, in part,

> (C) An action under sections 1345.01 to 1345.13 of the Revised Code may not be brought more than two years after the occurrence of the violation which is the subject of suit * * *. However, an action under sections 1345.01 to 1345.13 of the Revised Code arising out of the same consumer transaction can be used as a counterclaim whenever a supplier sues a consumer on an obligation arising from the consumer transaction.

{¶ 24} The event giving rise to appellant's claims occurred on June 20, 2006, the date of sale. Appellant brought suit against Steinle on November 10, 2011, more than five years after the sale of the truck and Steinle's alleged unconscionable acts. Thus, Count I was untimely by more than three years. Appellant argues, however, that he was prevented from filing suit because he was not aware that Steinle submitted loan documents bearing his signature until he was sued by FirstMerit on September 13, 2011.

{¶ 25} The two year time limitations period set forth in R.C. 1345.10(C) is an "absolute time limit to which the discovery rule does not apply." *Ford Motor Credit Co. v. Jones*, 8th Dist. Cuyahoga No. 92428, 2009-Ohio-3298, ¶ 20, citing *Weaver v. Armando's Inc.*, 7th Dist. Mahoning No. 02CA153, 2003-Ohio-4737, ¶ 37. That appellant may not have known that his name remained on the promissory note until 2011 does not toll the two year limitations period.

{¶ 26} In the alternative, appellant argues that the exception to the two year time limit that is reserved for counterclaims applies to this case. Appellant's CSPA claim was not, however, brought as a counterclaim, but rather as a third-party claim against Steinle whom he joined as a party.

{¶ 27} Appellant minimizes the distinction between a counterclaim and a third-party claim. He argues, "surely the legislature did not intend to limit a person from bringing action against others who may have been involved in the underlying transaction * * *." We disagree. The legislature could have included "third-party claims" or "cross-claims" when creating an exception to the two year statute of limitations. We will not read into the statute an exception that the legislature chose not to insert.

{¶ 28} The case is similar to *Ford Motor Credit v. Jones*, 8th Dist. Cuyahoga No 92428, 2009-Ohio-3298. There, a financing company sued the purchaser and cosigner to a car loan. The cosigner then filed a CSPA cross-claim against the dealership. The court found that the two year statute of limitations barred the cosigner's claim. *Id.* at ¶ 20; *see also Comer v. Early Auction Co.*, Clermont C.P. No. 2000CVH00060, 2006 WL 4551249,

*4 (June 12, 2006) ("The reasons for tolling [R.C. 1345.10(C)'s] statute of limitations from the filing date of the complaint lose their vitality when considered in relation to a cross-claim where one defendant seeks to recover damages for his own injuries from another defendant.") (Citations omitted.) In sum, we find that appellant's third-party claim under the CSPA was untimely filed and therefore fails as a matter of law.

{¶ 29} In Count II, appellant alleges that "Steinle's actions are in violation of the Truth-in-Lending-Act." Congress passed the Truth-In-Lending-Act ("TILA") to protect consumers from dishonest business tactics and to provide them with an accurate means of comparing credit prices and assessing the cost of deferring payment. *Mourning v. Family Publications Serv.*, 411 U.S. 356, 364, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973).

{¶ 30} Under TILA, the statute of limitations is one year for a damage claim, and three years for a right of rescission claim. 15 U.S.C. 1640(e) . *Steel Valley Bank, N.A. v. Tuckosh*, 7th Dist. Harrison Nos. 04HA566, 04HA567, 2004-Ohio-4907, ¶ 31. Appellant argues that his TILA claim is governed by the one year statute of limitations but that he is entitled to have it equitably tolled.

{¶ 31} For equitable tolling to apply, appellant must show "not only that [he] exercised due diligence to discover [his] cause of action prior to the running of the statute, but also that [Steinle] was guilty of some affirmative act of fraudulent concealment which frustrated discovery notwithstanding such diligence." *JPMorgan Chase NA v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273, ¶ 35,

quoting *Trimm v. Fifth Third Mtg. Co.*, N.D.Ohio No. 3:10CV1602, 2010 WL 3515596, *3 (Sept. 3, 2010).

{¶ 32} Here, appellant argues that he "had no way of knowing that Steinle had used him as a guarantor since he was not informed by Steinle * * *. It wasn't until [he] was sued [by the lender] that he became aware of Steinle's action." Appellant's argument appears to be that that Steinle's submission of the loan documents to the lender, in and of itself, constituted fraud. The record discloses no evidence that Steinle concealed that act. In the absence of any affirmative misrepresentation or effort by Steinle to hide the use of the loan documents, appellant cannot make a case that the limitations period should be tolled.

{¶ 33} Further, there is no evidence that appellant took any overt step, much less that he exercised due diligence, to discover whether, in fact, his name remained on the promissory note. Instead, appellant left the meeting without asking or demanding that the executed documents be destroyed. When his son joined him outside, appellant did not ask whether Steinle used the note bearing their joint signatures. Nor did appellant in the days, months, or years that followed, contact FirstMerit to ask whether his name was on the loan. Appellant was not prevented from asking; he simply chose not to ask. This is not the type of case that equitable tolling was designed to remedy.

{¶ 34} "[G]eneral references to equitable tolling without any explanation as to how it applies * * * are insufficient to create genuine issues of material fact." *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, 935 N.E.2d 70,

¶ 24 (10th Dist.). We find, as a matter of law, that appellant's TILA claim was untimely filed and that it was not equitably tolled.

{¶ 35} Finally, in Count III, appellant brings a common law fraud claim. Appellant argues that there are genuine issues of material fact with regard to his fraud claim and that it was not time-barred.

{¶ 36} In Ohio, a claim for fraud must be brought within four years after the fraud was or should have been discovered. R.C. 2305.09. With regard to when the so-called "clock" begins to run on a claim involving fraud, we have held,

> No more than a reasonable opportunity to discover the fraud is required to start the period of limitation. Information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's duty to inquire into the matter with due diligence. Once sufficient indicia of fraud are shown, a party cannot rely on its unawareness or the efforts of the opposition to lull it into a false security to toll the statute. (Citations omitted.) *Residential Funding Co., LLC, v. Thorne*, 6th Dist. Lucas No. L-09-1324, 2010-Ohio-4271, ¶ 56.

{¶ 37} A reasonable person who wished to "rescind his signature" to a note signed just moments before would have done something to protect his interests, namely finding out whether his name remained on the note. As previously discussed, appellant could have learned that simple fact from a variety of sources including a credit agency, his own son, the lender, or Steinle. Instead, appellant did nothing. We find that appellant had a

reasonable opportunity to discover the alleged fraudulent conduct on June 20, 2006. Therefore, the statute of limitations as to Count III expired on June 20, 2010.

{¶ 38} Construing the evidence in appellant's favor, we find that reasonable minds can only conclude that there are no genuine issues as to any material facts and that Steinle is entitled to judgment as a matter of law. Appellant's assignment of error is not well-taken.

{¶ 39} Having found appellant's assignment of error not well-taken, we hereby affirm the judgment of the Ottawa County Court of Common Pleas. Costs are assessed to appellant in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE