[Cite as *Linetsky v. Dejohn*, 2010-Ohio-5016.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94625

TANYA M. LINETSKY, ET AL.

PLAINTIFFS-APPELLANTS

vs.

TIMOTHY M. DEJOHN, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-672668

BEFORE: Cooney, J., Kilbane, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: October 14, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiffs-appellants, Tanya M. Linetsky ("Linetsky") and Eldar Zarbavel (collectively referred to as "appellants"), appeal the trial court's judgment granting summary judgment for defendant-appellee Timothy M. DeJohn. Finding some merit to the appeal, we affirm in part and reverse in part.

{¶ 2} On April 25, 2007, appellants executed a promissory note and mortgage for the purchase of a home located at 1331 Sunset Road in Mayfield Heights. DeJohn brokered the transaction on behalf of Carlyle Mortgage Services. Along with the note and mortgage documents, Linetsky signed: (1) a settlement statement, which listed all fees and costs associated with the transaction; (2) a notice of right to cancel, which advised appellants that they

could cancel the transaction within three days without penalty; (3) a notice of change of mortgage terms, which stated in an abbreviated handwritten note that the mortgage was changed from a conventional 30-year fixed-rate mortgage to a 10-year interest-only ARM type mortgage, which would not amortize for its first 10 years; and (4) a notice of escrow of taxes and regular monthly payment.

{¶ 3} In October 2008, appellants filed a complaint against DeJohn, Carlyle Mortgage Services, and Washington Mutual Bank alleging violation of the Federal Truth In Lending Act, 15 U.S.C. 1601 et seq., violation of the Ohio Consumer Sales Practices Act, violation of the Ohio Mortgage Broker Act, common law fraud, conspiracy, and negligence. The parties filed motions for summary judgment. The trial court denied appellants' motion for summary judgment and granted DeJohn's motion on all claims without opinion. DeJohn subsequently filed a motion for attorney fees pursuant to R.C. 2323.51 for having to defend against a frivolous lawsuit. The trial court granted the motion, but later stayed the judgment for fees pending appeal. Appellants raise two assignments of error on appeal.

{¶ 4} In their first assignment of error, appellants argue the trial court erred in granting DeJohn's motion for summary judgment on all claims.

{¶ 5} Civ.R. 56(C) provides that summary judgment is appropriate when there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and after construing the evidence most favorably for the party

against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. We review the trial court's judgment de novo using the same standard that the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

Truth In Lending Act ("TILA")

{¶ 6} Appellants claim that DeJohn violated the TILA, 15 U.S.C. 1601, et seq., by failing "to provide, timely, accurate material financial disclosures of the actual APR, the finance charge, the total payments and the total amount financed." Appellants allege that DeJohn represented to them that they were receiving a conventional, 30-year, fixed-rate amortizable loan. However, on the day of closing, appellants claim DeJohn faxed them a "Notice in Change of Mortgage Terms," that contained the following language: "changed from 30 fixed to 10/1 IO ARM with a 2nd HELOC 6.850% 1st, 10.5% 2nd," dated April 25, 2007.[1] The cover page of the fax contained the following handwritten note: "Tanya so Sorry, Duh." Appellants maintain they would not have signed this document if they had understood what these changes meant.

[1] In other words, the terms of the loan changed from a conventional 30-year fixed-rate mortgage to a 10-year interest-only adjustable rate mortgage with a home equity line of credit.

{¶ 7} Section 1639 of the TILA requires that a creditor make the following disclosures:

> "(A) in the case of a credit transaction with a fixed rate of interest, the annual percentage rate and the amount of the regular monthly payment; or
>
> "(B) in the case of any other credit transaction, the annual percentage rate of the loan, the amount of the regular monthly payment, a statement that the interest rate and monthly payment may increase, and the amount of the maximum monthly payment, based on the maximum interest rate allowed pursuant to section 3806 of Title 12."

15 U.S.C. 1639(a)(1)(A) and (B). Section 1639(b) requires that such disclosures be "given not less than 3 business days prior to consummation of the transaction." With regard to changes a creditor makes to the terms of the loan after the required disclosures have been given, the TILA further provides that:

> "a creditor may not change the terms of the extension of credit if such changes make the disclosures inaccurate, unless new disclosures are provided that meet the requirements of this section."

15 U.S.C 1639(b)(1)(A).

{¶ 8} It is undisputed that DeJohn faxed a "Notice of Change of Mortgage Terms" to appellants on the day of closing and that the terms of the mortgage changed from a 30-year fixed-rate mortgage to a 10-year interest-only adjustable rate mortgage ("ARM"). Hence, the changes rendered the prior disclosures inaccurate and did not meet the requirements of the TILA. Therefore, changing material terms of the mortgage hours before closing is a violation of Section 1639(b)(1)(A).

{¶ 9} However, DeJohn contends that even if he violated the TILA, appellants TILA claims are barred by the statute of limitations. 15 U.S.C. 1640(e) provides that actions for violations of the TILA must "be brought * * * within one year from the date of the occurrence of the violation." Appellants concede that they filed the complaint commencing this action almost eighteen months after violation but argue that the statute of limitations was tolled until they discovered that the mortgage was not amortizing. We disagree.

{¶ 10} DeJohn faxed a "Notice of Change in Mortgage Terms" that clearly indicates that there were material changes to the type of mortgage. Although appellants did not understand DeJohn's handwritten note indicating a change "from a 30 year fixed to a 10/1 IO ARM" at that time, they were at least on notice that material changes were made to the terms of the loan. If they did not understand the changes, they should have exercised due diligence to learn what the changes meant before signing any documents. Once having signed the documents, appellants were on notice that material changes had been made, and they should have discovered what the changes meant and filed their complaint within the one-year limitations period. Therefore, we agree that appellants' TILA claim is barred by the statute of limitations and that the trial court properly granted summary judgment in favor of DeJohn on the TILA claim.

Consumer Sales Practices Act

{¶ 11} In their second claim for relief, appellants argue DeJohn is liable in damages for violating Section 1345.02 of Ohio Consumer Sales Practices Act ("CSPA"). R.C. 1345.02(F) states, in pertinent part

> "Concerning a consumer transaction in connection with a residential mortgage, * * * the act of a supplier in doing * * * the following is deceptive:
>
> "(1) Knowingly failing to provide disclosures required under state and federal law;"

{¶ 12} Further R.C. 1345.03(A) provides:

> "No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."

{¶ 13} As previously explained, DeJohn violated the TILA when he faxed the "Notice of Change of Mortgage Terms" on the day of closing because the new terms rendered the previous disclosures, which had to be disclosed at least three days before consummation of the transaction, inaccurate. Hence, when DeJohn violated the TILA, he also violated R.C. 1345.02(F)(1), the CSPA. However, unlike the TILA, which has a one-year statute of limitations, R.C. 1345.10(C) provides a two-year statute of limitations for violations of R.C. 1345.01–1345.13.

{¶ 14} DeJohn argues that he is not liable for damages under the CSPA because he gave appellants a notice of cancellation, which advised them that they could cancel the transaction within three days. However, there is nothing in the TILA or CSPA that shields one from liability for violating the rule that

disclosures must be made at least three days prior to consummation of the transaction. Accordingly, we find that DeJohn violated the CSPA and the trial court erred in granting summary judgment in his favor on that claim.

Mortgage Broker Act

{¶ 15} Appellants' third claim for relief alleges that DeJohn violated the Ohio Mortgage Broker Act ("MBA"), R.C. 1322.064(A), which requires that brokers "[t]imely inform the buyer of any material change in the terms of the loan." R.C. 1322.064(A)(1) further states that for purposes of this section, "material change" means:

> "(a) A change in the type of residential mortgage loan being offered, such as a fixed or variable rate loan or a loan with a balloon payment;
>
> "(b) A change in the term of the residential mortgage loan, as reflected in the number of monthly payments due before a final payment is scheduled to be made;
>
> "(c) A change in the interest rate of more than 0.15%;
>
> "(d) A change in the regular total monthly payment, including principal, interest, any required mortgage insurance, and any escrowed taxes or property insurance, of more than five per cent;
>
> * * *."

{¶ 16} It is doubtful that disclosure of changes to material terms of a loan hours before closing would be considered "timely" under the MBA. Thus, the issue of timeliness would at least be a jury question rendering summary judgment on this issue improper.

{¶ 17} Nevertheless, DeJohn argues that even if he violated the MBA, the only remedy the MBA provides is found in R.C. 1322.064(C), which requires that the broker pay the buyer any amount by which the broker's fee increased as a result of the change in terms. Specifically, R.C. 1322.064(C) provides:

> "If an increase in the total amount of the fee to be paid by the buyer to the registrant or licensee is not disclosed in accordance with division (A)(2) of this section, the registrant or licensee shall refund to the buyer the amount by which the fee was increased. If the fee is financed into the loan, the registrant or licensee shall also refund to the buyer the interest that would accrue over the term of the loan on that excess amount."

{¶ 18} DeJohn argues that because the changes to the loan decreased his fee, he is not liable to appellants for any damages. However, R.C. 1322.081(D)(1) provides that a buyer injured by violation of the MBA may bring an action for recovery of damages that "shall not be less than all compensation paid directly or indirectly to a mortgage broker from any source, plus reasonable attorney's fees and court costs." If appellants were to prevail at trial, they would be entitled to these statutory damages. Therefore, we find the trial court erred in granting summary judgment to DeJohn on appellants' MBA claim.

Fraud and Conspiracy to Commit Fraud

{¶ 19} In their fourth assignment of error, appellants claim DeJohn deliberately misled appellants into believing they would be receiving a conventional 30-year fixed-rate mortgage rather than the 10-year interest-only ARM, and that such misrepresentation constitutes a fraud.

{¶ 20} A case for common law fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.* (1984) 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶ 21} There is no evidence in the record to support appellants' fraud claim. Although DeJohn should have provided the required disclosures sooner than the day of closing as required by the TILA and CSPA, the evidence establishes that he provided all the required notifications and appellants signed or initialed all the documents. If appellants had any questions about the import of any of the documents, they should have inquired further to be sure they understood them before signing off. The fact that they signed documents that they did not understand does not mean DeJohn perpetrated a fraud upon them. Therefore, summary judgment on appellants' common law fraud and conspiracy to commit fraud claims is appropriate.

Negligence

{¶ 22} In fifth claim for relief, appellants claim DeJohn negligently failed to inform appellants of the actual terms of their loan. However, as previously

mentioned, the evidence in the record establishes that all documents and disclosures required by the TILA, the CSPA, and the MBA were provided to appellants either before or at the time of signing. DeJohn provided appellants all the necessary information about the terms of their loan and mortgage. The fact that appellants signed documents they admit they did not understand does not mean DeJohn negligently failed to provide them with all the information. Therefore, summary judgment on appellants' negligence claim is appropriate.

{¶ 23} Accordingly, the first assignment of error is overruled in part and sustained in part.

Attorney Fees

{¶ 24} In their second assignment of error, appellants argue the trial court erred in granting DeJohn's motion for attorney fees without an opportunity to be heard in violation of R.C. 2323.51(B)(2). DeJohn moved for attorney fees pursuant to R.C. 2323.51, which allows a party to recover reasonable attorney fees incurred as a result of the other party's "frivolous conduct." DeJohn argued that he incurred attorney fees as a result of defending against appellants' frivolous claims.

{¶ 25} The decision to impose attorney fees as sanctions, pursuant to R.C. 2323.51, is within the trial court's discretion. *Painter v. Midland Steel Prod. Co.* (1989), 65 Ohio App.3d 273, 281, 583 N.E.2d 1018. Absent an abuse of discretion, a trial court's imposition of sanctions will not be reversed. *State ex*

rel. Fant v. Sykes (1987), 29 Ohio St.3d 65, 505 N.E.2d 966. An abuse of discretion connotes an attitude on the part of the court that is unreasonable, arbitrary or unconscionable. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 616 N.E.2d 218.

{¶ 26} R.C. 2323.51(A)(2) defines "frivolous conduct" as conduct that satisfies any of the following:

> "(i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.
>
> "(ii) It is not warranted under existing law , cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> "(iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> "(iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief."

{¶ 27} We have found that appellants' CSPA and MBA claims have merit and that summary judgment was erroneously granted as to those claims. Hence, these claims are not only warranted under existing law, there is evidentiary support for them as well. The evidence would also support appellants' TILA claim if it was not barred by the statute of limitations. The fact

that the TILA is barred by the statute of limitations does not render the claim frivolous since appellants made a good faith argument that they were unaware that the loan was not amortizing until over a year had passed, and they claimed that the statute of limitations had tolled during that time.

{¶ 28} Appellants' common law claims for fraud, conspiracy, and negligence, though unfounded, are not frivolous. The only evidence before us indicates that DeJohn and the lender changed the terms of the loan from a conventional 30-year fixed-rate mortgage to a 10-year interest-only ARM at the last minute on the day of closing. This fact alone suggests that they may have been planning to deceive appellants, especially since DeJohn had previously represented to appellants that they would receive a 30-year fixed-rate mortgage. Therefore, we do not find appellants' claims frivolous as defined by R.C. 2323.51.

{¶ 29} Further, 2323.51(B)(2) provides that attorney fees may only be awarded after a hearing. Specifically, R.C. 2323.51(B)(2) provides:

> "(2) An award may be made pursuant to division (B)(1) of this section upon the motion of a party to a civil action or an appeal of the type described in that division or on the court's own initiative, but only after the court does all of the following:
>
> "(a) Sets a date for a hearing to be conducted in accordance with division (B)(2)(c) of this section, to determine whether particular conduct was frivolous, to determine, if the conduct was frivolous, whether any party was adversely affected by it, and to determine, if an award is to be made, the amount of that award;
>
> "(b) Gives notice of the date of the hearing described in division (B)(2)(a) of this section to each party or counsel of record who allegedly engaged in

> frivolous conduct and to each party who allegedly was adversely affected by frivolous conduct;
>
> "(c) Conducts the hearing described in division (B)(2)(a) of this section in accordance with this division, allows the parties and counsel of record involved to present any relevant evidence at the hearing, including evidence of the type described in division (B)(5) of this section, determines that the conduct involved was frivolous and that a party was adversely affected by it, and then determines the amount of the award to be made. If any party or counsel of record who allegedly engaged in or allegedly was adversely affected by frivolous conduct is confined in a state correctional institution or in a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, the court, if practicable, may hold the hearing by telephone or, in the alternative, at the institution, jail, or workhouse in which the party or counsel is confined."

{¶ 30} The court never held a hearing on DeJohn's motion for attorney fees. Therefore, because appellants' claims are not frivolous and because the court never held a hearing as required by R.C. 2323.51(B)(2), we find the trial court abused its discretion in granting DeJohn's motion for attorney fees.

{¶ 31} Accordingly, the second assignment of error is sustained.

{¶ 32} Judgment is affirmed in part and reversed in part. Case is remanded for further proceedings.

It is ordered that appellant and appellee 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.

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR