

[Cite as *DeJohn v. DiCello*, 2011-Ohio-471.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94785

TIMOTHY DEJOHN, ET AL.

PLAINTIFFS-APPELLANTS/
CROSS-APPELLEES

vs.

NICHOLAS D. DICELLO

DEFENDANT-APPELLEE/
CROSS-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-681248

BEFORE: Jones, J., Blackmon, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 3, 2011

ATTORNEY FOR APPELLANTS

Brett M. Mancino
1360 East 9th Street
1000 IMG Center
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEE

John R. Christie
Rawlin Gravens Co., LPA
55 Public Square, Suite 850
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Plaintiffs-appellants/cross-appellees, Timothy DeJohn, et al. (“DeJohn”), appeal the trial court’s entry of judgment on defendant-appellee/cross-appellant’s, Nicholas D. DiCello’s (“DiCello”) counterclaim for breach of fiduciary duty in the amount of \$28,000.00, which was a setoff to the verdict in DeJohn’s favor for breach of contract in the amount of \$58,260. DeJohn also appeals the trial court’s dismissal of their fraudulent inducement claim against DiCello.

{¶ 2} Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court’s decision.

STATEMENT OF THE CASE

{¶ 3} This is an appeal from the trial court’s judgment entry on DiCello’s counterclaim

for breach of fiduciary duty in the amount of \$28,000. DiCello is also arguing four assignments of error in his counterclaim. Specifically, DiCello is arguing that the trial court erred in: (1) denying his motion for directed verdict; (2) allowing judgment against him in light of the unanimous jury verdict; (3) finding that judgment could be entered in favor of a de facto illegal entity; and (4) in entering an order for interest in plaintiffs' favor.

STATEMENT OF THE FACTS

{¶ 4} DeJohn and LeadBank L.L.C. brought a breach of contract and fraudulent inducement claim against DiCello. LeadBank L.L.C., is a company owned and operated by DeJohn for the purpose of buying and selling mortgage leads. Plaintiffs' representative met with DiCello, where numerous papers were presented, and it was communicated to DiCello that these documents needed to be signed as they were related to the loan. One of the documents included an alleged contract between LeadBank, L.L.C. and DiCello. This document was, by DeJohn's own admission, signed months after DeJohn commenced work on the project at issue.

{¶ 5} DeJohn's own representative's notes indicate that there was an inquiry as to whether or not DeJohn or its representative could receive "additional compensation" from the licensed and legal broker. DiCello states that this payback arrangement was never disclosed to DiCello and was an effort to increase compensation to DeJohn without DiCello's knowledge.

{¶ 6} Ultimately, DiCello hired DeJohn at a commission rate of 1.5 percent to find him

a construction loan to build a 8,500 square foot house to be located in Ft. Lauderdale, Florida. DeJohn was to receive a commission only if Dicello chose to close a loan that DeJohn found. There was a dispute as to the terms and conditions of the contract.

{¶ 7} The jury decision did not favor one party alone. The jury awarded DeJohn his 1.5 percent commission in the amount of \$58,260. However, the jury also awarded Dicello \$28,000 on his counterclaim for breach of fiduciary duty.

ASSIGNMENTS OF ERROR

{¶ 8} DeJohn assigns three assignments of error on appeal:

{¶ 9} “[1.] The trial court erred in not dismissing the defendant’s counterclaim for breach of fiduciary duty.

{¶ 10} “[2.] The trial court erred in not directing a verdict and not granting a judgment notwithstanding the verdict with regard to the breach of fiduciary duty counterclaim.

{¶ 11} “[3.] The trial court erred in directing a verdict against DeJohn for their claim for fraudulent inducement.”

{¶ 12} DiCello assigns four cross-assignments of error:

{¶ 13} “[1.] The trial court erred in denying defendant’s motion for directed verdict with respect to LeadBank and/or his motion for JNOV with respect to LeadBank.

{¶ 14} “[2.] The trial court erred in allowing judgment against the defendant in light of the unanimous jury verdict on the breach of fiduciary duty findings with respect to the plaintiffs.

{¶ 15} “[3.] The trial court erred in finding that judgment could be entered in favor of a de facto illegal entity and/or [the] trial court erred in finding that an illegal entity could enter into a binding and enforceable contract.

{¶ 16} “[4.] The trial court erred in entering an order for interest [in] plaintiffs’ favor in that no evidence was ever proffered or submitted as to the date of the mortgage.”

LEGAL ANALYSIS

{¶ 17} DeJohn argues in the first two assignments of error that the trial court erred with regard to the breach of fiduciary duty counterclaim. Due to the substantial interrelation between DeJohn’s first two assignments of error, we shall address them together.

{¶ 18} Specifically, DeJohn argues that the trial court erred in not dismissing DiCello’s counterclaim for breach of fiduciary duty. However, Ohio is a notice pleading state, and DiCello did not have a duty to plead every single particular fact related to his breach of fiduciary duty claim.

{¶ 19} DeJohn and LeadBank contend that the trial court erred in not dismissing DiCello’s counterclaim for breach of fiduciary duty pursuant to Civ.R. 12(B)(6). When determining whether or not to dismiss a complaint pursuant to Civ.R. 12(B)(6), the trial court is limited to the face of the complaint. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 569, 664 N.E.2d 931. All factual allegations of the complaint must be accepted as true. *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280, 649 N.E.2d 182. Furthermore, the plaintiff must be afforded all reasonable inferences therefrom.

Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

{¶ 20} “ * * * [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” (Citation omitted.) *O’Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

{¶ 21} When determining whether a complaint states a claim, the pleadings must be liberally construed. Civ.R. 8, which sets forth the general rules for pleading, provides in relevant part:

{¶ 22} “(A) Claims for relief. A pleading which sets forth a claim for relief * * * shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.”

{¶ 23} * *

{¶ 24} “(E) Pleading to be concise and direct; consistency.”

{¶ 25} “(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.”

{¶ 26} * *

{¶ 27} “(F) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.”

{¶ 28} Civ.R. 8(A) serves “to simplify pleadings to a ‘short and plain statement of the claim’ and to simplify statements of the relief demanded * * * to the end that the adverse party will receive fair notice of the claim and an opportunity to prepare his response thereto.”

Fancher v. Fancher (1982), 8 Ohio App.3d 79, 83, 455 N.E.2d 1344. Civ.R. 8(F) requires that pleadings be “construed as to do substantial justice.” Thus, pleadings must be construed liberally to serve the substantive merits of the action. *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 86, fn. 1, 438 N.E.2d 410.

{¶ 29} There are three elements to a breach of fiduciary duty claim. They are as follows:

{¶ 30} “(1) the existence of a duty arising from a fiduciary relationship;

{¶ 31} “(2) a failure to observe the duty; and

{¶ 32} “(3) an injury resulting proximately therefrom.”

{¶ 33} *Camp St. Mary’s Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, 889 N.E.2d 1066.

{¶ 34} In the case before us, some evidence demonstrates the existence of a fiduciary relationship between the parties, the failure of DeJohn to observe that duty, and financial injury.

{¶ 35} The record provides that DeJohn and DiCello had a contract in which DiCello authorized DeJohn to secure financing to build a home at 2500 Del Lago Drive, Ft. Lauderdale, Florida. DiCello signed an authorization letter and fee agreement authorizing DeJohn to pursue financing for the Florida property. Moreover, there is testimony from DeJohn that he found several loans that would have satisfied DiCello’s needs.

{¶ 36} The evidence establishes that DeJohn was a paid consultant with written

authority and personal knowledge provided by DiCello specifically for the purposes of securing financing for the Florida property. Accordingly, DeJohn had a fiduciary duty to act in DiCello's best interest. When DeJohn failed to fully disclose pertinent information concerning the loan to DiCello, a question of fact to be discussed by the jury, DeJohn violated his fiduciary duty to DiCello thereby causing financial injury. Accordingly, we find no error on the part of the trial court in its failure to dismiss DiCello's counterclaim for breach of fiduciary duty.

{¶ 37} In the second assignment of error, DeJohn argues that the trial court erred in not directing a verdict and not granting a judgment notwithstanding the verdict with regard to the breach of fiduciary duty counterclaim.

{¶ 38} DeJohn argues that there were no damages as a result of the breach of fiduciary duty and therefore the claim should have been directed out as a matter of law. However, contrary to DeJohn's claims, there is evidence to prove otherwise. There was testimony as to the difference of the interest rate that may have been secured through one of the alternate loans discussed at trial.

{¶ 39} There was significant evidence for the jury to evaluate that included the principal amount of the loan, interest rates, loan fees, service fees, and other amounts. There was also testimony concerning the additional \$9,170 "kick back" payment that was heard by the jury. The jury was free to contemplate a number of issues that could have contributed to the damages of DiCello. The potential damages contemplated could have ranged from the alleged referral

or “kick back” payment of \$9,710 all the way up to the additional interest that DiCello was compelled to pay under the only loan that was presented to him.

{¶ 40} This court is unable to reach into the jury room and determine exactly what the jury contemplated in reaching its \$28,000 figure for damages. In addition, DeJohn has not suggested that there was an objection to the award, a request to poll the jury, or an objection to any jury instruction.

{¶ 41} Accordingly, we find no error on the part of the lower court with regard to DeJohn’s first or second assignments of error.

{¶ 42} DeJohn’s first and second assignments of error are overruled.

{¶ 43} DeJohn argues in the third assignment of error that the trial court erred in directing a verdict against DeJohn for its claim for fraudulent inducement. We find no merit in DeJohn’s argument.

{¶ 44} The elements of fraudulent inducement are:

“(1) an actual or implied false representation concerning a fact or, where there is a duty to disclose, concealment of a fact,

“(2) which is material to the transaction;

“(3) knowledge of the falsity of the representation or such recklessness or utter disregard for its truthfulness that knowledge may be inferred;

“(4) intent to induce reliance on the representation;

“(5) justifiable reliance; and

“(6) injury proximately caused by the reliance.”

See *Info. Leasing Corp. v. Chambers*, 152 Ohio App.3d 715, 2003-Ohio-2670, 789 N.E.2d 1155. See, also, *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55, 514 N.E.2d 709.

{¶ 45} A review of the record in this case demonstrates that DeJohn failed to reference anywhere in the record where the alleged “false representation” was made. In addition, DeJohn also failed to demonstrate how the alleged false representation would have been material to the transaction. Therefore, since no indication of false representation has been demonstrated by DeJohn, they are unable to establish that the alleged false representation was done knowingly or recklessly with the intent to induce them to rely on that representation. Accordingly, DeJohn failed to prove the required elements of fraudulent inducement. *Info. Leasing Corp.*, 152 Ohio App.3d 715.

{¶ 46} Fraudulent inducement must be proven by clear and convincing evidence. *Mid-Am. Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619, ¶62.

{¶ 47} As appellants failed to demonstrate where any false representations were made or any materiality to the transaction, we find DeJohn’s third assignment of error to be without merit.

{¶ 48} DeJohn’s third assignment of error is overruled.

{¶ 49} DiCello argues four assignments of error in his counterclaim. Specifically,

DiCello argues that the trial court erred in: (1) denying his motion for directed verdict with respect to LeadBank and/or his motion for JNOV with respect to LeadBank; (2) allowing judgment against him in light of the unanimous jury verdict on the breach of fiduciary duty findings with respect to the plaintiffs; (3) in finding that judgment could be entered in favor of a de facto illegal entity and/or the trial court erred in finding that an illegal entity could enter into a binding and enforceable contract; and (4) in entering an order for interest in plaintiffs' favor.

{¶ 50} As we have addressed these issues, in part, earlier in this opinion we shall address them briefly below. DiCello argues in his first assignment of error that the court erred in denying his motion for directed verdict with respect to LeadBank and/or his motion for JNOV with respect to LeadBank.

{¶ 51} We find DiCello's argument to be without merit. DiCello asserts that there is no mention of LeadBank, L.L.C., by any of the three witnesses on cross-examination. However, DiCello's assertions do not provide a legal basis for granting a directed verdict. Moreover, DiCello fails to cite to any relevant portions of the transcript or provide any case law to support his assertions in his brief.

{¶ 52} Contrary to DiCello's claims, DeJohn testified that he owned and operated LeadBank L.L.C. for the purpose of buying and selling mortgage leads.¹ In addition,

¹Tr. 200.

LeadBank, through DeJohn, presented two signed consulting fee agreements that included LeadBank letterhead on them. Accordingly we find DiCello's first cross-assignment of error to be without merit.

{¶ 53} DiCello argues in his second cross-assignment of error that the trial court erred in allowing judgment against him in light of the unanimous jury verdict on the breach of fiduciary duty findings with respect to the plaintiffs. DiCello provided no legal basis in his brief for claiming that, just because a jury returned a verdict on this counterclaim for breach of fiduciary duty, that negates a breach of contract claim presented by DeJohn. Accordingly, we find DiCello's second cross-assignment of error to be without merit.

{¶ 54} DiCello argues in his third cross-assignment of error that the trial court erred in finding that judgment could be entered in favor of a de facto illegal entity, and/or the trial court erred in finding that an illegal entity could enter into a binding and enforceable contract.

{¶ 55} Here, again, DiCello fails to provide a legal basis to support his claim. LeadBank, L.L.C., is a properly organized limited liability company and recognized as such by the Secretary of State of Ohio. DiCello admitted this fact in his answer to DeJohn's complaint.²

{¶ 56} DiCello finally argues in his fourth cross-assignment of error that the trial court erred in entering an order for interest in plaintiffs' favor in that no evidence was ever proffered

²See, Answer paragraph 2.

or submitted as to the date of the closing of the mortgage. Again, DiCello provides no citation to the record or any legal authority to support his brief argument. Ohio courts have held that there is no discretion for trial courts when awarding prejudgment interest on breach of contract actions.

“Moreover, although not expressly stated by this Court, numerous appellate districts have found, and we agree, that ‘once a plaintiff receives judgment on a contract claim, the trial court has no discretion but to award prejudgment interest under R.C. 1343.03(A).’ *Zunshine v. Cott*, 10th Dist. No. 06AP-868, 2007-Ohio-1475, at ¶25, citing *First Bank of Marietta v. L.C. Ltd.* (Dec. 28, 1999), 10th Dist. No. 99AP-304. See, also, *Stoner v. Allstate Ins. Co.*, 5th Dist. No. 05 CA 16, 2006-Ohio-3998, at ¶18 (holding that R.C. 1343.03(A) is mandatory requiring a trial court to award prejudgment interest); *Water Works Supplies, Inc. v. Grooms Constr. Co., Inc.*, 4th Dist. No. 04CA12, 2005-Ohio-1292, at ¶32 (holding that ‘[t]he mandatory language of R.C. 1343.03(A) means that the trial court must award prejudgment interest when appropriate.’); *Indiana Ins. Co. v. Farmers Ins. of Columbus*, 5th Dist. No. 2002 AP 11 0090, 2003-Ohio-4851, at ¶160 (noting that the statutory language of R.C. 1343.03(A) that creditor is entitled to interest is mandatory).”

See *Zeck v. Sokol*, Medina App. No. 07CA0030-M, 2008-Ohio-727.

{¶ 57} Here, LeadBank clearly established the date that prejudgment should run from. The trial court ruled that prejudgment interest should run from June 21, 2008, the date the subject loan closed.³

{¶ 58} Accordingly, DiCello’s third and fourth cross-assignments of error are without merit.

Judgment affirmed.

³See, Judgment Entry February 10, 2010.

It is ordered that appellants/cross-appellees and appellee/cross-appellant split 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 Cuyahoga County Court of Common Pleas 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.

LARRY A. JONES, JUDGE

PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR