[Cite as *Stancik v. Deutsche Natl. Bank*, 2015-Ohio-2517.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102019

MARTIN S. STANCIK, JR.

PLAINTIFF-APPELLANT

vs.

DEUTSCHE NATIONAL BANK

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-814375

BEFORE: Keough, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: June 25, 2015

APPELLANT

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Plaintiff-appellant, Martin S. Stancik, Jr. ("Stancik"), pro se, appeals from the trial court's judgment granting the motion for summary judgment of defendant-appellee, Deutsche Bank National Trust Company, as Trustee under Pooling and Servicing Agreement Dated as of August 1, 2004 Morgan Stanley ABS Capital I Inc. Trust 2004-HE6 Mortgage Pass-Through Certificates, Series 2004-HE6 (the "Trust"). We affirm.

I. Background

{¶2} On March 26, 2004, Stancik executed a note in the amount of $50,000 in favor of New Century Mortgage Corporation ("New Century") for his residential property located at 724 Wyleswood Drive in Berea, Ohio. The note was secured by a mortgage. Effective July 31, 2004, New Century transferred servicing of Stancik's account to HomEq Servicing Corporation ("HomEq").

{¶3} New Century apparently transferred Stancik's note and mortgage to the Trust in 2004 or 2005. On June 2, 2005, the Trust filed a foreclosure complaint against Stancik, alleging that it was the holder of Stancik's note and mortgage, and that he was in default. *Deutsche Bank Natl. Trust Co. as Trustee v. Stancik*, Cuyahoga C.P. No. CV-05-564330. Stancik filed an answer and counterclaim for breach of contract and negligence, asserting that HomEq had created the alleged default because it had failed to properly apply part of his monthly payments toward his property taxes, pursuant to Stancik's agreement with New Century, and that he was not in default because he had

paid the property taxes in full.

{¶4} On May 4, 2006, the parties entered into a Mutual Release and Settlement Agreement. The parties agreed that HomEq would pay Stancik $5,000. In addition, the parties agreed that Stancik had not made any payments from March 2005 through May 2006; the total amount of escrow and monthly payments due was $8,459.23; and HomEq would waive the missed payments, as well as any late fees, penalties, or other arrearages on the note and mortgage as of the date of the settlement agreement. The parties further agreed that Stancik would resume making his monthly payments of $349.61 on or before June 1, 2006.

{¶5} HomEq apparently failed to properly credit Stancik's account as agreed in the Mutual Release and Settlement Agreement because, although Stancik made the June, July, and August 2006, monthly mortgage payments, in a letter dated September 19, 2006, HomEq advised Stancik that it was returning his August check because his account was in foreclosure. Stancik contacted HomEq and tried to resolve the matter to no avail. HomEq refused to accept any more mortgage payments from Stancik because his account was allegedly in default.

{¶6} Effective August 31, 2010, HomEq transferred the servicing of Stancik's account to Ocwen Loan Servicing, L.L.C. ("Ocwen"). On November 2, 2010, Ocwen advised Stancik that he was in default on his mortgage. Subsequently, in a letter dated January 14, 2011, Ocwen advised Stancik that the amount payable under the note and mortgage was $64,689.91, but that he qualified for a "special streamlined loan

modification" that would reduce his mortgage payment to $299.61 per month and lower the interest rate. Stancik did not accept this offer, apparently because he disputed Ocwen's calculation of the amount due on the mortgage and note, contending that Ocwen, like HomEq, had not waived the missed payments, late fees, and penalties as agreed in the 2006 settlement agreement.

{¶7} In February 2011, Stancik sued Ulmer & Berne, L.L.P. (counsel for the Trust in the 2005 foreclosure proceeding), Deutsche Bank National Trust Company, and Ocwen for "breach of contract, pain and suffering, unfair debt collection, fraud, intimidation, harassment, estoppel, causing emotional stress and destruction of his health, and negligence" relating to the false foreclosure notices against him, and the "fraudulent" loan modification contract sent to him in January 2011. *Stancik v. Ulmer & Berne*, Cuyahoga C.P. No. CV-11-748081. Stancik's complaint alleged that the 2005 foreclosure was false; the resulting settlement agreement was breached by Deutsche Bank when HomEq, and later Ocwen, failed to properly credit his account per the agreement, refused to accept further payments, and told him he was in foreclosure again; and that Deutsche Bank was therefore estopped from demanding further payment on the loan. Stancik further alleged that the stress caused by the defendants had caused him to have significant health issues related to his heart, including quadruple by-pass surgery and congestive heart failure, and he sought $1,000,000 in damages.

{¶8} The trial court subsequently granted summary judgment to all defendants. Stancik did not appeal the trial court's judgment. Instead, on December 2, 2011, he filed

suit in the United States District Court for the Northern District of Ohio against Felty & Lembright Co., L.P.A., David M. Gauntner, Community First Title Agency, Inc., HomeEq, and Deutsche Bank National Trust Company. *Stancik v. Felty & Lembright Co., L.P.A.*, N.D. Ohio No. 1:11 CV 2618. In his complaint, Stancik alleged due process violations under the Fourteenth Amendment pursuant to 42 U.S.C. 1983, as well as state-law claims for fraud, libel, slander, defamation of character, breach of contract, and violations of the Ohio Rules of Professional Conduct. Stancik's claims were based on the 2005 foreclosure action, as well as HomEq's refusal in September 2006, to accept his check and its advisement that he was again in default. (Stancik referred to these events as "false foreclosures.")

{¶9} Stancik's claims also arose out of his 2011 suit against Ocwen, Deutsche Bank National Trust Company, and Ulmer & Berne. Gauntner, an attorney with Felty & Lembright, represented Ocwen and Deutsche Bank in the 2011 state court case and filed summary judgment motions and supporting briefs in that case on their behalf. In the supporting briefs, Gauntner stated that "[p]laintiff had fallen behind on his mortgage payments" before the Trust initiated the 2005 foreclosure action. In the federal court action, Stancik alleged that Gauntner's statement was false because he was not, in fact, behind in his mortgage payments before the 2005 foreclosure action was filed, as demonstrated by the settlement agreement in that case. Stancik contended that Gauntner's statement, directed by Felty & Lembright, was an intentional misrepresentation that was intended to prejudice the trial court against him and prevent

him from obtaining a fair trial. As in the state court case, Stancik asserted that the stress caused by the defendants had caused him to have significant health issues related to his heart, including quadruple by-pass surgery and congestive heart failure, and he sought $1,000,000 in damages.

{¶10} The federal court subsequently dismissed Stancik's federal and state-law claims with prejudice. With respect to Stancik's claims that Gauntner and Felty & Lembright had violated his civil rights under 42 U.S.C. 1983, the court found that Gauntner and Felty & Lembright were not state actors acting under "color of state law," as required for a section 1983 violation. The federal court further determined that it did not have diversity jurisdiction to hear Stancik's state-law claims. Stancik did not appeal the district court's decision.

{¶11} On October 16, 2012, the Trust filed another foreclosure complaint against Stancik. *Deutsche Bank Natl. Trust Co., as Trustee v. Stancik*, Cuyahoga C.P. No. CV-12-793607. The Trust again asserted that it was the holder of a note and mortgage relating to Stancik's home on Wyleswood Drive, and that Stancik was in default. Interestingly, in this foreclosure action, the Trust asserted that New Century Mortgage Corporation had assigned the note and mortgage to the Trust on September 1, 2010 (five years after the Trust's 2005 foreclosure action against Stancik). Attached to the Trust's complaint was an assignment of mortgage from New Century to the Trust dated February 2, 2011 and effective September 1, 2010, which incorrectly stated that New Mortgage was transferring the mortgage to "Deutsche Bank National Trust Company, as Trustee *for*

the Pooling and Servicing Agreement Dated as of August 1, 2004 Morgan Stanley ABS Capital I Inc. Trust 2004-HE6 Mortgage Pass-Through Certificates, Series 2004-HE6." (Emphasis added.) Also attached was a corrective assignment in which New Century corrected the name of the assignee to "Deutsche Bank National Trust Company, as Trustee *under* Pooling and Servicing Agreement Dated as of August 1, 2004 Morgan Stanley ABS Capital I Inc. Trust 2004-HE6 Mortgage Pass-Through Certificates, Series 2004-HE6."

{¶12} The allonge attached to the note, dated February 2, 2011 and effective September 1, 2010, also incorrectly stated that New Century transferred the note to Deutsche Bank National Trust Company as Trustee *for* the Pooling and Servicing Agreement instead of as Trustee *under* the Pooling and Servicing Agreement.

{¶13} Stancik answered and counterclaimed for damages, asserting that this was the third false foreclosure against him, that the stress of dealing with the false foreclosures had ruined his health, and that the false foreclosures had caused him to lose his job selling insurance. In addition, in response to the Trust's motion for summary judgment, Stancik argued that the allonge, assignment of mortgage, and corrective assignment of mortgage proffered by the Trust with the complaint were fraudulent because the mortgage and note were transferred to the Trust in 2004, not 2010, as evidenced by the Trust's 2005 foreclosure action against him.

{¶14} After a hearing, the magistrate denied the Trust's motions for default and summary judgment. In addition, the magistrate determined that the name of the entity to

which the mortgage and note were assigned differed from the Trust's name as set forth in its complaint, and that the Trust had not attached a complete copy of the mortgage to the complaint as required by Civ.R. 10(D). The magistrate granted the Trust 14 days to submit an amended complaint addressing these issues. The trial court subsequently dismissed the case without prejudice because the Trust failed to comply with the court's order.

{¶15} On September 25, 2013, Stancik again filed suit in state court against Deutsche National Bank. *Stancik v. Deutsche Natl. Bank,* Cuyahoga C.P. No. CV-13-814375. He subsequently amended his complaint to add the Trust as a defendant. Stancik asserted claims for negligence, breach of the implied covenant of good faith and fair dealing, breach of fiduciary responsibility, intentional infliction of emotional distress, conversion, and fraud. Stancik's claims were based on the allegedly false foreclosures, as well as Deutsche Bank's use of the allegedly fraudulent allonge, assignment of mortgage, and corrective assignment of mortgage in the 2012 foreclosure case. Stancik alleged that the defendants' actions destroyed his health, reputation, professional career, and finances, and he sought compensatory and punitive damages.

{¶16} The Trust filed a motion to dismiss Stancik's complaint, which the trial court converted to a motion for summary judgment and subsequently granted. It is from this judgment that Stancik now appeals.

II. Analysis

A. Standard of Review

{¶17} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

{¶18} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.* B. Res Judicata

{¶19} Stancik raises 13 assignments of error for our review, each alleging that the trial court erred in granting summary judgment for various reasons. Of these 13 assignments of error, 8 implicate the doctrine of res judicata.

{¶20} The doctrine of res judicata involves both claim preclusion and issue preclusion. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995).

Under the claim preclusion aspect of res judicata, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Id.* at syllabus; *Ford Motor Credit Co. v. Collins*, 8th Dist. Cuyahoga No. 101405, 2014-Ohio-5152, ¶ 11, citing *Hughes v. Calabrese*, 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725, ¶ 12.

{¶21} Issue preclusion provides that relitigation of an issue that has been actually and necessarily litigated and determined in a prior action is precluded. *Krahn v. Kinney*, 43 Ohio St.3d 103, 107, 538 N.E.2d 1058 (1989). In other words, "material facts or questions that were in issue in a former suit, and were there judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to that action and person in privity with them." *Mlakar v. Mlakar*, 8th Dist. Cuyahoga No. 98194, 2013-Ohio-100, ¶ 11.

{¶22} In his first assignment of error, Stancik asserts that the trial court erred in granting summary judgment because it "did not consider Deutsche Bank's breach of the mutual, binding oral contract that Stancik had originally with New Century, and Deutsche Bank reaffirmed in 2004 when they bought his mortgage."

{¶23} In his second assignment of error, Stancik asserts that the trial court erred in granting summary judgment because it "did not consider estoppel concerning the appellant's mortgage payments from May 2006 to October 2010."

{¶24} In the sixth assignment of error, Stancik contends that the trial court erred in

granting summary judgment because it "did not consider Deutsche Bank's requirement to pay the real estate taxes due to [its] breach of contract." In the eleventh assignment of error, Stancik asserts that the trial court denied him due process because it did not enforce "the Mutual Release and Settlement Agreement."

{¶25} These assignments of error implicate issues decided in the 2011 state court case, however, and thus are barred by res judicata. In the 2011 case, Stancik asserted that 1) a false foreclosure was filed in 2005 and resulted in a settlement; (2) the settlement was breached by Deutsche Bank when HomEq, and subsequently Ocwen, did not properly credit his account after the settlement, and then refused to accept further payments because he was in foreclosure again; and that Deutsche Bank is therefore estopped from demanding further payment on the loan; and (3) his medical issues, financial difficulties, and lack of employment were caused by the defendants' actions. These issues were litigated in the 2011 case and ultimately, determined by summary judgment in favor of Deutsche Bank and the other defendants. Stancik did not appeal the trial court's judgment in that case and, accordingly, those issues are now res judicata. Likewise, any subsequent claims regarding these events are barred by res judicata.

{¶26} In his third assignment of error, Stancik asserts that the trial judge erred in granting summary judgment in this case because the judge in the 2011 case "did not consider the false statement of Mr. David Gauntner and his violation of Civil Rule 11 when he committed fraud upon the court in 2011, and his violation of Ohio Supreme Court Rule 3.4."

{¶27} In his fourth assignment of error, Stancik asserts that the trial court erred in granting summary judgment because it "did not consider the judicial fraud and fraud upon the court" committed by the federal district court judge and the judge in the 2011 state court case "that she could have reversed."

{¶28} In the fifth assignment of error, Stancik contends that the trial court erred in granting summary judgment because it did not consider that "David Gauntner's statement contradicts Ulmer & Berne."

{¶29} And in the twelfth assignment of error, Stancik asserts that the trial court was biased because it did not recognize that the federal district court judge and the judge in the 2011 state court case "failed to uphold the law and committed fraud upon the court by their decisions" in those cases.

{¶30} With respect to the federal district court case, Ohio constitutional and statutory law is clear that state courts have no jurisdiction to review federal district court decisions. Stancik should have raised any alleged errors regarding the district court decision on appeal in the federal court; a subsequent action in a state trial court is not the appropriate forum to do so. Likewise, a state court trial judge has no jurisdiction to reverse another judge's decision in a separate case. Thus, the trial judge in this case was without authority to reverse the judge's decision in the 2011 case. As with the federal court case, Stancik should have raised any errors on appeal of the trial court's decision in the 2011 case; because he did not do so, any issues relating to that case are barred by res judicata.

{¶31} Accordingly, the first, second, third, fourth, fifth, sixth, eleventh, and twelfth assignments of error are overruled.

{¶32} This case is not, however, as the Trust contends, "entirely based on allegations previously made in both the 2011 case and the subsequent federal district case." Although Stancik's complaint set forth the facts related to the previous lawsuits, it made clear that his claims were also based on the Trust's use of the allegedly fraudulent allonge, assignment of mortgage, and corrective assignment of mortgage in the Trust's 2012 foreclosure action against Stancik.

{¶33} The Trust contends that these claims fail because "none of these documents are fraudulent." As support for its contention that the documents are not fraudulent, the Trust refers to the affidavit of Kevin Flannigan, a loan analyst for Ocwen, that was attached to its motion for summary judgment. In his affidavit, Flannigan averred that New Century assigned the mortgage to the Trust on February 2, 2011, effective September 1, 2010; issued a corrective assignment due to a scrivener's error on June 14, 2012; and endorsed the note February 2, 2011, effective September 1, 2010. Flannigan averred that the allonge, assignment of mortgage, and corrective assignment of mortgage, copies of which were attached as exhibits to his affidavit, were not forgeries or fraudulent.[1]

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[1]In describing the scrivener's error relating to the assignment of mortgage and corrective assignment of mortgage in his affidavit, Flannigan misidentified the error, and stated that the original assignment included an extra "National" in Deutsche Bank's name, which required the corrective assignment. In its reply brief in

{¶34} But Flannigan's blanket assertion that the documents were not fraudulent does not explain how the Trust foreclosed on Stancik in 2005 if New Century did not assign the note and mortgage to the Trust until 2010. Although Stancik argued in his motion for summary judgment that the documents were fraudulent in light of the 2005 foreclosure, the Trust made no attempt in its response brief to explain how it only came in possession of the note and mortgage ten years after the first foreclosure. In the absence of any explanation, the record raises lingering concerns about whether the 2005 foreclosure action — the action that seems to have precipitated this ongoing saga — was fraudulently initiated, or whether the 2012 foreclosure action was based on fraudulently created documents.

{¶35} Moreover, despite the Trust's assertion otherwise, the doctrine of res judicata does not apply to Stancik's claims regarding the 2012 case. Obviously, any claims related to the Trust's use of the allegedly false documents in 2012 were not decided in the 2011 case or the federal district court case. Furthermore, the 2012 foreclosure case was dismissed without prejudice, and there was no determination on the

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support of its supplemental motion for summary judgment, counsel for the Trust also stated that, "the **only** difference in the assignment of mortgage and the corrective assignment of mortgage was the accidental inclusion of an extra "National" in the assignee's name." (Emphasis in original.) But in the 2012 foreclosure case, the Trust identified the scrivener's error as stating that the mortgage was assigned to Deutsche Bank as trustee "for" the pooling and servicing agreement, instead of as trustee "under" the pooling and servicing agreement. Thus, Stancik's assertion that the document with the additional "National" in it never existed, and his contention in the ninth assignment of error that the Trust had many different attorneys "who kept saying different things, contradicting each other" appear to be correct.

merits regarding the validity of the documents. Accordingly, res judicata does not apply to any claims or issues relating to the 2012 case.

{¶36} Nevertheless, as discussed below, Stancik's claims fail for other reasons.

C. No Claims Against the Trust

{¶37} Stancik made no allegations against the Trust in his original complaint. Although he subsequently amended his complaint to add the Trust as a defendant, he never amended the complaint to add any allegations or claims against the Trust (the allegations of the original complaint were against Deutsche National Bank only). Therefore, any purported claims against the Trust fail as a matter of law. And, as discussed below, even if Stancik had amended his allegations to include the Trust, his claims would still fail.

D. Negligence Claims

{¶38} Stancik alleged that the Trust was negligent for failing to (1) determine the truthfulness and accuracy of its documents before initiating foreclosure in 2012; (2) determine whether the documents it used in the foreclosure action were part of the original loan procurement process; and (3) ensure that its internal records were correct and Stancik was truly in default before initiating foreclosure.

{¶39} In its motion for summary judgment, the Trust argued that Stancik's negligence claims are barred by the economic loss doctrine. Economic losses "are intangible losses that do not arise from tangible physical harm to persons or property." *RWP, Inc. v. Fabrizi Trucking & Paving Co.*, 8th Dist. Cuyahoga No. 87382,

2006-Ohio-5014, ¶ 20. Under the economic loss doctrine, a party cannot recover purely economic losses in a tort action against another party based upon the breach of contractually created duties. *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, syllabus. The reasoning behind the economic loss doctrine is that tort law is not intended to compensate parties for monetary losses suffered as a result of duties that are owed to them simply as a result of the contract. *Digiknow, Inc. v. PKXL Cards, Inc.*, 8th Dist. Cuyahoga No. 96034, 2011-Ohio-3592, ¶ 2, citing *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 7, 560 N.E.2d 206 (1990). The economic loss doctrine does not apply to this case, however, because Stancik also alleged physical injury, i.e., that he suffered significant health problems as a result of the ongoing foreclosure issues.

{¶40} However, "the existence of a contract action excludes the opportunity to present the same case as a tort claim." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151, 684 N.E.2d 1261 (9th Dist.1996). When an alleged breach is of a duty that is created by a contract and is "independent of any duty imposed by law, the cause of action is one of contract, not tort." *Cuthbert v. Trucklease Corp.*, 10th Dist. Franklin No. 03AP-662, 2004-Ohio-4417, ¶ 44. Where the causes of action in tort and contract are "factually intertwined," a plaintiff must show that the tort claims derive from the breach of duties that are independent of the contract and that would exist notwithstanding the contract. *Id.*, citing *Wexler v. Jewish Hosp. Assoc. of Cincinnati*, 1st Dist. Hamilton No. C-820654, 1983 Ohio App. LEXIS 11806 (Oct. 26, 1983).

{¶41} Here, the parties' relationship is contractual, and any purported duties and responsibilities of the Trust in maintaining accurate records before initiating foreclosure are related to the contract. Because Stancik's allegations regarding the Trust's alleged breach of its duties do not encompass any duties independent of their contractual relationship, his negligence claims necessarily fail as a matter of law.

E. Conversion

{¶42} Stancik's conversion claim likewise fails. Conversion is the wrongful control over the personal property of another. *Beavers v. PNC Bank, Natl. Assoc.*, 8th Dist Cuyahoga No. 99773, 2013-Ohio-5318, ¶ 29. "A claim of conversion must be based on the taking of identifiable personal property." *Id.*, citing *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-5077, 797 N.E.2d 1002, ¶ 27 (8th Dist.). Stancik's conversion claim alleged that Deutsche Bank converted the equity in his real property, which is not the proper subject of a conversion claim. Accordingly, this claim fails as a matter of law.

F. Intentional Infliction of Emotional Distress

{¶43} Intentional infliction of emotional distress occurs when "one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another." *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983), abrogated on other grounds, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051. To prevail on such a claim, a plaintiff must prove that: (1) the defendant either intended to cause emotional distress, or knew or should have

known that its conduct would result in serious emotional distress to the plaintiff; (2) the defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; (3) the defendant's actions proximately caused psychological injury to the plaintiff; and (4) the plaintiff suffered serious emotional distress of a nature no reasonable person could be expected to endure. *Rhoades v. Chase Bank*, 10th Dist. Franklin No. 10AP-469, 2010-Ohio-6537, ¶ 15.

{¶44} Stancik did not provide any evidence that he suffered the type of serious mental anguish required to establish a claim for intentional infliction of emotional distress. In *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983), the Ohio Supreme Court described "serious emotional distress" as "emotional injury which is both severe and debilitating." *Id.* at 78. The court set forth some examples of serious emotional distress: "A non-exhaustive litany of some examples of serious emotional distress should include traumatically-induced neurosis, psychosis, chronic depression, or phobia." *Id.*

{¶45} Stancik produced no evidence that he suffered a "severe and debilitating" emotional injury. Although he asserted that he was "humiliated, shamed, and ridiculed" as a result of the ongoing foreclosure issues with Deutsche Bank, and that he experienced significant medical issues as a result of the stress caused by the foreclosure issues, he offered no evidence from an expert or third party as to the emotional distress he suffered, and there is no evidence that he sought medical treatment for any alleged emotional

distress. "Summary judgment is appropriate when the plaintiff presents no testimony from expert or third parties as to the emotional distress suffered and where the plaintiff does not seek medical or psychological treatment for the alleged injuries." *Crable v. Nestle USA, Inc.*, 8th Dist. Cuyahoga No. 86746, 2006-Ohio-2887, ¶ 58. Accordingly, the trial court did not err in granting the Trust summary judgment on Stancik's intentional infliction of emotional distress claim.

G. Good Faith and Fair Dealing

{¶46} Stancik claims that the Trust breached the implied covenant of good faith and fair dealing by using false documents in its 2012 foreclosure action. Parties to a contract are bound by an inherent duty of good faith and fair dealing. *Ireton v. JTD Realty Investments, L.L.C.*, 12th Dist. Clermont No. CA2010-04-023, 2011-Ohio-670, ¶ 51. Outside of the insurance context, however, the breach of this duty does not exist as a separate cause of action from a breach of contract claim. *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, ¶ 57 (8th Dist.). The covenant of good faith and fair dealing is part of a contract claim and does not stand alone as a separate claim from breach of contract. *Macklin v. Citimortgage, Inc.*, 8th Dist. Cuyahoga No. 101077, 2015-Ohio-97, ¶ 14. Stancik makes no breach of contract claim; therefore, his claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law.

H. Breach of Fiduciary Duty

{¶47} Stancik's claim for breach of fiduciary duty likewise fails. In his

complaint, Stancik alleged that the Trust breached its fiduciary duty to him by "failing to develop and administer an anti-fraud program" and by "publicly exposing him to ridicule." In his answers to the Trust's interrogatories, Stancik asserted that the Trust breached its fiduciary duty by not ensuring that its records regarding his mortgage payments were correct, wrongfully filing for foreclosure in 2005, and using a false assignment of mortgage, corrected assignment of mortgage, and allonge in its 2012 foreclosure action against him.

{¶48} The Trust correctly asserts that any issue regarding the 2005 foreclosure action is barred by res judicata. The Trust further contends that Stancik's breach of fiduciary duty claim fails because "reasonable minds can only come to the conclusion that the three documents in question are not fraudulent." We disagree. The Trust has never explained how the documents used in the 2012 foreclosure action — documents representing that the Trust only came in possession of the note and mortgage in 2010 — were valid in light of the Trust's representation in the 2005 foreclosure action that it was entitled to foreclose because it was the holder of Stancik's note and mortgage.

{¶49} Nevertheless, it is well settled that the relationship of debtor and creditor, without more, is not a fiduciary relationship. *Blon v. Bank One, Akron, N.A.*, 35 Ohio St.2d 98, 101, 519 N.E.2d 363 (1988). A bank and its customers stand at arm's length in negotiating terms and conditions of a loan. *Stone v. Davis*, 66 Ohio St.2d 74, 78, 419 N.E.2d 1094 (1981). A fiduciary relationship can be created in these circumstances, but "only when both parties understand that a special trust or confidence has been reposed."

Id. at 78.

{¶50} Stancik did not produce evidence establishing that a fiduciary relationship existed between him and the Trust. A fiduciary relationship cannot be created unilaterally, *Craggett v. Adell Ins. Agency*, 92 Ohio App.3d 443, 451, 635 N.E.2d 1326 (8th Dist.1993), and there was no evidence that the Trust understood that Stancik was placing a special trust or confidence in the relationship. Accordingly, there was no mutual agreement for the repose of a special trust, and thus, Stancik's claim for breach of fiduciary duty fails as a matter of law.

I. Fraud

{¶51} Finally, Stancik's fraud claim fails. Fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, omission of a fact, (2) that 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.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984). Civ.R. 9(B) provides that fraud claims must be pled with particularity. This court has held that the particularity requirement of Civ.R. 9(B) includes "the time, place and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence of the fraud." *Pointe at Gateway Condo. Owners' Assn. v. Schmelzer*, 8th Dist. Cuyahoga Nos. 98761 and 99130,

2013-Ohio-3615, ¶ 65.

{¶52} Stancik's complaint did not allege fraud with particularity. Although presumably his fraud claim is premised on the Trust's use of allegedly false documents in the 2012 foreclosure action, Stancik's claim did not specify the time, place, and content of the alleged material false representation by the Trust, his reliance on the misrepresentation, nor his damages. In fact, the entirety of Stancik's fraud claim is a request that the court "order the release of the Ocwen employees' current status who falsified these documents" and "identify their supervisor who created this scam of creating false documents against [him]." These assertions are insufficient to meet the Civ.R. 9(B) burden of pleading fraud with particularity.

J. Stancik's Other Assignments of Error

{¶53} In his seventh assignment of error, Stancik contends that the trial court erred in granting summary judgment because it "did not deny" the allegedly fraudulent documents used by the Trust in the 2012 foreclosure case.

{¶54} In his ninth assignment of error, Stancik contends that the trial court erred because it did not recognize that through the years, the Trust had "15 different attorneys and three different law firms * * * who kept saying different things, were contradicting each other, and kept producing contracts that their other attorneys would later say were not valid."

{¶55} In his tenth assignment of error, Stancik contends that the trial court erred in granting summary judgment because it allowed the Trust to submit case law to

substantiate its arguments, even though it used allegedly false documents in the 2012 foreclosure action.

{¶56} And in his thirteenth assignment of error, Stancik asserts that he did not have to file an affidavit authenticating the documents he submitted in opposition to the Trust's motion for summary judgment because the documents had been filed in the prior court actions.

{¶57} App.R. 12(A) provides that "errors not specifically pointed out in the record and separately argued by brief may be disregarded" by the reviewing court. Because Stancik did not argue any of these assignments of error separately in his brief, they can be disregarded. *N. Coast Cookies, Inc. v. Sweet Temptations, Inc.*, 16 Ohio App.3d 342, 343, 476 N.E.2d 388 (8th Dist.1984). Even if we were to consider them, we would find they have no merit because none of them affect our judgment that Stancik's claims fail as a matter of law.

{¶58} Last, in his eighth assignment of error, Stancik contends that the trial court erred in granting summary judgment because it did not require the Trust to produce the document with the extra "National" in its name. This alleged error has no merit because there is no relevant document with an extra "National" in its name. As discussed in footnote 1, Flannigan misidentified the scrivener's error in the September 1, 2010 assignment from New Century to the Trust as including an extra "National" in Deutsche Bank's name. The actual scrivener's error, which is evident from the assignment and corrective assignment, stated that the mortgage was assigned to Deutsche Bank as trustee

"for" the pooling and servicing agreement, instead of as trustee "under" the agreement.

{¶59} Accordingly, the seventh, eighth, ninth, tenth, and thirteenth assignments of error are overruled. Because all of Stancik's claims necessarily fail as a matter of law, the trial court did not err in granting summary judgment to the Trust, and the trial court's judgment is affirmed.

{¶60} Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR