

[Cite as *Powers v. Green Tree Servicing, L.L.C.*, 2015-Ohio-3355.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **102753**

TIMOTHY M. POWERS

PLAINTIFF-APPELLANT

vs.

GREEN TREE SERVICING, L.L.C.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-840917

BEFORE: Celebrezze, A.J., E.A. Gallagher, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: August 20, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellant, Timothy M. Powers, brings the instant appeal from the trial court's dismissal of his complaint against appellee, Green Tree Servicing, L.L.C. ("Green Tree"). Powers claims the court erred in dismissing his claims for alleged violations of the Ohio Consumer Sales Practices Act ("OCSPA") committed by Green Tree in relation to a home mortgage loan. After a thorough review of the facts and law, this court reverses and remands.

I. Factual and Procedural History

{¶2} Powers obtained a home mortgage loan from National City Bank on July 15, 2003. The note and accompanying mortgage were assigned to Green Tree on November 1, 2009. On September 27, 2014, Powers filed for Chapter 7 bankruptcy protection. Powers asserts in his complaint that Green Tree received notice on January 7, 2015, that this debt was discharged in the bankruptcy proceedings. Powers further asserts that on January 23, 2015, Green Tree improperly sent him a letter claiming he was in default on his mortgage. The letter further demanded payment and threatened certain actions for nonpayment.

{¶3} On February 23, 2015, Powers filed suit against Green Tree for alleged breaches of the OCSPA. Green Tree responded by filing a motion to dismiss pursuant to Civ.R. 12(B)(6). After Powers filed a brief in opposition, the trial court, on March 18,

2015, granted the motion and dismissed Powers's suit, finding Powers was not a consumer and Green Tree was not a supplier under the OCSPA. He now appeals assigning one error:

I. The trial court erred in dismissing the cause for failure to state a claim upon which relief can be granted.

II. Law and Analysis

A. Standard of Review

{¶4} Powers argues he asserted a valid claim under the OCSPA. He claims he is a consumer and Green Tree is a supplier that committed a deceptive act under the OCSPA.

{¶5} This court applies a de novo standard of review when analyzing a trial court's ruling on a Civ.R.12(B)(6) motion to dismiss for failure to state a claim. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Under this standard of review, we must independently review the record and afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 13.

{¶6} Pursuant to Civ.R. 12(B)(6), a complaint is not subject to dismissal for failure to state a claim upon which relief may be granted unless it appears beyond doubt that the plaintiff can prove no plausible set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants*

Union, Inc., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975). Therefore, “[a]s long as there is a set of facts, consistent with the plaintiff’s complaint, which would allow the plaintiff to recover, the court may not grant a defendant’s motion to dismiss.” *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

{¶7} In resolving a Civ.R. 12(B)(6) motion, a court’s factual review is generally confined to the four corners of the complaint. *Grady v. Lenders Interactive Servs.*, 8th Dist. Cuyahoga No. 83966, 2004-Ohio-4239, ¶ 6. However, documents attached to or incorporated into the complaint may be considered. *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589, ¶ 38, citing *NCS Healthcare, Inc. v. Candlewood Partners, L.L.C.*, 160 Ohio App.3d 421, 2005-Ohio-1669, 827 N.E.2d 797 (8th Dist.). Within these confines, a court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the nonmoving party. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995).

B. Applicability of the OCSA to Mortgagees

{¶8} Under the OCSA, “[n]o 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.” R.C. 1345.02(A). Further, “[n]o supplier shall commit an unconscionable act or practice concerning a consumer transaction in connection with a residential mortgage. Such an unconscionable act or practice by a supplier violates this

section whether it occurs before, during, or after the transaction.” R.C. 1345.031(A). In order to maintain an action under these sections of the OCSPA, a plaintiff must establish that he or she is a “consumer” who engaged in a “consumer transaction” with a “supplier,” and the supplier violated one of the above provisions. *See Gilchrist v. Saxon Mtge. Servs.*, 10th Dist. Franklin No. 12AP-556, 2013-Ohio-949.

{¶9} R.C. 1345.01(A) defines a consumer transaction as “a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.” The statute specifically excludes real estate transactions with certain financial institutions delineated in R.C. 5725.01, but excepts “transactions in connection with residential mortgages between loan officers, mortgage brokers, *or nonbank mortgage lenders and their customers * * **.”

(Emphasis added.) R.C. 1345.01(K) further defines nonbank mortgage lenders as

any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate’s compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

{¶10} R.C. 1345.01(D) defines a consumer to be “a person who engages in a consumer transaction with a supplier.” A supplier is defined as

a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, “supplier” does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, “seller” means a loan officer, mortgage broker, *or nonbank mortgage lender*.

(Emphasis added.) R.C. 1345.01(C). R.C. 1345.091 relieves an assignee that purchases a mortgage loan for value of liability for acts committed by the assignor prior to the assignment. It also provides that a claim may be asserted against an assignee for a violation committed by the assignee:

No claim or defense under this chapter may be asserted by the attorney general or any consumer against an assignee or purchaser of a mortgage loan for value unless any one of the following applies:

(A) The violation was committed by the assignee or purchaser.

(B) The assignee or purchaser is affiliated by common control with the seller of the loan at the time of such assignment or purchase.

Id.

{¶11} Powers claims that the act of sending a letter stating he was in default and threatening certain actions for nonpayment is a violation of the OCSPA. Green Tree is silent on whether the letter it sent constitutes a deceptive act. Rather, it argues this falls into the category of mortgage servicing; something that does not fall within the act.

{¶12} “A debt collector is governed as a ‘supplier’ by the OCSPA if the underlying debt was accrued during a consumer transaction.” *Wise v. Zwicker & Assoc.*,

P.C., 780 F.3d 710, 719 (6th Cir.2015), citing *Schroyer v. Frankel*, 197 F.3d 1170, 1177 (6th Cir.1999); *Celebrezze v. United Research, Inc.*, 19 Ohio App.3d 49, 482 N.E.2d 1260 (9th Dist.1984). Mortgage servicing would appear to fall in the same category. However, the Ohio Supreme Court has ruled that a mortgage servicer is not a supplier and mortgage servicing is not a transaction under the OCSPA. *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997.

{¶13} There, the Ohio Supreme Court held that this is not the type of transaction that falls within the OCSPA as between a mortgagor and a company hired by the mortgagee to service the debt. The court held both that the servicing of a mortgage loan is not a consumer transaction and mortgage servicers are not suppliers under the act. *Id.* at paragraphs one and two of the syllabus. Green Tree uses these holdings to argue it is a mortgage servicer not engaged in a consumer transaction.

{¶14} The OCSPA specifies that consumer transactions include “transactions in connection with residential mortgages between * * * nonbank mortgage lenders and their customers * * *.” R.C. 1345.01(A). Here, Green Tree is a nonbank mortgage lender as the assignee and holder of Powers’s residential mortgage and note. Green Tree is not a mortgage servicer. Green Tree, as the assignee of the mortgage, steps in to the shoes of the original mortgage lender. Green Tree argues in its brief that “there is no contract between the borrower and the mortgage servicer,” referring to itself. However, Green Tree stands in its position as a party to the mortgage transaction. Holding otherwise

would render R.C. 1345.091's cause of action for deceptive or unconscionable acts committed by an assignee in a mortgage transaction nugatory.

{¶15} The holding in *Anderson* that the servicing of a mortgage was not a consumer transaction was largely based on a lack of a contractual relationship between the servicer and the consumer and the fact that the interaction between the servicer and consumer did not have any of the hallmarks of an exchange. *Anderson* at ¶ 12. However, the same cannot be said of Green Tree. As the assignee of the mortgage and note, it is a nonbank mortgage lender interacting with its customer. It is more than a servicer attempting to collect a debt for the mortgagee. It is the mortgagee. The OCSPA covers transactions in connection with a residential mortgage loan between nonbank lenders and their customers whether that interaction occurs before, during, or after the transaction. There is an agency relationship between a servicer and the mortgagee that the Ohio Supreme Court apparently didn't feel was significant enough to establish liability under the OCSPA. But an agency relationship is legally less significant than the relationship present here. Therefore, the holdings in *Anderson* are not determinative in this case. The OCSPA has a specific exception for nonbank mortgage lenders, including Green Tree. The *Anderson* court also referenced the Uniform Consumer Sales Practices Act, on which Ohio's act is based, and cited the lack of applicability to real estate transactions. However, the OCSPA has provisions specific to mortgage transactions implicated in the present case that the model act does not.

{¶16} The definition of a consumer transaction in R.C. 1345.01(A) exempts certain financial institutions. This section provides, “[c]onsumer transaction’ does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for * * * transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers[.]” The original lender, National City Bank, is a financial institution as defined by R.C. 5725.01. It is plausible that Green Tree should be allowed to shelter under the exception in the act for certain financial institutions. However, Green Tree does not fit within the narrow sanctuary offered by this provision in the OCSPA. The exclusion in the rule for banks is a carefully considered enactment by the legislature based on the extensive regulations that already govern the operations of such financial institutions. Nonbank mortgage lenders are not governed by the same system of regulations, and were singled out by the Ohio Legislature under the OCSPA to afford consumers greater protections when dealing with these entities. *Accord Lee v. Javitch, Block & Rathbone, L.L.P.*, 522 F.Supp.2d 945, 956 (S.D.Ohio 2007).

{¶17} Cases since *Anderson* that have addressed whether the OCSPA applies to entities dealing with consumers regarding residential mortgages have not faced the precise situation here. Generally, those cases involve mortgage servicers, those contracted by servicers to initiate or maintain foreclosure proceedings, or banking institutions. *See CitiMortgage, Inc. v. Rudzik*, 7th Dist. Mahoning No. 13 MA 20, 2014-Ohio-1472; *Ogle v. BAC Home Loans Servicing LP*, 924 F.Supp.2d 902 (S.D.Ohio

2013); *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875 and 99736, 2013-Ohio-5589; *Clark v. Lender Processing Servs. Inc.*, 949 F.Supp.2d 763 (N.D. Ohio 2013). Green Tree does not fit within any of these categories. Therefore, these cases are not germane to the present situation.

{¶18} Unlike servicers, the legislature has specifically provided for application of the OCSPA to transactions between nonbank mortgage lenders and their customers. The *Anderson* court specifically stated,

the General Assembly, through Am.Sub.S.B. No. 185 (“S.B. 185”), amended R.C. 1345.01(A), effective in 2007, to expressly include three types of entities actively engaged in the residential mortgage market that were not previously subject to the CSPA: loan officers, mortgage brokers, and *nonbank mortgage lenders*. But, notably, the legislature has not expanded the application of the CSPA to include mortgage servicers.

(Emphasis added.) *Anderson*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E.2d 997, at ¶ 23. As such, the interaction between Powers and Green Tree falls within the act. Assuming Green Tree’s actions constitute a deceptive practice¹ as we must, this could constitute a violation of the OCSPA. Therefore, the trial court erred in dismissing Powers’s complaint.

III. Conclusion

¹ Green Tree did not argue that its actions were not deceptive. *But see Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). There, the Supreme Court acknowledged that a mortgage, in certain circumstances, may survive Chapter 7 bankruptcy proceedings even where the debt evidenced by the note was discharged. The letter sent by Green Tree also contained a disclaimer for customers that filed bankruptcy.

{¶19} Powers's complaint asserts that Green Tree committed a deceptive act when it sent a letter to Powers threatening certain actions that he alleges are not allowed by law. Assuming this act constitutes a deceptive practice, Powers may have an actionable claim under the OCSPA against Green Tree, a nonbank mortgage lender.

{¶20} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

EILEEN A. GALLAGHER, J., and
EILEEN T. GALLAGHER, J., CONCUR