[Cite as *LaSalle Bank, N. A. v. Kelly*, 2010-Ohio-2668.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

LASALLE BANK, N. A. Appellee v. JOHN P. KELLY, et al. Appellants	C.A. No. 09CA0067-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 07 CIV 1526

DECISION AND JOURNAL ENTRY

Dated: June 14, 2010

MOORE, Judge.

{¶1} Appellants, John and Tabitha Kelly, appeal from the decision of the Medina County Court of Common Pleas. This Court affirms in part, reverses in part, and remands for proceedings consistent with this opinion.

I.

{¶2} On May 12, 2005, the Kellys and Appellee, First Franklin, executed a promissory note in favor of First Franklin for property at 184 Pine Street, Wadsworth, Ohio, in Medina County. The note was secured by a mortgage. Subsequently, First Franklin assigned its interest to Appellee, LaSalle Bank.

{¶3} On September 26, 2007, LaSalle filed the instant foreclosure action. On November 13, 2007, the Kellys filed their answer. On December 5, 2007, LaSalle filed its motion for summary judgment. On March 13, 2008, the Kellys filed a counterclaim/third-party complaint. The third-party complaint asserted claims against several third parties, including First

Franklin. On May 16, 2008, First Franklin and LaSalle filed a joint motion to dismiss. The Kellys opposed this motion, and on August 21, 2009, the trial court granted LaSalle's motion for summary judgment and the joint motion to dismiss. The trial court's entry states that "there is no just reason for delay in entering judgment herein." See Civ.R. 54. The Kellys timely appealed from this decision, raising eight assignments of error for our review. We have combined some errors for ease of review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN GRANTING [] LASALLE BANK'S MOTION FOR SUMMARY JUDGMENT WHEN THE ACCELERATION CLAUSE IN THE MORTGAGE IN QUESTION NECESSITATED ADVANCE NOTICE PRIOR TO FILING THIS FORECLOSURE ACTION AND [LASALLE] FAILED TO PLEAD AND ESTABLISH."

{¶4} In their first assignment of error, the Kellys contend that the trial court erred in granting LaSalle's motion for summary judgment when the acceleration clause in the mortgage in question necessitated advance notice prior to filing this action which LaSalle failed to plead and establish. We agree.

{¶5} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for

> summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

{¶7} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id., at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶8} In its motion for summary judgment, LaSalle contends that the terms and conditions of the Kellys' promissory note and mortgage were breached by reason of nonpayment, and as a result LaSalle accelerated the loan balance pursuant to the mortgage agreement. As the moving party, LaSalle was required to point to evidence to show that there "was no genuine issue of material fact in regard to the allegations in appellee's complaint for foreclosure." *U.S. Bank, N.A. v. Fowler*, 9th Dist. No, 22159, 2005-Ohio-2396, at ¶13. LaSalle pointed to the affidavit of Bryan Kusich, Vice President of Home Loans Services, Inc., a loan servicing agent for LaSalle. He averred that the mortgage and note attached to the pleadings were true and accurate copies of the originals, that LaSalle "has exercised the option contained in said mortgage note and has accelerated and called due the entire principal balance due thereon[,]" and that "the affiant has examined and has personal knowledge of the loan account of John P. Kelly, Defendant; herein; that said account is under affiant's supervision; that there is

presently due a principal balance of $105,600.00 with interest thereon at the rate of 6.75% per annum from May 1, 2007; that said account has been and remains in default."

{¶9} In their response, the Kellys argued that pursuant to the acceleration clause in the mortgage, LaSalle was required to provide them with notice prior to filing the instant foreclosure action. The Kellys stated that LaSalle bank failed to show that it complied with the notice requirement.

{¶10} Pursuant to paragraph 22 of the mortgage:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument ***. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by Judicial proceeding and sale of the Property."

{¶11} In its response to the Kellys' brief in opposition to its summary judgment motion, LaSalle argued that the Kellys failed to raise the affirmative defense of its alleged failure to properly provide notice prior to acceleration in a motion to dismiss, in their answer, or by amendment, and therefore the affirmative defense was waived. LaSalle did not assert that it complied with paragraph 22 by sending the Kellys notification prior to acceleration.

{¶12} We will first address LaSalle's contention that the Kellys forfeited any argument regarding notice by not raising it as an affirmative defense prior to summary judgment.

{¶13} The notice requirement set forth in paragraph 22 is not an affirmative defense. Rather, "[w]here prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent," and it is subject to the requirements of Civ.R. 9(C). *First Financial Bank v. Doellman*, 12th Dist. No. CA2006-02-029, 2007-Ohio-222, ¶20. Pursuant to Civ.R. 9(C), "[i]n pleading the performance or occurrence of

conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." In the instant case, LaSalle did not allege in its complaint, even generally, that it complied with the requisite condition precedent. *Doellman*, supra, at ¶21. "Under these circumstances, the [Kellys] were not required to plead with specificity that the bank failed to provide them with notice of default. Rather, it was sufficient that the [Kellys] alleged that the bank failed to state a claim upon which relief may be granted. Consequently, the [Kellys] appropriately raised the lack of notice in their opposition to the motion for summary judgment." Id.

{¶14} We next turn to whether LaSalle satisfied its burden pursuant to *Dresher*. Viewing the motions presented by LaSalle as well as the accompanying affidavit in the light most favorable to the non-moving party, it is clear that LaSalle made no attempt to establish that it complied with paragraph 22. Kusich's affidavit does not mention whether the bank sent notice to the Kellys prior to filing suit. Therefore, we conclude that LaSalle failed to support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C) that showed the absence of a genuine issue of fact with regard to its compliance with paragraph 22. *Dresher*, 75 Ohio St.3d at 292-93. As LaSalle failed to satisfy its burden, summary judgment was not proper. The Kellys' first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN GRANTING [] LASALLE BANK'S MOTION FOR SUMMARY JUDGMENT AS THE AFFIDAVIT SUBMITTED BY LASALLE BANK WAS INSUFFICIENT WITH REGARD TO WHETHER IT WAS THE REAL PARTY IN INTEREST."

{¶15} Our disposition of the Kellys' first assignment of error renders their second assignment of error moot. Consequently, we need not address it.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED TO THE PREJUDICE OF [THE KELLYS] BY ENTERING FINAL JUDGMENT ENTRY OF DECREE ON [LASALLE'S] MOTION FOR SUMMARY JUDGMENT AND [LASALLE AND FIRST FRANKLIN'S] MOTION TO DISMISS."

{¶16} In their third assignment of error, the Kellys contend that the trial court erred to their prejudice by entering a final judgment entry of decree on the summary judgment motion and the motion to dismiss.

{¶17} To support their contention, the Kellys submit that the trial court should not have relied upon Kusich's affidavit in support of LaSalle's motion for summary judgment. Although their assignment of error mentions the motion to dismiss, the argument relates solely to the summary judgment motion. Therefore, our disposition regarding the Kellys' first assignment of error renders their third assignment of error moot. We decline to address it.

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN GRANTING [LASALLE AND FIRST FRANKLIN'S] MOTION TO DISMISS AS [THE KELLYS] PROPERLY AND SUFFICIENTLY PLEADED RESPA CLAIMS IN COUNT ONE."

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED IN GRANTING [LASALLE AND FIRST FRANKLIN'S] MOTION TO DISMISS AS [THE KELLYS] PROPERLY AND SUFFICIENTLY PLEADED A CLAIM OF BREACH OF FIDUCIARY DUTIES ON COUNT TWO."

ASSIGNMENT OF ERROR VI

"THE TRIAL COURT ERRED IN GRANTING [LASALLE AND FIRST FRANKLIN'S] MOTION TO DISMISS AS [THE KELLYS] PROPERLY AND SUFFICIENTLY PLEADED A CLAIM OF FRAUD."

ASSIGNMENT OF ERROR VII

"THE TRIAL COURT ERRED IN GRANTING [LASALLE AND FIRST FRANKLIN'S] MOTION TO DISMISS AS [THE KELLYS] PROPERLY AND

SUFFICIENTLY PLEADED A CLAIM OF VIOLATIONS OF THE OHIO CONSUMER PROTECTION ACT."

ASSIGNMENT OF ERROR VIII

"THE TRIAL COURT ERRED IN GRANTING [LASALLE AND FIRST FRANKLIN'S] MOTION TO DISMISS AS [THE KELLYS] STATED RELIEF UPON WHICH RELIEF MAY BE GRANTED REGARDING CLAIMS OF CIVIL CONSPIRACY AND REQUESTS FOR PUNITIVE DAMAGES AND DECLARATORY JUDGMENT."

{¶18} In their fourth, fifth, sixth, seventh, and eighth assignments of error, the Kellys contend that the trial court erred in granting LaSalle and First Franklin's motion to dismiss. We do not agree.

{¶19} This Court reviews de novo a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Hunt v. Marksman Prod., Div. of S/R Industries, Inc*. (1995), 101 Ohio App.3d 760, 762. Dismissal is appropriately granted once all the factual allegations of the complaint are presumed true and all reasonable inferences are made in favor of the nonmoving party, and it appears beyond doubt that the nonmoving party cannot prove any set of facts entitling him to the requested relief. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548.

RESPA

{¶20} In Count One of their counterclaim/third-party complaint, the Kellys alleged that "Plaintiff and/or First Franklin violated the procedures mandated by RESPA in properly and timely informing [the Kellys] that their loans had been sold or assigned." Specifically, the Kellys point to 12 U.S.C. 2605(b) and (c), which, according to the Kellys' complaint, "requires that notice be given when a consumer's loan is sold or assigned." In actuality, 12 U.S.C. 2605 refers to the *servicing* of mortgage loans. Subsections (b) requires

"Notice by transferor of loan servicing at time of transfer

> "(1) Notice requirement
>
> "Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person." (Emphasis added.)

{¶21} This notice must be given, with some exceptions, "not less than 15 days before the effective date of transfer of the servicing of the mortgage loan[.]" 12 U.S.C. 2605(b)(2). 12 U.S.C. 2605(c) requires

> "Notice by transferee of loan servicing at time of transfer
>
> "(1) Notice requirement
>
> "Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer." (Emphasis added.)

{¶22} This notice must be given, with some exceptions, "to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan[.]" 12 U.S.C. 2506(c)(2).

{¶23} The Kellys contend that LaSalle and/or First Franklin failed to timely inform them that they sold or assigned their loans. They contend that "First Franklin at some time subsequent sold and/or assigned or otherwise its interest in the properties to certain financial institutions and ultimately to Plaintiff." Any potential failure to make such a notification, would not, however, violate 12 U.S.C. 2506, as this is not an allegation that the servicing of the loan has been transferred, sold, or assigned.

{¶24} The sale, assignment, or transfer of the loan does not lead to an inference that the servicing of the loan has also been sold, assigned, or transferred. Pursuant to paragraph 20 of the Kellys' mortgage, "[t]he Note or a partial interest in the Note (together with this Security Interest) can be sold one or more times without prior notice to Borrower.*** If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the

mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the note purchaser." Thus, even presuming the facts are as stated in the complaint and making all *reasonable* inferences in favor of the Kellys, we conclude that they have failed to state a claim pursuant to 12 U.S.C. 2506. The Kellys' fourth assignment of error is overruled.

BREACH OF FIDUCIARY DUTIES

{¶25} In Count Two of their counterclaim/third-party complaint, the Kellys alleged that "as [the Kellys'] fiduciary, [LaSalle] and First Franklin owed [the Kellys] the duties of good faith, trust, confidence, and candor while servicing the mortgages and notes in question." The Kellys relied upon the premise that LaSalle and First Franklin were their fiduciaries. This premise is incorrect.

{¶26} The Ohio Supreme Court has explained that

> "it is clear that a fiduciary duty does not arise between a bank and a prospective borrower unless there are special circumstances. The General Assembly codified this principle in R.C. 1109.15(D), which states, 'Unless otherwise expressly agreed in writing, the relationship between a bank and its obligor, with respect to any extension of credit, is that of a creditor and debtor, and creates no fiduciary duty or other relationship between the parties.'" *Groob v. Key Bank* (2006), 108 Ohio St.3d 348, 353, 2006-Ohio-1189. at ¶22.

{¶27} Accordingly, unless otherwise expressly agreed to, LaSalle and First Franklin's relationship with the Kellys was that of creditor/debtor. Id. On appeal, the Kellys do not point this Court to any portion of the agreement that would create a fiduciary relationship. Instead, they state that the "allegations in the Counterclaim and Third Party Complaint clearly established the creation of fiduciary duties upon [LaSalle and First Franklin] despite law which states such a duty does not generally apply, but can under certain circumstances." They do not explain what

circumstances occurred in this case that would establish such a relationship. Our review of the parties' agreement does not reveal that the parties agreed to a fiduciary relationship. Accordingly, the Kellys cannot prove any set of facts entitling them to the requested relief. The Kellys' fifth assignment of error is overruled.

FRAUD

{¶28} In Counts Three and Six in their counterclaim/third-party complaint, the Kellys asserted allegations of fraud. Essentially, the Kellys contend that the third–party defendants fraudulently induced them to enter into the note.

{¶29} To state a fraud claim, the Kellys were required to plead the following elements;

> "'(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) 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, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.'" *Jarvis v. Stone*, 9th Dist. No. 23904, 2008-Ohio-3313, at ¶10, quoting *Cohen v. Lamko Inc*. (1984), 10 Ohio St.3d 167, 169.

{¶30} Pursuant to Civ.R. 9(B), "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." It is not clear how the Kellys' averment of fraud pertains to LaSalle and First Franklin. In the introduction of their counterclaim/third-party complaint the Kellys extensively list facts that could potentially support a claim of fraud. These facts, however, are not specifically attributed to either LaSalle or First Franklin. Instead it appears that the Kellys generally take issue with the loan application and appraisal, which were conducted by other defendants. In fact, the Kellys refer to misrepresentations and omissions on the loan application, as completed by another third-party defendant that would have "improperly influenced the First Franklin's underwriting decision-making." There is no allegation in the complaint that First Franklin unjustly relied upon the loan

application, as prepared by another third-party defendant. Accordingly, even if we were to determine that the Kellys have stated a claim for fraud, they have not stated a claim for fraud against LaSalle or First Franklin. Thus, the trial court properly dismissed these claims as to LaSalle and First Franklin. The Kellys' sixth assignment of error is overruled.

CSPA

{¶31} In Count Four of the Kellys' counterclaim/third-party complaint, they alleged that LaSalle and First Franklin violated the Consumer Sales Practices Act. The Kellys present no argument to support their claim that the trial court erred in dismissing this claim. App.R. 16(A)(7); App.R. 12(A)(2). Instead, they focus on why LaSalle and First Franklin's arguments below were without merit. This is not an analysis as to why the claim was valid and therefore should not have been dismissed. We have consistently stated that we will not create an argument for an appellant. *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Accordingly, the Kellys' seventh assignment of error is overruled.

CIVIL CONSPIRACY, PUNITIVE DAMAGES, DECLARATORY JUDGMENT.

{¶32} The Kellys asserted a claim for civil conspiracy, and requests for punitive damages and declaratory relief. As we have determined that all of the Kellys' claims with regard to LaSalle and First Franklin were properly dismissed, these remaining claims must also be dismissed.

{¶33} To establish a cause of action for civil conspiracy, the Kellys must have asserted:

> "'(1) a malicious combination, (2) involving two or more persons, (3) causing injury to person or property, and (4) the existence of an unlawful act independent from the conspiracy itself.' *Gibson v. City Yellow Cab Co.* (Feb. 14, 2001), 9th Dist. No. 20167, at *3. '[T]he underlying unlawful act must be a tort.' *Avery v. Rossford Ohio Transp. Dist*. (2001), 145 Ohio App.3d 155, 165; see, also, *Gosden v. Louis* (1996), 116 Ohio App.3d 195, 221-222." *Wright Safety Co. v. U.S. Bank, N.A.*, 9th Dist. No. 24587, 2009-Ohio-6428, at ¶32.

{¶34} The Kellys concede that "[a] civil action for civil conspiracy requires a viable claim distinct from the conspiracy in order for the conspiracy claim to survive." As we have disposed of all of the potential tort claims that could have supported the conspiracy claim, the Kellys cannot show an unlawful act independent from the conspiracy itself. Accordingly, this claim was properly dismissed.

{¶35} Likewise, the Kellys' request for declaratory relief was properly dismissed.

> "The three essential elements for declaratory relief are that (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties. A court may dismiss a declaratory-judgment action, pursuant to Civ.R. 12(B)(6), only when (1) no real controversy or justiciable issue exists between the parties or (2) the declaratory judgment will not terminate the uncertainty or controversy." (Internal citations omitted.) *State ex rel. Gelesh v. State Med. Bd. of Ohio*, 10th Dist. No. 06AP-1072, 2007-Ohio-3328, at ¶7.

{¶36} In light of our disposition regarding the dismissal of all the Kellys' claims, the trial court properly dismissed this request for relief as no real controversy or justiciable issue existed between the Kellys and LaSalle and First Franklin.

{¶37} Finally, "[p]unitive damages are sought as a remedy for certain claims; they are not an independent cause of action." *Sony Electronics, Inc. v. Grass Valley Group, Inc*. (March 22, 2002), 1st Dist. Nos. C-010133, C-010423, at *4. Therefore, the trial court properly dismissed the Kellys' claim for punitive damages. Accordingly, the Kellys' eighth assignment of error is overruled.

III.

{¶38} The Kellys' first assignment of error is sustained. Their second and third assignments of error are moot. Their remaining assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is reversed in part, affirmed in part, and

remanded for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally..

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

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