

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

BAC Home Loans Servicing, LP, etc.

Court of Appeals No. L-11-1199

Appellee

Trial Court No. CI0200906186

v.

Ronald M. Blankenship

Appellant

v.

The Mortgage Firm, Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: June 7, 2013

* * * * *

Andrew D. Neuhauser and Richard Alston, for appellant.

Robert H. Eddy, Eric Wineland, and Colleen A. Mountcastle,
for appellee, Shore Financial Services, d.b.a. United Wholesale Mortgage.

* * * * *

PIETRYKOWSKI, J.

{¶1} This appeal is from a July 11, 2011 judgment of the Lucas County Court of
Common Pleas in foreclosure proceedings brought by BAC Home Loans Servicing, LP

(“BAC”) against Ronald M. Blankenship, appellant and cross-appellee. The dispute arises out of a mortgage loan to refinance Blankenship’s home. Shore Financial is an appellee in Blankenship’s appeal. In the foreclosure proceedings, Blankenship filed a third-party complaint and named Shore Financial Services d.b.a. United Wholesale Mortgage (“Shore Financial”) and The Mortgage Firm, Inc. (“Mortgage Firm”) third-party defendants. Mortgage Firm, also an appellee, has not participated in the appeal.

{¶2} This appeal is brought by Blankenship and has been assigned case No. L-11-1199. BAC also filed an appeal from the July 11, 2011 judgment, appeal No. L-11-1195. Shore Financial is an appellee in both appeals and filed a cross-appeal in L-11-1195 against Blankenship.

{¶3} On August 30, 2011, we ordered L-11-1199 and L-11-1195 consolidated for proceedings in this court. On April 25, 2012, Blankenship and BAC filed a stipulation, later granted, seeking dismissal of their appeals against each other. Contemporaneously, Blankenship also moved to sever the two appeals. We granted the motion to sever on May 7, 2012.

{¶4} We consider in this decision Blankenship’s appeal in appeal No. L-11-1199.

Mortgage Loan

{¶5} Blankenship secured a mortgage loan in May 2008 to refinance his home. Mortgage Firm acted as the broker for the loan. Shore Financial acted as the original mortgagee. Under the loan, Blankenship borrowed \$87,290 and executed an FHA

Multistate Fixed Rate Note and an FHA Ohio Open-end Mortgage with MERS. The Federal Housing Administration (“FHA”) insures the note and mortgage.

{¶6} The promissory note requires monthly payments to the lender in the amount of \$537.46 until June 1, 2038. Blankenship made his last monthly payment on the loan in January 2009. On August 6, 2009, Blankenship mailed a notice of rescission of the loan to BAC, Shore Financial, and Mortgage Firm. On August 12, 2009, BAC filed this foreclosure action, asserting rights as holder of the note. In its complaint, BAC alleged that Blankenship was in default of his obligations under the note and mortgage securing the note. Blankenship filed a counterclaim against BAC and a third-party complaint against Shore Financial and Mortgage Firm.

{¶7} In a judgment filed on March 24, 2011, the trial court ruled on a series of motions filed by the parties. In the judgment, the trial court:

1. Granted Blankenship’s motion to dismiss, with prejudice, BAC’s action for foreclosure;
2. Dismissed, with prejudice, the counterclaim of Blankenship against BAC;
3. Dismissed, with prejudice, the third party complaint brought by Blankenship against Shore Financial and Mortgage Firm;
4. And overruled the motion for summary judgment filed by Shore Financial against Blankenship as moot.

{¶8} In April 2011, both BAC and Blankenship filed notices of appeal from the March 24, 2011 judgment. We dismissed the appeal on June 23, 2011, for lack of a final appealable order, noting that the March 24, 2011 judgment did dispose of the case in its entirety and the judgment lacked a Civ.R. 54(B) determination that there is no just reason for delay. *BAC Home Loans Servicing, LP. v. Blankenship*, 6th Dist. No. L-11-1091 (June 23, 2011).

{¶9} On July 11, 2011, the trial court issued a judgment finding no just cause for delay of the March 24, 2011 judgment. Thereafter, BAC, Blankenship, and Shore Financial each filed notices of appeal from the July 11, 2011 judgment.

{¶10} Blankenship asserts three assignments of error in his appeal:

Assignment of Error 1: The trial court erred in dismissing Mr. Blankenship's third-party complaint with prejudice.

Assignment of Error 2: The trial court erred in granting third-party defendant The Mortgage Firm's motion to dismiss.

Assignment of Error 3: The trial court abused its discretion in granting third-party defendant Shore Financial's motion for reconsideration.

{¶11} We consider first the issue of whether the trial court erred in dismissing the third-party complaint on Civ.R. 14(A) grounds (Assignments of Error Nos. 2 and 3).

Next we will address whether the trial court erred in ordering the dismissals to be with prejudice (Assignment of Error No. 1).

{¶12} Both third-party defendants filed motions in the trial court to dismiss the third-party complaint against them based on the argument that the claims asserted by Blankenship were not of the type that under Civ.R. 14(A) can be brought by third-party complaint. Shore Financial raised the issue first, in a motion to dismiss filed on December 28, 2009. The trial court denied that motion on April 30, 2010.

{¶13} Subsequently Mortgage Firm filed its own motion to dismiss the third-party complaint on Civ.R. 14(A) grounds. Shore Financial joined Mortgage Firm's motion and requested the court to reconsider its prior ruling. In its March 24, 2011 judgment, the trial court granted the motions to dismiss as to both third-party defendants and dismissed the third-party complaint with prejudice.

{¶14} A third-party complaint is a vehicle through which defendants are permitted to assert claims against non-parties of a type specified under Civ.R. 14(A) without leave of court:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him*. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not

later than fourteen days after he serves his original answer. (Emphasis added.) Civ.R. 14(A).

{¶15} The dispute under Assignments of Error Nos. 2 and 3 concerns whether the claims asserted by Blankenship against Shore Financial and Mortgage Firm are of the type under Civ.R. 14(A) that may be brought by a third-party complaint. Central to the issue is the relationship between the claims asserted in the third-party complaint and the primary claim in the case.

{¶16} The primary claim in this case is an action on a promissory note and mortgage securing the note based upon a default in payments required under the note. The third-party complaint asserts four claims against Shore Financial: (1) for alleged violation of the Truth in Lending Act (“TILA”), 15 U.S.C. 1635 and Regulation Z, 12 C.F.R. 226.23(a)(3) and (b)(1)(v) due to a claimed failure to deliver required disclosures including two copies of the Notice of Right to Rescind the mortgage loan; (2) for alleged violation of the Fair Housing Act, 42 U.S.C. 3601 et seq. when Shore Financial allegedly discriminated against Blankenship due to Blankenship’s vision handicap; (3) for alleged violation of the Ohio Consumer Sales Practices Act for a claimed failure to provide Blankenship with certain loan documents and claimed unconscionable practices taking advantage of Blankenship’s blindness; and (4) for an alleged civil conspiracy between Shore Financial and Mortgage Firm against Blankenship.

{¶17} The third-party complaint asserts six claims against Mortgage Firm. In addition to claims under TILA, the Fair Housing Act, the Ohio Consumer Sales Practices Act, and for civil conspiracy with Shore Financial, the third-party complaint also asserts claims against Mortgage Firm for an alleged violation of the Ohio Mortgage Broker Act and for alleged breach of fiduciary duty.

{¶18} The Ohio Supreme Court has recognized that “Civ.R. 14(A) sets forth an express condition which must be satisfied before a third party complaint may be impleaded.” *State ex rel. Jacobs v. Mun. Court of Franklin Cty.*, 30 Ohio St.2d 239, 241, 284 N.E.2d 584 (1972). The rule allows for the filing and service of a third party complaint by a defendant “upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.” Civ.R. 14(A). Construing the rule, the Ohio Supreme Court concluded in *Jacobs*:

This language presupposes that the liability sought to be “passed on” by the third-party claim arose out of the transaction or occurrence which is the subject matter or the primary claim. The transaction or occurrence which forms the subject matter of the primary claim must be the same transaction or occurrence that gives rise to legal rights in the defendant against the third-party defendant. If the claim asserted in the third-party complaint does not arise because of the primary claim, or is in some way

derivative of it, then such claim is not properly asserted in a third-party complaint. *Jacobs* at 242.

{¶19} Blankenship argues that the third-party complaint meets the requirements of Civ.R. 14(A) as identified in *Jacobs*. He asserts that the claims in the third-party complaint arise out of the same transaction or occurrence as the mortgage loan and that the foreclosure action and third party complaint both involve events surrounding the origination of the loan.

{¶20} Even when a third-party claim arises out of the same transaction or occurrence as the primary claim, it will not meet the requirements of Civ.R. 14(A) where the third-party complaint asserts an independent cause of action. *Franklin Cty. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio-1331, 787 N.E.2d 59, ¶16 (10th Dist.); *State Farm Mut. Auto Ins. Co. v. Charlton*, 41 Ohio App.2d 107, 109, 322 N.E.2d 333 (10th Dist.1974). “[T]he alleged right of the defendant to recover, or the duty allegedly breached by the third-party defendant, must arise from the plaintiff’s successful prosecution of the main action against defendant.” *Renacci v. Martell*, 91 Ohio App.3d 217, 221, 632 N.E.2d 536 (9th Dist.1993). As recognized by the Ninth District Court of Appeals in *Renacci*, a third-party complaint must assert a claim of derivative liability:

In order for a claim to be appropriately brought pursuant to Civ.R. 14(A), it must be “derivative of the outcome of the main claim.” *United States v. Joe Grasso & Son, Inc.* (C.A.5, 1967), 380 F.2d 749, 751. The

third-party defendant must be “secondarily liable” or “liable over.” *Id.* “[I]t is clear that impleader under Rule 14 requires that the liability of the third party be dependent upon the outcome of the main claim.” *Id.* at 751-752. *Renacci* at 220.

{¶21} *Renacci*’s analysis that claims asserted by third-party complaint must be derivative of the outcome of the primary claim against the defendant has been approved and followed by other Ohio appellate courts. *Barton v. Realty Corp. of America*, 8th Dist. No. 97340, 2012-Ohio-1838, ¶ 18; *Miami Valley Hosp. v. Middleton*, 2d Dist. No. 24240, 2011-Ohio-5069, ¶ 13; *Franklin Cty. Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio-1331, 787 N.E.2d 59, ¶ 16 (10th Dist.).

{¶22} The claims asserted by Blankenship against Shore Financial and Mortgage Firm in the third-party complaint in this case are not derivative of the outcome of the primary claim for foreclosure. They are not based upon claimed secondary liability of Shore Financial or Mortgage Firm for claims asserted against Blankenship by BAC. Although the claims against Shore Financial and Mortgage Firm arise out of the same transaction, they present independent and not derivative claims. Accordingly, we conclude that the trial court did not err in dismissing the claims in the third-party complaint against Shore Financial and Mortgage Firm as the claims are not of the type that can be brought by third-party complaint.

{¶23} We find Assignments of Error Nos. 2 and 3 not well-taken.

{¶24} Under Assignment of Error No. 1, Blankenship argues that the trial court erred in dismissing the third party complaints with prejudice when the dismissals were on Civ.R. 14(A) procedural grounds. We agree.

{¶25} Blankenship cites the Ohio Supreme Court decision in *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147 in support of its argument. In *Fletcher*, the court considered a medical malpractice action in which the plaintiff failed to attach an affidavit of merit to a complaint asserting a claim of medical malpractice, as required by Civ.R. 10(D)(2). The trial court granted a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim due to the failure and dismissed the action with prejudice.

{¶26} The Ohio Supreme Court ruled that while dismissal was required, the dismissal was otherwise than upon the merits and should have been without prejudice:

Notwithstanding the appropriateness of the dismissal, the trial court erred in dismissing the case with prejudice. A dismissal with prejudice operates as adjudication on the merits. *Thomas v. Freeman* (1997), 79 Ohio St.3d 221, 225, 680 N.E.2d 997, fn. 2. It is axiomatic, then, that a dismissal otherwise than on the merits should be without prejudice. *Id.* *Fletcher* at ¶ 16.

{¶27} Where a court dismisses a third-party complaint on Civ.R. 14(A) grounds because the claims are not of the type that can be asserted in a third-party complaint, the

dismissal is otherwise than on the merits. Such a ruling does not determine that the claims do not state claims upon which relief could be granted in a separate action. *Renacci* at 91 Ohio App.3d at 221, 632 N.E.2d 536. Accordingly, such dismissals are to be without prejudice. *Id.*

{¶28} The trial court dismissed the third-party complaint on Civ.R. 14(A) procedural grounds alone and in making the dismissals, the court made no determination of the underlying merits of the claims.

{¶29} Accordingly, we conclude that the trial court erred in dismissing the third-party complaint with prejudice. We find Assignment of Error No. 1 well-taken.

{¶30} For the reasons stated, we reverse the judgment of the Lucas County Court of Common Pleas in part and affirm in part. We affirm the judgment to the extent it dismisses Ronald M. Blankenship's third-party complaint against Shore Financial Services d.b.a. United Wholesale Mortgage and The Mortgage Firm, Inc., but amend the judgment to provide that the dismissal is without prejudice. Pursuant to App.R. 24, we order appellees Shore Financial Services d.b.a. United Wholesale Mortgage and The Mortgage Firm, Inc. to pay the costs of this appeal.

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

BAC Home Loans Servicing, LP, etc.
v. Ronald M. Blankenship, et al.
v. The Mortgage Firm, Inc., et al.
L-11-1199

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
