Circuit Court for Prince George's County

Case No. CAE1601060

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2245

September Term, 2016

JAMES M. COOK, SR., ET AL.

v.

MICHAEL T. BRADLEY, ET AL.

Wright,
Beachley,
Fader,

JJ.

Opinion by Wright, J.

Filed: February 8, 2018

In November of 2014, foreclosure proceedings were initiated, in the Circuit Court for Prince George's County, against James and Sharon Cook (the "Cooks"), regarding real property located at 1713 Tulip Avenue in District Heights (the "Property"), which was encumbered by a mortgage (the "Loan"). Those proceedings culminated in a foreclosure sale of the Property, and that sale was ratified by the court in May of 2016. During the course of those proceedings, the Cooks filed, in the circuit court, a separate action alleging fraud and misrepresentation against, among others, Nationstar Mortgage LLC ("Nationstar"), which was responsible for servicing the Loan prior to, and during the foreclosure proceedings. Nationstar thereafter filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The court granted that motion. In this appeal, the Cooks present the following question for our review:

> Did the Complaint allege sufficient facts to withstand a motion to dismiss and to survive a *res judicata* motion by pleading acts of extrinsic fraud?

For reasons to follow, we reverse in part and affirm in part the judgment of the circuit court.

BACKGROUND

In 2006, the Cooks financed the Property by way of the Loan, and Nationstar eventually became the servicer on the Loan. In August of 2014, the Cooks consulted with Michael Bradley, a realtor and property manager employed by Inclusions and Associates Real Estate, LLC ("Inclusions"), to help them modify the terms of the Loan.[1]

[1] Both Bradley and Inclusions were named-defendants in the Cooks' lawsuit; however, neither defendant is a party to the instant appeal, and the claims against them were never dismissed.

Specifically, the Cooks provided Bradley with information to complete a loan-modification application, which the Cooks then submitted to Nationstar on or about November 17, 2014.

Around that same time, U.S. Bank National Association ("U.S. Bank"), which held the Deed of Trust on the Property, initiated foreclosure proceedings against the

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Ordinarily, a judgment that "adjudicates fewer than all of the claims in an action . . . or . . . less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action" is not final appealable. Md. Rule 2-602(a). In the instant case, the claims against Bradley and Inclusions remain outstanding and the judgment is not final.

Md. Rule 2-602(b) permits a circuit court, in its discretion, to "direct . . . the entry of a final judgment . . . as to one or more but fewer than all of the claims or parties" upon a finding that there is "no just reason for delay." Factors relevant to the exercise of that discretion include: "'harsh economic effect' caused by delaying the right to appeal;" "the danger that the same issues will have to be considered by the appellate court on successive appeals;" "the possibility that 'the determination of the remaining [issues] before the trial court might utterly moot the need for the review now being sought;'" and "'whether entertaining the present appeal upon the merits would require us to determine questions that are still before the trial court.'" *Rochkind v. Stevenson*, 229 Md. App. 422, 444-46 (2016), *rev'd on other grounds*, 454 Md. 277 (2017); (quoting *Doe v. Sovereign Grace Ministries*, 217 Md. App. 650 (2014)) (citations omitted).

Pursuant to Md. Rule 8-602(e), if this Court "determines that the order from which the appeal is taken was not a final judgment when the notice of appeal was filed but that the lower court had discretion to direct the entry of a final judgment pursuant to Md. Rule 2-602(b), the appellate court may, as it finds appropriate, . . . enter a final judgment on its own initiative." We exercise our discretion to do so in the instant case. The factors weighing against the certification of a final judgment do not apply in this case, and the circuit court plainly would have had discretion to certify the judgment against Nationstar as final, as was requested but not ruled upon. We see no justification for further delaying the resolution of this appeal. Accordingly, we shall direct the entry of a final judgment against Nationstar pursuant to Md. Rule-8-602(e).

Cooks regarding the Property.[2] Bradley advised the Cooks not to make any mortgage payments on the Loan "in order to effect maximum leverage" with Nationstar. Bradley also told the Cooks that U.S. Bank would not foreclose on the Property "notwithstanding any notices the Cooks were to receive to the contrary."

In June of 2015, Nationstar sent a letter to the Cooks that stated "receipt of the application materials would suspend all foreclosure activity." The Cooks then submitted "all application and material requested by Nationstar." Around that same time, Ms. Cook spoke to "Fred," last name unknown, a representative of Nationstar, who "stated that the loan modification process was reopened" and "confirmed that all documents were submitted to Nationstar."

Shortly thereafter, the Cooks received a "Notice of Sale" from Nationstar, which stated that the Property would be sold *via* a foreclosure sale. On or about July 29, 2015, a foreclosure sale was held, and the Property was sold. On August 10, 2015, a report of the sale was filed in the circuit court.

Around the time that the Cooks received the "conflicting" information from Nationstar regarding the suspension of foreclosure activity and the foreclosure sale, the Cooks contacted Bradley, who stated that "those are just scare tactics" and that "an answer was forthcoming from Nationstar." Bradley also stated that "the loan modification process was secure," and that the Cooks "need not worry about the

[2] U.S. Bank was also a named-defendant in the Cooks' lawsuit but is only implicated in the Declaratory Judgment requests to set aside the Foreclosure sale.

foreclosure sale." Shortly thereafter, the Cooks received a "notice of ratification," which they presented to Bradley, who stated that "it was a non-issue."

On January 15, 2016, the Cooks filed a lawsuit against Bradley, Inclusions, Nationstar, and U.S. Bank based on the aforementioned facts. As part of that lawsuit, the Cooks claimed that Nationstar committed fraud, constructive fraud, and negligent misrepresentation when it stated that it "would not foreclose during the loan modification procedure" and yet continued with the foreclosure sale. The Cooks further claimed that, "because of the misrepresentations made by Nationstar," they failed to "exercise any of their contractual rights to defend against the foreclosure action, participate meaningfully in the mandatory mediation procedure, or exercise their post-sale objection rights." The Cooks claimed, therefore, that they "suffered damage in the loss of the equity in their property," and that they were "irreparably harmed in that they [had] lost their ownership interest in their real property." The Cooks requested that the circuit court set aside the foreclosure sale and award compensatory damages plus costs, interest therein, attorney fees, and punitive damages.

The Cooks, based on the alleged misrepresentations, asked that the circuit court grant equitable relief including an order setting aside the foreclosure sale by way of a declarative judgment.

Despite the claims made in the Cooks' lawsuit, and despite the fact that the foreclosure sale had yet to be ratified by the circuit court, the Cooks failed to file any objection or other motion in the foreclosure action. On May 18, 2016, the court ratified the foreclosure sale, and, on May 20, 2016, Nationstar filed, in the instant action, a

motion to dismiss the Cooks' lawsuit. As part of that motion, Nationstar argued that the Cooks' claims were a collateral attack on a completed foreclosure action and, thus, were barred by *res judicata*. Nationstar also argued, in the alternative, that the Cooks' lawsuit should be dismissed because it failed to allege sufficient facts to support the claims of fraud and misrepresentation. Following a hearing, the court granted Nationstar's motion to dismiss.

STANDARD OF REVIEW

Md. Rule 2-322(b)(2) provides that a defendant in a civil suit in circuit court may seek dismissal of the suit if the complaint fails "to state a claim upon which relief can be granted." In such a motion, "[a] defendant asserts . . . that, despite the truth of the allegations, the plaintiff is barred from recovery as a matter of law." *Porterfield v. Mascari II, Inc.*, 374 Md. 402, 414 (2003). "In deciding whether to grant a motion to dismiss a complaint, a court is to assume the truth of the factual allegations of the complaint and the reasonable inferences that may be drawn from those allegations in the light most favorable to the plaintiff." *Heavenly Days Crematorium, LLC v. Harris, Smariga and Associates, Inc.*, 433 Md. 558, 568 (2013). "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ricketts v. Ricketts*, 393 Md. 479, 492 (2006). "Upon appellate review, the trial court's decision to grant such a motion is analyzed to determine whether the court was legally correct." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010).

DISCUSSION

The Cooks contend that the circuit court erred in granting Nationstar's motion to dismiss. They claim that their complaint was sufficiently pled to survive a motion to dismiss, as it specifically alleged all of the factual elements for fraud and constructive fraud. The Cooks also claim that their complaint properly alleged all of the elements of negligent misrepresentation, including "the duty element," which, according to the Cooks, is set forth in the Maryland Consumer Protection Act. Finally, the Cooks also claim that their complaint was not barred by the doctrine of *res judicata*, as the fraud perpetrated by Nationstar constituted extrinsic fraud, which, if proven, allows an enrolled judgment to be attacked collaterally.

I. Extrinsic Fraud

Nationstar counters that any alleged fraud was not extrinsic because it did not actually prevent the Cooks from presenting a defense, or its allegations of fraud, in the foreclosure proceedings. Nationstar avers, therefore, that the instant action is barred by the doctrine of *res judicata*. Nationstar also avers, in the alternative, that the Cooks' complaint failed to state a claim upon which relief could be granted. Specifically, Nationstar argues that the Cooks failed to state a claim for fraud because the complaint did not allege any facts showing that Nationstar's statements were false, or that the Cooks relied on those statements to their detriment. Nationstar further argues that the Cooks failed to allege a claim for constructive fraud and negligent misrepresentation, as their complaint did not put forth sufficient facts establishing that Nationstar owed them a duty of care beyond any contractual obligations that may have existed at the time.

"*Res judicata*, also known as claim preclusion or direct estoppel, means 'a thing adjudicated.'" *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 106 (2005). "*Res judicata* . . . generally indicates an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been – but was not – raised in the first suit." *Lizzi v. Washington Metro. Area Transit Auth.*, 384 Md. 199, 206 (2004) (citations and quotations omitted). "Under Maryland law, the elements of *res judicata*, or claim preclusion, are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits." *Norville*, 390 Md. at 107.

Here, there is little question that the Cooks' request for a Declaratory Judgment setting aside the foreclosure because of constructive fraud against Nationstar could have been, or should have been, raised in the foreclosure action, as that action involved the same parties, series of transactions, and resulted in a final judgment.[3] *See Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008) ("The effect of a final ratification of [a foreclosure sale] is *res judicata* as to the validity of such a sale, except in the case of

[3] The appellant's cause of action for fraud and negligent misrepresentation would not have to be filed in a foreclosure case because Maryland has no compulsory counterclaim rule comparable to Fed. R. Cir. P. Rule 13(a). Md. Rule 2-331(a) is a permissive counterclaim rule. *Fairfax Sav., F.S. B. v. Kris Jen. Ltd. Partnership*, 338 Md. 1, 11 (1995); *see also* Paul V. Nirmeyer & Linda M. Richards, Maryland Rules Commentary 167 (1984) (stating that Md. Rule 2-331 does not make compulsory the filing of counterclaims).

fraud or illegality."). The Cooks do not dispute that their claims meet the elements of *res judicata*; rather, they claim that Nationstar's fraudulent representations constituted extrinsic fraud, which is an exception to the doctrine of *res judicata*, and permits a court to revise an enrolled judgment at any time.

Md. Rule 2-535(b) provides that, "[o]n a motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity." "To establish fraud under [Md.] Rule 2-535(b), a movant must show extrinsic fraud, not intrinsic fraud." *Pelletier v. Burson*, 213 Md. App. 284, 290 (2013) (citations omitted). "Fraud is extrinsic when it actually prevents an adversarial trial but is intrinsic when it is employed during the course of the hearing which provides the forum for the truth to appear, albeit, the truth was distorted by the complained of fraud." *Id.* at 290-91. As the Supreme Court explained in *U.S. v. Throckmorton*, 98 U.S. 61 (1878):

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumed to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side; these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.

Id. at 65-66 (cited by *Schwartz v. Merchants Mortg. Co.*, 272 Md. 305, 309 (1974)).

In light of the above legal principles, we reject the Cooks' argument that the alleged fraud was extrinsic, and thus, permitted the circuit court to revise its enrolled

judgment. To begin with, even assuming that Nationstar told the Cooks that submission of the loan-modification documents would suspend all foreclosure activity, there is no indication that that statement actually prevented the Cooks from presenting their claims during the foreclosure proceedings. The Cooks, by their own admission, were well aware that the foreclosure proceedings had not been suspended and had ample opportunity to bring the instant claims at that time.

In fact, the Cooks filed the instant lawsuit in January of 2016, approximately four months *before* the court ratified the foreclosure sale. The Cooks were not prevented from raising the instant claims during the foreclosure proceedings, as the instant lawsuit was filed while those proceedings were pending. That the purported fraud may have limited the Cooks' choices, and caused them to take certain actions, is not sufficient to meet the strict definition of extrinsic fraud. *See Green v. Ford Motor Credit Co.*, 152 Md. App. 32, 50-51 (2003) (rejecting the argument that definition of extrinsic fraud included "fraud that induced a party to default or consent to judgment against him[.]"); *see also Thacker v. Hale*, 146 Md. App. 203, 217 (2002) ("Maryland courts 'have narrowly defined and strictly applied the terms fraud, mistake, [and] irregularity,' in order to ensure finality of judgments."). Accordingly, we hold that all claims of constructive fraud raised by the Cooks in the instant lawsuit, that would result in setting aside the foreclosure sale, are barred by the doctrine of *res judicata*.[4]

[4] As to the constructive fraud claim, aside from the request to set aside the enrolled judgment, the Cooks allege that as a mortgage lender and as the entity acting on the application for a loan modification, there existed a fiduciary relationship or one of

II. Fraud

As to the claim of fraud, we will reverse the circuit court's ruling to dismiss the fraud count, without leave to amend for failure to state a claim upon which relief could be granted.

To establish their claim of fraud, the Cooks needed to plead sufficient facts establishing: 1) that Nationstar made a false representation to them; 2) that Nationstar knew the representation was false or made it with reckless indifference as to its truth; 3) that Nationstar made the misrepresentation for the purpose of defrauding them; 4) that they had a right to and actually did rely on the misrepresentation; and 5) that they

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confidence and trust. The Cooks have failed to present any argument as to this claim in their brief.

Indeed, under Md. Rule 8-504(a)(5), an appellant is required to set forth in the brief "argument in support of the party=s position." In addition, under Md. Rule 8-504(a)(3), it is the obligation of the appellant to provide a statement of the questions presented, "indicating the legal propositions involved and the questions of fact at issue." By failing to raise an issue in the questions presented and in the legal argument set forth in appellant=s opening brief, an appellant effectively waives the right to have this Court review that argument. *Health Servs. Cost Review Comm'n v. Lutheran Hosp. of Md., Inc.*, 298 Md. 651, 664 (1984) ("This Court has consistently held that a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review.").

We have also stated that it is not this Court's function "to scour the record for error once a party notes an appeal and files a brief." *Fed. Land Bank, Inc. v. Esham*, 43 Md. App. 446, 457 (1979). "Further, it is not this Court's responsibility to attempt to fashion coherent legal theories to support appellant's sweeping claims." *Elecs. Store, Inc. v. Cellco P'shp*, 127 Md. App. 385, 405 (1999). As a result, we will affirm the circuit court's dismissal of the constructive fraud claim.

suffered compensable injury as a result of the misrepresentation. *Lasater v. Guttmann*, 194 Md. App. 431, 470 (2010).

In addition, the Cooks needed to plead their claim of fraud with particularity. *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 527 (2014). As we have explained:

> The requirement of particularity ordinarily means that a plaintiff must identify who made what false statement, when, and in what manner (*i.e.*, orally, in writing, etc.); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (*i.e.*, that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement.

Id. at 528.

Here, we are persuaded that the Cooks failed to plead a claim of fraud with the requisite particularity to overcome Nationstar's motion to dismiss. The only "misrepresentation" alleged by the Cooks, with any particularity, was that Nationstar informed them, *via* letter sent in June of 2015, that "receipt of the application materials would suspend all foreclosure activity." The Cooks did not, however, indicate why that statement was false or why a finder of fact would conclude that Nationstar acted with scienter and with the intention of persuading the Cooks to rely on the statement. In fact, the statement appears less a misstatement of fact and more a promise of future activity conditioned upon some action by the Cooks. Such predictive statements regarding further events are generally not cognizable as fraud. *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 73 (2002). As to the statement allegedly made by Fred, the statement does not indicate when it was made and, therefore, the statement falls short of the requirement of particularity.

III. Leave to Amend

The Cooks requested that they be granted leave to amend the complaint to address any pleading deficiencies if found by the court. The motion to amend was not granted. Under Md. Rule 2-341(c), amendments to pleadings are allowed "when justice so permits." The scope of an amendment can include changing the nature of the action or setting forth a better statement of facts. *Id*. We review a circuit court's denial of a request for leave to amend for abuse of discretion. *See Higginbotham v. Pub. Serv. Comm. of Maryland*, 71 Md. App. 254, 275-76 (2006). It is settled law that leave to amend "should be granted freely to serve the ends of justice and that it is the rare situation in which a court should not grant leave to amend." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 673 (2010). Nonetheless, an amendment should not be allowed if it would prejudice the opposing party, cause undue delay, or when an amendment would be futile because the claim is flawed irreparably. *Id.* at 673-74.

The Maryland Rule on dismissal is, in part, based on Federal Rules of Civil Procedure 12(b)(6) and hence, federal cases discussing the application of the Rule are instructive. In *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013), the United States Court of Appeals for the Ninth Circuit discussed five factors that Circuit considers in assessing whether a district court abuses its discretion in dismissing a complaint without leave to amend. The Court noted the following factors:

> "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint."

Id. at 520. The Court further noted that district courts should freely give leave to amend when justice so requires except that the court's discretion is particularly broad where a party has amended the complaint previously. *Id.*

In light of our State's liberal amendment standard, we hold that the circuit court abused its discretion by not granting the Cooks' request to amend their complaint. This is not a case where the plaintiff, on the eve of trial, attempts to add a new claim, but is asking that they be able to augment their complaint. In this case, the complaint had not been amended previously. Amending the complaint would not prejudice Nationstar or cause undue delay. The circumstances existing at the time of the hearing, and what was plead and may be plead, clearly warranted leave to amend.

IV. Negligent Misrepresentation

The Cooks' claim for negligent misrepresentation should be allowed to stand. In order to successfully plead a claim for negligent misrepresentation, the Cooks were required to plead that: (1) the defendant, owing a duty of care to the plaintiff, negligently asserted a false statement of material fact; (2) the defendant intended that his statement would be acted upon; (3) the defendant had knowledge that the plaintiff would probably rely on the statement; (4) the plaintiff justifiably relied on the statement; and (5) the plaintiff suffered damages as a proximate result of the defendant's negligence. *See Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 656-57 (1996).

The Cooks' complaint alleged facts that would give rise to a duty of care owed to them by Nationstar as related to the loan when Nationstar agreed to process the Cooks' loan modification application. *Jacques, et ux. v. The First National Bank of Maryland*,

307 Md. 527, 531-38 (1986). In this case, the relationship between the Cooks and Nationstar was more than purely contractual by virtue of the Note and Deed of Trust.

Here, as discussed above, the Cooks alleged in this case that the statement made by Nationstar was false and contradictory, and the statement was intended to be acted upon. Accordingly, the circuit court erred in dismissing the complaint as to the claim of negligent misrepresentation.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID BY APPELLANTS.