SECOND DIVISION
October 9, 2012

No. 1-12-0008
2012 IL App (1st) 120008-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FRANK R. KNIGHT, Plaintiff-Appellant, v. DECISION ONE MORTGAGE CO., LLC; HSBC FINANCE CORP.; MORTGAGEIT, INC; DEUTCHE BANK; ERIK STERNBERG; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and SELECT PORTFOLIO SERVICING, INC, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 10 L 1038 Honorable Raymond W. Mitchell, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Murphy concurred in the judgment.*

ORDER

Held: Plaintiff did not state valid claims for consumer fraud under 815 ILCS 505/2 (West 2006) and breach of fiduciary duty where plaintiff's claims were based only on mortgage broker's failure to disclose that he lacked an Illinois mortgage broker's license and where plaintiff failed to allege sufficient facts to show an agency relationship. Circuit court's dismissal of the complaint with prejudice was not an abuse of discretion where plaintiff had three previous opportunities to amend.

¶1 Plaintiff Frank R. Knight sued his mortgage broker and a number of financial entities for breach of fiduciary duty and violation of section 2 of the Illinois Consumer Fraud and Deceptive

Practices Act (815 ILCS 505/2 (West 2010)). The circuit court dismissed plaintiff's original complaint and three amended complaints for failure to state a claim. We affirm.

¶2 This case arises from plaintiff's purchase of a house and his eventual default on the mortgage. In late 2006, according to the complaint, plaintiff entered into a residential real estate contract and agreed to pay the seller $390,000 for the property. Plaintiff sought financing for the purchase by using an online service in order to solicit offers from mortgage brokers. Defendant Erik Sternberg, an employee of defendant MortgageIt Co., LLC, contacted plaintiff and offered to find him a 30-year mortgage loan at a fixed rate of 8%. Sternberg ultimately did not secure a loan for plaintiff under those terms, instead presenting plaintiff with an offer for what the complaint describes as "an 80/20 $390,000 high interest, high cost adjustable rate mortgage financing through [defendant] Decision One Mortgage Co. LLC with over $20,000 in total closing costs that required a borrower having $9000 per month gross income and materially exceeded plaintiff's ability to repay." The complaint alleged that plaintiff's gross monthly income was actually about $6500. The complaint also alleged that, in violation of Illinois law, Sternberg was not a licensed mortgage broker.

¶3 Notwithstanding his alleged ignorance of Sternberg's license status and the fact that the offered loan was not at the fixed rate of 8% that he originally wanted, plaintiff accepted the loan terms[1] and closed on the property. Plaintiff put no money down on the purchase other than a $2500 earnest-money deposit, instead financing the entire purchase price through two separate loans from defendant Decision One. Plaintiff granted Decision One two mortgages on the property in order to secure the loans. The closing occurred on January 25, 2007. Decision One later transferred the notes to defendant Mortgage Electronic Registration Systems, which then

[1] Based on the loan documents that plaintiff attached to the complaint, the total loan was broken into two separate loans of $312,000 and $78,000, subject to an adjustable rate that was set at 8.39% for two years and then adjusted through on a fairly complicated formula specified in the note, though it was capped at 14.39%.

assigned them to non-party U.S. Bank National Association. Plaintiff later defaulted on the loan, and U.S. Bank filed to foreclose the mortgage in September 2008. That lawsuit, which is not at issue here, was finally resolved in July 2012, when the circuit court confirmed the foreclosure sale of the property.

¶4 This case is not about the foreclosure itself, as an appeal in that case is currently pending with this court under docket No. 1-12-2296. Instead, shortly after U.S. Bank filed its foreclosure lawsuit, plaintiff filed this case against defendants (all of whom were either involved in some way with the initial loan or are the parent entities of defendants who were), alleging that they violated section 2 of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2 (West 2010)) and breached their fiduciary duties to him. Plaintiff eventually amended his complaint three times, but his core allegations were always the same and were primarily based on Sternberg's alleged lack of an Illinois mortgage broker's license at the time that he originated the loan. Plaintiff contended that the lack of a license was a material omission under the Act, and that if he had known that Sternberg was unlicensed then he would not have accepted the loan. Plaintiff also contended that Sternberg was his fiduciary and was therefore legally obligated to get plaintiff a loan that was suitable to his financial condition. Plaintiff contended that his ultimate default on the loans was due to Sternberg's violation of the Act and breach of his fiduciary duties to plaintiff. Defendant alleged that the remaining defendants were liable under various theories of vicarious liability.

¶5 On defendants' motion, the circuit court dismissed each iteration of plaintiff's complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). After dismissing the second amended complaint, the circuit court warned plaintiff that it was only granting plaintiff leave to replead "with the expressed caveat that this would be Plaintiff's final

opportunity to attempt to state a claim." When defendants successfully moved to dismiss the third amended complaint under section 2-615, the circuit court dismissed the case with prejudice. Plaintiff now appeals.

¶6 We review *de novo* the dismissal of a complaint under section 2-615, taking as true all well-pleaded facts in the complaint and construing them in the light most favorable to the plaintiff. See *Doe v. McLean County District No. 5 Board of Directors*, 2012 IL 112479, ¶¶ 15-16. "The critical question is whether the allegations in the complaint *** are sufficient to state a cause of action upon which relief may be granted." *Id.* ¶ 16.

¶7 Plaintiff's third amended complaint, which is the version of the complaint at issue here, contains 14 separate counts against different defendants under various theories of direct or vicarious liability, but there are only two core claims. First, plaintiff contends that Sternberg's failure to disclose that he did not have an Illinois mortgage broker's license violated section 2 of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2 (West 2010)). Second, plaintiff claims that Sternberg was plaintiff's fiduciary and breached his duties to plaintiff by, essentially, giving plaintiff a bad loan that plaintiff had no hope of being able to repay and failing to give plaintiff information that would have allowed plaintiff to realize the true nature of the loan.

¶8 In order to state a claim for consumer fraud under section 2, a plaintiff must allege "(1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving trade and commerce." *Connick v. Suziki Motors Co.*, 174 Ill. 2d 482, 501 (1996). Additionally, if the plaintiff is a private individual, then the plaintiff must also allege that "the consumer fraud proximately caused the plaintiff's injury." *Id.*; see *Zekman v. Direct American Marketers*, 182 Ill. 2d 359,

373 (1998). In this case, plaintiff contends that the deceptive act was the omission of Sternberg's unlicensed status. Plaintiff claims that had this fact been disclosed, he would not have closed on the loan and therefore never would have defaulted. The problem with plaintiff's position is that, even if we assume for the sake of argument that the omission of Sternberg's license status violated section 2 of the Act, plaintiff cannot show that the omission proximately caused the injuries that he complains of.

¶9 Plaintiff complains that the damages he was "wrongfully caused to pay at closing include[] plaintff's $2500 earnest money deposit, about $7,000 in total broker fees, charges and commissions, and $10,411.30 in seller closing costs." Yet none of these alleged damages have anything to do with Sternberg's license status. All of these "damages" are instead ordinary costs that anyone who purchases a residential property would need to pay at closing. Even if Sternberg had been properly licensed, plaintiff would still have had to pay every one of these costs, so it cannot be said that Sternberg's lack of a license proximately caused them.

¶10 The result is the same for plaintiff's "present" damages, which he contends are "his destroyed credit rating, all attorneys fees and costs *** incurred to date in defense of plaintiff's pending mortgage foreclosure case," and emotional distress. Plaintiff also seeks recompense for "future" damages for his "potential liability for over $1,040,000 in finance charges for his first and second mortgages, and liability for delinquency and collection charges and a potential personal deficiency judgment." But the damages that plaintiff lists are a consequence of his default on the mortgage loan, and the documents that plaintiff himself attached to the complaint demonstrate that plaintiff was fully aware of the terms of the loan at the time of closing and voluntarily chose to accept those terms. The complaint incorporated the loan application, the HUD-1 settlement statement, and the promissory note for the loan, each of which plaintiff

signed. Whatever effect Sternberg's failure to disclose his licensing status may have had, it did not prevent plaintiff from knowing the terms of the loan. The omission neither caused plaintiff to accept the loan terms nor to default on his payments, so it cannot have proximately caused the damages that he complains of. *Cf.*, *e.g.*, *Zekman*, 182 Ill. 2d at 375 (no cause of action for a deceptive practice under section 2 because the plaintiff voluntarily chose to incur the alleged damages). Plaintiff accordingly does not have cause of action against defendants for violation of the Act under section 2, whether directly or vicariously.

¶ 11 This brings us to plaintiff's second overall contention: that defendants breached their fiduciary duties to plaintiff by giving him a bad loan. Plaintiff claims that Sternberg was his fiduciary due to "the parties' agency relationship created by S[ternberg]'s undertaking to find mortgage financing" for plaintiff. Plaintiff contends that Sternberg breached his fiduciary obligations in a number of ways, including by failing to have an Illinois broker's license; falsely representing that he could find plaintiff a 30-year mortgage at a fixed rate of 8%; failing to provide plaintiff with a number of required disclosures prior to closing on the loan; failing to secure plaintiff a loan "on favorable terms that [plaintiff] could afford;" "falsifying and inflating plaintiff's loan income to $9,000/month on the loan application;" "manipulating plaintiff's loan application to give the appearance of a refinance rather than a purchase money mortgage;" incorporating excessive fees into the closing costs; and other, unspecified malfeasance.

¶ 12 Even if we overlook the fact that the documents attached to the complaint refute nearly all of these claims, the underlying problem is that plaintiff misapprehends the legal relationship between a mortgage broker and a loan applicant that existed at the time he closed on his loan. In order for there to be a cause of action for breach of fiduciary duty, a fiduciary relationship must first exist. See *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). A fiduciary relationship may be

established either as a matter of law or as a matter of fact due to "the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former." *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010).

¶ 13 Agents are fiduciaries to their principals (see *Kaparovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 210 (2003)), and section 5-7 of the Residential Mortgage License Act of 1987 establishes that an agency relationship exists a matter of law between a borrower and a mortgage broker (see 205 ILCS 635/5-7(a) ("A mortgage broker shall be considered to have created an agency relationship with the borrower in all cases")). But this section was not enacted until November 2, 2007 (see Public Act 95-691, § 10), and it did not take effect until June 1, 2008, nearly a year and a half after plaintiff closed on his loan (see 205 ILCS 635/5-7(a) (West 2008). When plaintiff took out his loan, therefore, no agency relationship existed as a matter of statutory law between plaintiff and Sternberg.

¶ 14 Plaintiff tries to avoid this conclusion by claiming that section 5-7 merely codified preexisting legal rules about the agency relationship between mortgage brokers and borrowers. Yet although plaintiff cites two Illinois cases in support of his position, neither of these cases actually stands for the proposition that mortgage brokers were the agents of borrowers as a matter of law prior to the enactment of section 5-7. See, *e.g.*, *Johnson v. Matrix Financial Services Corp*., 354 Ill. App. 3d 684, 698 (2004) (assuming only for the purpose of argument that fiduciary relationship between a mortgage broker and a borrower existed); *Kikruff v. Wisegarver*, 297 Ill. App. 3d 826, 832 (1998) (dealing with the relationship between real estate brokers and purchasers, not mortgage brokers and borrowers).

¶ 15 Without a legally established agency relationship to base his claim on, plaintiff must allege facts showing that one existed. An agency relationship "exists when the principal has the

right to control the manner in which the agent performs his work and the agent has the ability to subject the principal to personal liability." See *Kaparovskiy*, 338 Ill. App. 3d at 210. In this case, however, plaintiff has not alleged any facts demonstrating that he had the right to control Sternberg's actions, which is a "hallmark of agency." *Id.* Indeed, the complaint alleges only that the agency relationship was created by Sternberg's "undertaking to find mortgage financing for plaintiff." Yet although plaintiff recites numerous ways in which Sternberg allegedly breached his fiduciary obligations to plaintiff, at no point does plaintiff allege any facts that would show that he had the right to tell Sternberg how to go about finding the financing or originating the loan, nor does the complaint allege that Sternberg executed or signed the loans on behalf of plaintiff. The complaint alleges only that Sternberg said he could find plaintiff a mortgage loan and that plaintiff agreed. Without any factual allegations that might demonstrate plaintiff's right to control Sternberg's actions or Sternberg's authority to enter into a binding contract on plaintiff's behalf, there can be no agency relationship as a matter of fact, and without agency there can be no fiduciary duty for Sternberg to breach. Plaintiff accordingly has no cause of action for breach of fiduciary duty against defendants under either direct or vicarious liability theories.

¶ 16 So the circuit court was correct to dismiss plaintiff's third amended complaint, and the only remaining question on appeal is whether the circuit court was also correct to dismiss the complaint with prejudice. "A litigant does not have an absolute right to amend under section 2-615, and we will not disturb a trial court's decision dismissing a complaint with prejudice absent an abuse of discretion. [Citation.] In exercising his discretion, the trial court may consider the ultimate efficacy of the claim and whether plaintiff had prior opportunities to amend." (Internal quotation marks omitted.) *Hume & Liechty Veterinary Assocs. v. Hodes*, 259 Ill. App. 3d 367,

370 (1994). In this case, plaintiff had four opportunities to plead his claims against defendants. The circuit court rejected essentially identical claims in the previous iterations of plaintiff's complaint, and the circuit court placed defendant on notice that the third amended complaint was plaintiff's last chance. Choosing to dismiss the third amended complaint with prejudice rather than allow plaintiff yet another chance was well within the circuit court's discretion under these circumstances.

¶ 17 Affirmed.