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2021 IL App (3d) 200366-U

Order filed December 15, 2021

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2021

ADAM BELMARES and LETICIA HARO)	Appeal from the Circuit Court
BELMARES,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiffs-Appellants,)	
)	
v.)	Appeal No. 3-20-0366
)	Circuit No. 18-CH-892
WELLS FARGO BANK, N.A. and FEDERAL)	
HOME LOAN MORTGAGE CORP.,)	Honorable
)	Roger Rickmon,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The court did not err in dismissing the plaintiffs' complaint.

¶ 2 The plaintiffs, Adam Belmares and Leticia Haro Belmares, appeal the trial court's granting of the motion to dismiss the complaint filed by the defendants, Wells Fargo Bank, N.A. and Federal Home Loan Mortgage Corp., arguing that the motion should have been denied as it was based on false testimony.

¶ 3 I. BACKGROUND

¶ 4 In May 2018, the plaintiffs filed their initial complaint in this case, alleging counts for declaratory judgment, fraud, breach of good faith and fair dealing, promissory estoppel, quiet title, and violation of the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 *et seq.* (2018)). The complaint alleged that the plaintiffs obtained a loan for \$175,000 from Wells Fargo Bank in January 2011. The loan was secured by a mortgage on their home in Romeoville, Illinois. The plaintiffs were “informed and believe[d]” that the mortgage had been assigned to Freddie Mac Multiclass Certificates Series 3800 (Freddie Mac) on February 28, 2011. The plaintiffs alleged that this assignment had the effect of “stripping Wells Fargo’s claims to payment,” while Wells Fargo continued to seek payment from the plaintiffs. The complaint stated that there was a clear dispute as to the true owner of the loan, the defendants “should be estopped and precluded from asserting any claim against the Plaintiffs’ Property,” and that the plaintiffs’ purpose of eventually owning the property had “been severely, knowingly and intentionally thwarted and made quite difficult to continue proper payments as the uncertainty regarding the Note’s ownership still lingers.” The plaintiffs asserted that Wells Fargo could not have continued to collect payment on the mortgage from the plaintiffs and sought compensatory, special, general, and punitive damages, restitution, attorney’s fees and costs, and injunctive relief, including a stay of any attempts to foreclose on the property during the pendency of the case. The plaintiffs were fully up to date on their loan and had been submitting the payments to Wells Fargo.

¶ 5 The defendants moved to dismiss the complaint, arguing that plaintiffs failed to state a claim and no actual controversy existed as the plaintiffs had not defaulted on their loan and were not subject to competing demands for payment of their mortgage. The court granted the defendants’ motion to dismiss as to the declaratory judgment, fraud, promissory estoppel, and

breach of the FDCPA claims without prejudice and the breach of good faith and fair dealing claim with prejudice but denied the motion as to the quiet title claim.

¶ 6 The plaintiffs filed an amended complaint in May 2019, again raising claims of fraud, quiet title, and breach of the FDCPA and requesting a declaratory judgment. The defendants filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2018). Again, the defendants argued that the plaintiffs' complaint failed to state a claim and that no actual controversy existed. Attached to the motion was an affidavit of Shae Smith, the Vice President of Loan Documentation for Wells Fargo. The affidavit stated that Smith was familiar with the business records maintained by Wells Fargo as part of her job performance. She personally reviewed the plaintiffs' loan file and acquired personal knowledge of the records associated with their account and determined that Wells Fargo held the note for the plaintiffs' loan and serviced the loan and that Freddie Mac owned the note and was currently the investor. Attached to the affidavit was a copy of the note for the plaintiffs' loan from the file.

¶ 7 The plaintiffs' filed a brief in opposition to the motion, alleging that the motion to dismiss was built on the false testimony of Smith and asked that the motion to dismiss be stricken. Attached to the brief was the deposition of Smith. Smith stated that she had reviewed her affidavit, the exhibits to the affidavit, and the plaintiffs' loan file prior to the deposition. She stated that her counsel drafted the affidavit, she reviewed it and the plaintiffs' record to confirm that she agreed with the contents, and then she signed it. She did not review the actual contents of the plaintiffs' amended complaint but had viewed the caption to confirm that she had the correct documents. She did not believe that she needed to review the complaint in order to testify or submit her affidavit. She did not know who made the documents or uploaded the documents prior to her review of them on the computer. She had training regarding the regular practice of uploading and maintaining the

records. She stated that she reviewed the investor, holder, and servicer information for the loan on a database. She described her process for reviewing this information. Her search in the database confirmed that Wells Fargo was the servicer on the plaintiffs' loan and the holder. Though there was no specific document that she could provide that stated that Wells Fargo was the holder, her training had shown her how to determine the holder by looking through the database. She did not recall seeing any assignments of the mortgage. The plaintiffs' counsel asked, "[I]f Wells Fargo originated the note and never transferred it to anybody else, wouldn't Wells Fargo be the owner of the note?" Smith stated, "As far as I know, yes." The plaintiffs subsequently filed a motion to strike the defendants' pleadings and to enter a default, stating that the defendants' responses to written discovery were deficient and they had submitted a false affidavit.

¶ 8 A hearing was held via Zoom on August 24, 2020. The court first denied the motion to strike, stating that the affidavit was "fine." On the motion to dismiss, the defendants' counsel stated that there was no issue in this case because Wells Fargo held and serviced the note so the payments were properly going to Wells Fargo. The plaintiffs' counsel stated that they were 100% current on their loan, but were

"simply trying to get a better understanding of *** who is, in fact, the owner and holder of their note because they have documentation from Freddie Mac that says, when you look up their web site and type in this specific loan, it says *** that Freddie Mac is the owner of the loan since 2011, which would lead them to get very suspicious to say well, we've been paying to Wells Fargo every month for the last nine years, how can Freddie Mac be the owner."

The court asked the plaintiffs' counsel what the controversy was, which he replied, "The controversy is trying to understand who the proper party is to be receiving these payments." The

court replied, “I think the proper party to be receiving these payments is Wells Fargo.” The court then stated:

“The big change in the statute, back in the day you may want to file a foreclosure action, one of the things you had to do was present the original note and mortgage to the Court and you could withdraw it and substitute copies. That’s been obviated by the statute because these notes are all over the place. They are bought in mass, they are sold in mass.

But I am still—I am trying to figure out why you have been involved in two years of litigation when obviously there has been no harm to your client.”

The court granted the motion to dismiss, with prejudice, stating that it could not find anything “worth litigating.” The plaintiffs appeal.

¶ 9

II. ANALYSIS

¶ 10

On appeal, the plaintiffs argue that the court erred in granting the motion to dismiss because it was based on false testimony.¹ The plaintiffs do not argue the actual merits of the claims raised in their amended complaint and dismissed by the trial court.

¶ 11

At the outset, we note that the defendants argue that we should strike the plaintiffs’ brief and dismiss the appeal for their failure to comply with Illinois Supreme Court Rule 341(h) (eff. Oct. 1, 2020). Specifically, the defendants point out that the plaintiffs’ brief does not contain a Points and Authorities section (Ill. S. Ct. R. 341(h)(1)), contain an introductory paragraph (Ill S. Ct. R. 341(h)(2)), or support all factual statements or allegations with citations to the record (Ill.

¹The section of the plaintiffs’ brief labeled “Issues Presented for Review” also states that they are arguing that the court erred by denying their motion to strike. However, this issue is not contained anywhere else in their brief or their prayer for relief. Therefore, we find that the plaintiffs have forfeited this issue by failing to argue it. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020); *Vancura v. Katris*, 238 Ill. 2d 352, 370, 373 (2010).

S. Ct. R. 341(h)(6), (7)). While the plaintiffs' brief may be technically deficient in some respects, we find that any violations of Rule 341(h) are not so flagrant as to hinder or preclude our review. *Country Preferred Insurance Co. v. Groen*, 2017 IL App (4th) 160028, ¶¶ 12-13. Thus, we decline to strike the brief.

¶ 12 Turning to the merits, the defendants' motion to dismiss the plaintiffs' amended complaint was brought under section 2-619.1 of the Code, which allows a party to file a motion combining a section 2-615 motion to dismiss and a section 2-619 motion to dismiss. 735 ILCS 5/2-619.1 (West 2018). A motion to dismiss under section 2-615 challenges the legal sufficiency of the complaint, while a section 2-619 motion to dismiss admits the sufficiency but asserts a defense outside the complaint that defeats it. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. When reviewing a section 2-619.1 motion, we accept all well-pleaded facts and reasonable inferences as true and interpret the pleadings in the light most favorable to the nonmoving party. *Horn v. Goodman*, 2016 IL App (3d) 150339, ¶ 10. We review the trial court's granting of a section 2-619.1 motion to dismiss *de novo*. *Id.*

¶ 13 As stated above, the plaintiffs solely argue that the motion to dismiss should have been denied because it was based on false testimony. The plaintiffs contend that Smith's affidavit was false because of "contradicting" statements she made in her deposition, including (1) the affidavit was prepared by her attorney for her to sign, (2) she had not read through the allegations in the amended complaint, (3) she did not know who uploaded the documents that she reviewed onto the Wells Fargo computer database, (4) she could point to no specific document that stated that Wells Fargo was the holder or servicer of the note, and (5) "[s]he maintain[ed] that her business records confirm that Wells Fargo is the owner and investor of the loan."

¶ 14 We disagree with the plaintiffs’ contention that Smith’s affidavit was false or contradictory to her deposition. The plaintiffs cite no law that requires Smith to review the allegations of the complaint or prepare the affidavit herself. She stated that the attorney had drafted the affidavit, she reviewed it and the file to confirm that the statements made in the affidavit were true, and then she signed it. She also reviewed the portions of the complaint necessary for her to provide the correct documentation. Smith discussed at length in her deposition the process by which she accessed the computer database to determine that Wells Fargo was the holder and servicer of the note. During her training she learned how the documents were uploaded onto the computer such that she was a competent witness to aver as to the business records. Moreover, the plaintiffs’ contention that Smith incorrectly stated that Wells Fargo is the owner and investor of the loan is incorrect. The plaintiffs’ counsel posed Smith the hypothetical question of “[I]f Wells Fargo originated the note and never transferred it to anybody else, wouldn’t Wells Fargo be the owner of the note?” to which Smith replied, “As far as I know, yes.” Answering the hypothetical question in this way is not the same thing as stating that Wells Fargo owned the note *in this instance*, as the plaintiffs contend. We find that Smith’s affidavit was not false nor contradictory. We note that the plaintiffs do not challenge the sufficiency of Smith’s affidavit, other than to argue that it was false. Nonetheless, we find that her affidavit complied with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). See *US Bank, National Ass’n v. Avdic*, 2014 IL App (1st) 121759, ¶¶ 26-32.

¶ 15 We also agree with the trial court that there is no actual controversy, here.

“ ‘The word “actual” is one of emphasis rather than of definition. *** A “controversy” in this sense must be one that is appropriate for judicial determination. *** A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

*** The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *** It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’ ” *Exchange National Bank of Chicago v. Cook County*, 6 Ill. 2d 419, 422 (1955) (quoting *Aetna Life Insurance Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937)).

¶ 16 In their brief the plaintiffs make statements stating that the defendants are “attempting to prolong the foreclosure process” and “cannot be said to have conclusive standing to foreclose on [their] Property.” However, there are no foreclosure proceedings, at least as indicated by the record at the point this motion to dismiss was granted. As the plaintiffs admit in their brief, they were 100% current on their mortgage payments. Smith stated in her affidavit that Wells Fargo is the holder and servicer of the note. Thus, Wells Fargo can collect on the payments owed (*Hashop v. Federal Home Loan Mortgage Corp.*, 171 F.R.D. 208, 210 (N.D. Ill. 1997) (Freddie Mac “contracts with thousands of different servicers to collect the monthly mortgage payments and take the necessary actions to preserve the property securing the loans it has purchased.”)) and foreclose on the mortgage when the need arises (*OneWest Bank FSB v. Cielak*, 2016 IL App (3d) 150224, ¶ 30). The fact that the plaintiffs’ mortgage was shown as 100% current when they made all their payments to Wells Fargo also indicated that they were paying the correct party. We cannot see what the plaintiffs seek to gain from this litigation, when they agree they owe on the loan and are up to date on payments. Therefore, we find that the court did not err in granting the motion to dismiss.

¶ 17

III. CONCLUSION

¶ 18 The judgment of the circuit court of Will County is affirmed.

¶ 19 Affirmed.