STATE OF MICHIGAN

COURT OF APPEALS

RONALD C. WINIEMKO,

Plaintiff-Appellant,

v

GE CAPITAL MORTGAGE SERVICE, INC, RILEY and ROUMELL, P.C., and WILBER M. BRUCKER, III,

Defendants-Appellees.

UNPUBLISHED
January 17, 1997

No. 177827

Macomb County
LC No. 93-003639-CH

Before: Taylor, P.J., and Markey and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(8) and (10). We affirm.

This case arises out of the real estate mortgage foreclosure by advertisement of plaintiff's home, the subsequent sheriff's sale of the property, and the issuance of a sheriff's deed conveying title in the property to defendant GE Capital Mortgage Services, Inc. In response to the foreclosure, plaintiff filed a three-count complaint alleging in Count I that defendants violated the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq.*, by failing to include in each communication to plaintiff the required warning in §1692e(11) that any information defendants received regarding plaintiff could be used to collect the outstanding debt.[1] In Count II, plaintiff alleged that defendants violated a common law duty to refrain from misleading him to his detriment by not giving plaintiff this same warning. In Count III, plaintiff asserted that the foreclosure was null and void because the mortgage that had been assigned from mortgagee Travelers Mortgage Services, Inc., to defendant GE Capital Mortgage Services, Inc., was not recorded as required by MCL 600.3204(3); MSA 27A.3204(3). The trial court found that defendants were not "debt collectors" within the FDCPA, 15 USC 1692a(6), because defendant attorneys' contact with plaintiff "was to provide him with information regarding the foreclosure procedure," not collect the debt.[2] The court also held that no common law duty paralleling

* Circuit judge, sitting on the Court of Appeals by assignment.

15 USC 1692e(11) existed and that defendant GE Capital was a successor corporation, not an assignee, of Travelers, so there was no assignment to record. We affirm.

First, we find upon de novo review that the trial court did not err, as a matter of law, in ruling that defendants owed no duty to plaintiff under the FDCPA because defendant GE Capital, defendant law firm Riley and Roumell, and defendant attorney Brucker, who is employed by defendant Riley and Roumell, are not "debt collectors" as defined in 15 USC 1692a(6). See *State Treasurer v Schuster*, 215 Mich App 347, 350; 547 NW2d 332 (1996); cf. *Heintz v Jenkins*, 514 US ___; 115 S Ct 1489; 131 L Ed 2d 395 (1995). In reviewing the grant of a motion for summary disposition under MCR 2.116(C)(8), we look to the pleadings, accept as true all factual allegations and their reasonable inferences, and uphold the grant where no factual development could possibly justify a right of recovery. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395-396; 516 NW2d 498 (1994).

According to §1692a(6):

> The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6)[3] [15 USC §1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. . . . [Emphasis added.]

It is undisputed that defendants were engaged in the enforcement of a security interest, not the collection of a debt. Given the express language of §1692a(6) that for purposes of §808(6), which is inapplicable here,[4] the term "debt collector" does include those whose principal purpose is the enforcement of security interests, we believe that these enforcers of security interests are not otherwise included within the broader definition of "debt collectors."

Further, although the United States Supreme Court determined in *Heintz*, 131 L Ed 2d 398, 402, that the FDCPA "applies to attorneys who 'regularly' engage in consumer-debt-collection activity, including litigation," plaintiff failed to plead that defendants Riley and Roumell and Brucker "regularly" or as part of the firm's "principal purpose" engaged in consumer debt collection activities, pursuant to 15 USC 1692a(6). Indeed, because defendants were engaged in the enforcement of a security interest, not in the collection of a money or deficiency judgment, plaintiff could make no such allegation. Moreover, in the absence of the regularity required in *Heinz, supra*, defendant law firm and defendant attorney could not be considered "debt collectors" for purposes of the FDCPA. Summary disposition pursuant to MCR 2.116(C)(8) was therefore proper. *ETT Ambulance Service Corp, supra.*

We likewise find that no factual development could justify plaintiff's right of recovery under the alleged "common-law duty to disclose to Plaintiff, and not to conceal from him, that any information furnished to Defendants by Plaintiff would be used by Defendants to collect the debt purportedly owed by Plaintiff." We find no authority supporting the existence of such a common law duty and will not search for authority where plaintiff provides none. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). While plaintiff alleged that he acted in reliance upon "such intentional and material omission" by voluntarily supplying defendants with information regarding the debt, this is also insufficient to establish a claim for misrepresentation. Fraudulent misrepresentation requires proof that (1) defendants made a material representation, (2) the representation was false, (3) defendants knew it was false when made or made it recklessly without knowledge of its truth and as a positive assertion, (4) defendants made it with the intent to induce plaintiff to rely upon it, (5) plaintiff acted in reliance on it, and (6) plaintiff consequently suffered injury. *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677-678; 473 NW2d 720 (1991). Because defendants' alleged "omission" was not a positive assertion or material representation, plaintiff's misrepresentation claim must also fail.

Finally, upon de novo review and consideration of the pleadings and other documentary evidence in a light most favorable to plaintiff, we agree with the trial court that defendant was entitled to judgment as a matter of law regarding Count III because defendant GE Capital was not the assignee of plaintiff's mortgage. See *Allstate Ins Co v Elassal*, 203 Mich App 548, 552; 512 NW2d 856 (1994). Rather, defendant GE Capital purchased the capital stock of Travelers in 1990 and changed Travelers' corporate identity to GE Capital Mortgage Services by filing Restated Articles of Incorporation with the Secretary of State of New Jersey, the state of Travelers' incorporation. Accordingly, there was no assignment of plaintiff's mortgage or any other asset owned by Travelers. See, generally, *Bill Kettlewell Excavating, Inc v St Clair County Health Dep't*, 187 Mich App 633, 639-641; 468 NW2d 326 (1991). Thus, defendant GE Capital did not violate MCL 600.3204(3); MSA 27A.3204(3)[5] and summary disposition pursuant to MCR 2.116(C)(10) was proper.

Affirmed.

/s/ Jane E. Markey
/s/ Nick O. Holowka

Taylor, P.J., not participating.

[1] According to 15 USC 16923(11), "the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose" is a violation of the act's prohibition on the use of false, deceptive or misleading representations or means in the collection of any debt.

[2] See *Williams v Trott*, 822 F Supp 1266, 1269 (ED MI, 1993).

[3] 15 USC 1692f(6), which is §808(6), provides:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> > (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—
> >
> > > (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
> > >
> > > (B) there is no present intention to take possession of the property; or
> > >
> > > (C) the property is exempt by law from such dispossession or disablement.

Because plaintiff has not pleaded any of the violations listed in §808(6) or argued that they apply here, this provision is not applicable to the case at bar.

[4] See footnote 3

[5] MCL 600.3204(3); MSA 27A.3204(3) provides:

> To entitle any party to give a notice as hereinafter prescribed, and to make such foreclosure, it shall be requisite:
>
> * * *
>
> > (3) That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned that all the assignments thereof shall have been recorded.

In the absence of an assignment, plaintiff cites no statutory requirement that defendant GE must record all of the mortgages it acquired in the asset sale of Travelers, and we will not search for authority to support this proposition. *Toler, supra.*