

Court of Appeals, State of Michigan

ORDER

Tonya Knight v Prime Financial

Docket No. 313879

LC No. 2012-125768 CH

Christopher M. Murray
Presiding Judge

Kathleen Jansen

Douglas B. Shapiro
Judges

The Court orders that the May 14, 2014 unpublished opinion is hereby AMENDED to correct a clerical error. The opinion is corrected to read May 29, 2014 as the date of the opinion.

In all other respects, the opinion remains unchanged.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 12 2014

Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

TONYA KNIGHT,

Plaintiff-Appellant,

v

PRIME FINANCIAL,

Defendant,

and

BANK OF AMERICA, N.A.,

Defendant-Appellee.

UNPUBLISHED

May 14, 2014

No. 313879

Oakland Circuit Court

LC No. 2012-125768-CH

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's opinion and order of November 26, 2012, granting summary disposition in favor of defendant Bank of America, N.A. (defendant) pursuant to MCR 2.116(C)(6). We reverse and remand for further proceedings consistent with this opinion.

In September 2007, plaintiff borrowed \$154,050 from Prime Financial to purchase a parcel of real property situated in Southfield, Michigan. In exchange, plaintiff executed a note and granted a mortgage to Prime Financial. On September 18, 2007, Prime Financial assigned defendant to service the note.

In order to make her regular payments to defendant, plaintiff set up automatic monthly withdrawals from her bank account. It appears that plaintiff made her monthly payments to defendant in this manner without incident at first. However, as the circuit court correctly recognized, plaintiff does not dispute that she eventually stopped making payments and defaulted under the terms of the note.

Plaintiff alleges that upon receiving her bank statement in December 2009, she noticed that the account number listed for her loan had been changed without notice. Thus, on December 16, 2009, plaintiff sent defendant a qualified written request (QWR) in accordance with the Real Estate Settlement Procedures Act (RESPA), 12 USC 2601 *et seq.*, inquiring into "any and all notices, sales, transfers, and changes that had occurred." In a letter dated February 2, 2010,

defendant acknowledged receipt of plaintiff's QWR, stated that it remained the servicer of plaintiff's loan, and informed plaintiff that her loan was now owned by CRE-HFS 1st Mortgage. Among other things, defendant also notified plaintiff that she still had time to make her payments and that her loan had not yet been "referred to foreclosure." Over the next several months, plaintiff sent at least two additional QWRs to defendant, raising the same objections that she had raised in her first QWR.

On August 8, 2011, plaintiff sued Prime Financial and defendant in the United States District Court for the Eastern District of Michigan, setting forth claims of (1) violation of RESPA, (2) breach of contract, (3) fraudulent misrepresentation, and (4) negligent misrepresentation. In particular, plaintiff pointed to a provision of the mortgage agreement which entitled her to "receive notices with regard to any changes of the loan." She alleged that Prime Financial and defendant had provided no such notice to her. On August 24, 2011, the United States District Court entered an order declining to exercise supplemental jurisdiction over plaintiff's state-law claims of breach of contract, fraud, and negligent misrepresentation, dismissing these three claims without prejudice. Accordingly, only plaintiff's RESPA claim remained pending in federal court.¹

On March 22, 2012, plaintiff filed the instant action against Prime Financial and defendant in the Oakland Circuit Court, asserting claims of (1) breach of contract, (2) fraudulent misrepresentation, and (3) intentional infliction of emotional distress. In lieu of filing an answer, defendant moved for summary disposition pursuant to MCR 2.116(C)(6) and (8).² Among other things, defendant noted that plaintiff's RESPA action remained pending in federal court and asserted that the present case should therefore be dismissed. The circuit court determined that because plaintiff's state-law claims in the present case would require an examination of the same operative facts as plaintiff's still-pending RESPA claim in federal court—namely, whether defendant violated RESPA and failed to provide notice that the account number for plaintiff's loan had changed—summary disposition was proper under subrule (C)(6). On November 26, 2012, the circuit court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(6). As a consequence, the court declined to reach defendant's alternative argument that plaintiff's claims were legally insufficient to justify recovery under MCR 2.116(C)(8).

¹ The United States District Court ultimately granted summary judgment for defendant and dismissed plaintiff's remaining RESPA claim with prejudice on January 7, 2013. *Knight-Bonner v Prime Financial*, unpublished order of the United States District Court for the Eastern District of Michigan, entered January 7, 2013 (Docket No. 11-13436).

² As the circuit court correctly observed, plaintiff did not serve Prime Financial. Indeed, plaintiff admitted that she was unable to serve Prime Financial because it had gone out of business. On June 14, 2012, plaintiff moved for leave to file an amended complaint to substitute CRE-HFS 1st Mortgage as a defendant in place of Prime Financial and to clarify certain of her claims. However, plaintiff never filed a praecipe or noticed her motion for hearing, and it was consequently never considered or decided. See MCR 2.119(E)(1); LCR 2.119(B)(1).

We review de novo the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(6). *Valeo Switches & Detection Systems, Inc v Emcom, Inc*, 272 Mich App 309, 311; 725 NW2d 364 (2006). The interpretation of MCR 2.116(C)(6) presents a question of law that we similarly review de novo. *Valeo Switches*, 272 Mich App at 311.

MCR 2.116(C)(6) provides that summary disposition is proper when “[a]nother action has been initiated between the same parties involving the same claim.” However, MCR 2.116(C)(6) does not apply when the other action between the same parties involving the same claims is no longer pending at the time the motion is decided. *Fast Air, Inc v Knight*, 235 Mich App 541, 545; 599 NW2d 489 (1999). Stated differently, “summary disposition cannot be granted under MCR 2.116(C)(6) unless there is another action between the same parties involving the same claims currently initiated and pending at the time of the decision regarding the motion for summary disposition.” *Id.* at 549.

Turning to the facts of the case at bar, we note that the United States District Court declined to exercise supplemental jurisdiction and dismissed plaintiff's state-law claims well before defendant's motion for summary disposition was decided by the circuit court. In other words, “at the time of [defendant's motion for summary disposition], there was no action initiated and pending involving the same parties *and same claims.*” *Id.* at 546 (emphasis added). Furthermore, although plaintiff's federal-court RESPA claim did depend on many of the same facts as plaintiff's state-law claims, it cannot be said that the two suits were “based on the same or substantially same cause of action.” *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983). Indeed, each state-law claim involved at least some factual and legal issues that were not common to the RESPA claim. *Id.* at 667. We reverse the circuit court's grant of summary disposition in favor of defendant pursuant to MCR 2.116(C)(6) and remand for further proceedings.

We reject defendant's alternative argument that plaintiff's state-law claims in this case are barred by the doctrine of res judicata. Because the United States District Court declined to exercise supplemental jurisdiction over plaintiff's state-law claims of breach of contract and fraudulent misrepresentation, these claims were properly refiled in the circuit court and are not barred by res judicata. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 387; 596 NW2d 153 (1999). Nor is plaintiff's claim of intentional infliction of emotional distress barred by res judicata. The federal court would have declined to exercise supplemental jurisdiction over this state-law tort claim as well had it been brought. *Id.* at 384. When “it is clear that the federal court would have declined to exercise jurisdiction over a related state claim that could have been raised in the federal action through [supplemental] jurisdiction, a subsequent action in state court on the state claim that would have been dismissed without prejudice in the prior federal action is not barred by the doctrine of res judicata.” *Bergeron v Busch*, 228 Mich App 618, 627; 579 NW2d 124 (1998).

Plaintiff also argues that the circuit court abused its discretion by failing to consider her first amended complaint. At a hearing held on June 20, 2012, plaintiff explained to the court that she wished to amend her complaint to substitute CRE-HFS 1st Mortgage in place of defendant Prime Financial and to clarify certain of her claims as they applied to CRE-HFS 1st Mortgage. The circuit court appeared to support this request, commenting from the bench that plaintiff should file a motion for leave to amend her complaint as quickly as possible. Plaintiff timely

submitted a motion for leave to file an amended complaint, together with a proposed first amended complaint. The problem, however, is that plaintiff never filed a praecipe or noticed her motion for hearing. See MCR 2.119(E)(1); LCR 2.119(B)(1). Therefore, the motion was never considered or decided. When a party fails to file a praecipe or notice a motion for hearing, the motion is not placed on the court's calendar for decision and the circuit judge generally has no knowledge of the matter. See *Hosner v Brown*, 40 Mich App 515, 526 n 1; 199 NW2d 295 (1972).

The circuit court speaks only through its written orders, and not through its oral pronouncements. *Hall v Fortino*, 158 Mich App 663, 667; 405 NW2d 106 (1986). Accordingly, the circuit court's oral remarks on June 20, 2012, did not somehow oblige it to grant plaintiff's motion or consider plaintiff's proposed first amended complaint. Because we are remanding for further proceedings, however, we note that leave to amend the pleadings "shall be freely given when justice so requires." MCR 2.118(A)(2). On remand, plaintiff may again seek leave to file a first amended complaint, but must do so in conformity with the court rules and local rules.

We decline to consider the remaining alternative grounds for affirmance put forward by defendant, which were not addressed by the circuit court. On remand, the circuit court shall consider defendant's arguments that plaintiff's claims are legally insufficient to justify recovery under MCR 2.116(C)(8), and that plaintiff's claims are barred by the doctrine of collateral estoppel.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro