

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SHANNON C. DIEHL-
GUERRERO,

Plaintiff,

v.

HARDY BOYS
CONSTRUCTION, LLC.,
RELIABLE HOME
INSPECTION SERVICES, RHIS,
INC., and WELLS FARGO
HOME MORTGAGE, INC.,

Defendants.

C.A. No. N16C-08-041 CLS

Date Submitted: November 30, 2016

Date Decided: February 28, 2017

On Defendant Wells Fargo Home Mortgage's Motion to Dismiss
Pursuant to Superior Court Civil Rule 12(b)(6).

GRANTED.

ORDER

Gary W. Alderson, Esquire, Elzufon Austin Tarlov & Mondell, Wilmington,
Delaware, Attorney for Plaintiff.

Kathleen A. Murphy, Esquire, Buchanan Ingersoll & Rooney, Wilmington,
Delaware, Attorney for Defendant Wells Fargo Home Mortgage Inc.

SCOTT, J.

Defendant, Wells Fargo Home Mortgage Inc., moves this Court to dismiss the present action pursuant to Superior Court Civil Rule 12(b)(6). For the following reasons, Defendant's Motion to Dismiss is **GRANTED**.

Relevant Background

Plaintiff filed a Complaint with this Court on August 3, 2016, and pleads the following. Plaintiff claims that in May of 2013 he made plans to acquire two adjoining properties located at 2611 Philadelphia Pike (referred to as "the Duplex") and 2613 Philadelphia Pike (referred to as "the SFD") in Claymont, Delaware. Plaintiff intended to acquire these properties by means of a HUD-insured Section 203(k) loan for the rehabilitation and repair of single family properties. Plaintiff met with Defendant, Hardy Boys in May 2013. An estimator visited both properties in June 2013. As of June 2013, John W. Kerrigan, employed with Defendant Reliable Home Inspection Services, was Plaintiff's "HUD consultant" pursuant to Section 203(k). Pursuant to an estimate given by Defendant Hardy Boys, Plaintiff closed on the FHA Section 203(k) loan from Defendant, Wells Fargo Mortgage Inc (hereinafter "Wells Fargo") on October 31, 2013 for \$128,868.00. This loan was specifically for the Duplex property. On December 31, 2013, Defendant Wells Fargo told Plaintiff it needed copies of the building, HVAC, electrical and plumbing permits. On February 6, 2014, Wells Fargo contacted Plaintiff and informed him that Defendant Hardy Boys' contractor

licenses expired and Wells Fargo needed an updated license before funds could be disbursed. Plaintiff notified Defendant Hardy Boys and the updated licenses were provided. According to Plaintiff, Mr. Kerrigan, the HUD consultant, approved three “draws” between January 31, 2014 and June 20, 2014. As a result a total of \$41,951.70 was disbursed from the renovation loan. On March 23, 2014 Defendant Hardy Boys sent Plaintiff a list of additional charges to be added on to the original project estimate. On July 8, 2014 Defendant Hardy Boys sent Plaintiff a text message claiming that the pricing of the project was severely underestimated, and Defendant could no longer serve as Plaintiff’s general contractor. Subsequently the renovations of the property were left incomplete.

The Parties’ Contentions on this Motion to Dismiss

Wells Fargo filed a Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6). Wells Fargo contends that Plaintiff failed to state a claim of negligence against Wells Fargo because (1) Wells Fargo did not owe a duty to Plaintiff; and (2) Plaintiff failed to plead how Wells Fargo’s actions were the proximate cause of Plaintiff’s damages. Plaintiff argues that (1) his reliance upon Wells Fargo’s approval of Mr. Kerrigan as the HUD consultant “created a reasonable expectation that this engagement would result in HUD funding from Wells Fargo;” (2) Wells Fargo owed Plaintiff a duty, and breached its duty, to conduct due diligence regarding the HUD consultant’s competency and proficiency; (3) Plaintiff

reasonably relied on Wells Fargo's approval of Mr. Kerrigan; and (4) as a result of Plaintiff's reliance he sustained an injury. Oral Arguments were held on November 15, 2016. The Court asked Plaintiff to provide the initial loan agreement. Plaintiff filed a letter with the Court on November 29, 2016 and wished to supplement the record with HUD requirements attached to counsel's letter. On November 30, 2016, Wells Fargo filed a letter with this Court objecting to Plaintiff's submission and reaffirming Wells Fargo's arguments pursuant to its initial Motion to Dismiss.

Standard of Review

The test for sufficiency of a complaint challenged by a Rule 12(b)(6) motion to dismiss is whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.¹ In making its determination, the Court must accept all well-pleaded allegations in the complaint as true and draw all reasonable factual inferences in favor of the non-moving party.² The complaint must be without merit as a matter of fact or law to be dismissed.³ Therefore, if the plaintiff can recover under any conceivable set of

¹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); see *Cambium Ltd. v. Trilantic Capital Partners III L.P.*, 2012 WL 172844, at *1 (Del. Jan. 20, 2012) (citing *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011)).

² *Ramunno v. Cawley*, 705 A.2d 1029, 1034-36 (Del.1998); *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. Ct.1983).

³ *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52 (Del.1970).

circumstances susceptible of proof under the complaint, the motion to dismiss will not be granted.⁴

Discussion

The crux of Wells Fargo's Motion is based on the argument that Plaintiff failed to demonstrate that Wells Fargo owed Plaintiff a duty. A plaintiff must prove duty, breach, causation, and harm, by a preponderance of the evidence in order to prevail on a negligence claim.⁵ The Court must determine whether a duty exists because it is "entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law."⁶ The Court's "determination of a duty must be formulated based upon the facts of each case."⁷ Absent the showing of a duty, Plaintiff's negligence claim against Wells Fargo fails as a matter of law. Under Delaware law, "there is no fiduciary duty relationship between a debtor and a creditor, i.e., also a mortgagee and a mortgagor and, therefore, there can be no breach of a fiduciary duty claim."⁸ Thus, due to the

⁴ *Ramunno*, 705 A.2d at 1034; see *Cambium*, 2012 WL 172844, at *1 (citing *Cent. Mortg.*, 27 A.3d at 537).

⁵ See *Hudson v. Old Guard Ins. Co.*, 3 A.3d 246, 250 (Del. 2013).

⁶ *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007)(citing *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002).

⁷ *Shepard v. Reinoehl*, 830 A.2d 1235, 1238-39 (Del. Super. Ct. 2002)(citing *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988).

⁸ *Keith v. Sioris*, 2007 WL 544039, at *7 (Del. Super. Ct. Jan. 10, 2007)(citing *Margulies v. Chase Manhattan Mortg. Corp.*, 2005 WL 2923580 at *2, (N.J. Super. Ct. App. Div. Nov. 7, 2005).

debtor and creditor relationship, no fiduciary duty existed between Plaintiff and Wells Fargo.

Similarly, Plaintiff did not allege facts in the Complaint regarding any involvement of Wells Fargo in selecting Mr. Kerrigan as the consultant. According to the United States Department of Housing and Urban Development's ("HUD") website, "Section 203(k) insurance enables homebuyers and homeowners to finance both the purchase (or refinancing) of a house and the cost of its rehabilitation through a single mortgage or to finance the rehabilitation of their existing mortgage."⁹ Generally, the "203(k) Rehabilitation Mortgage program requires the use of an FHA-approved 203(k) Consultant. FHA maintains a list of qualified Consultants on the FHA 203(k) Consultant Roster. Only a Consultant on the Roster may be selected by the Mortgagee to conduct Consultant functions in the 203(k) program."¹⁰ Plaintiff's Complaint states that "Wells Fargo owed Plaintiff a duty to conduct due diligence regarding Mr. Kerrigan's competency and proficiency as a HUD Consultant." However, Plaintiff's Complaint evidences that Plaintiff chose Mr. Kerrigan as the HUD consultant, not Wells Fargo. Likewise, the Complaint does not allege that Wells Fargo chose Mr. Kerrigan as a consultant; rather the Complaint merely states that Wells Fargo gave Plaintiff approval to use

⁹ *203(k) Rehab Mortgage Insurance*, HUD.GOV, https://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/203k/203k--df (last visited Feb. 28, 2017).

¹⁰ U.S. DEP'T OF HOUS. AND URBAN DEV., *FHA Single Family Housing Policy Handbook* 66 (Dec. 30, 2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf>.

Mr. Kerrigan as his consultant. As Plaintiff acknowledges in his Complaint, Mr. Kerrigan was a person listed on the FHA 203(k) Consultant Roster active in Delaware, and was the only consultant available. Based on an examination of the pleadings, the Court cannot infer that a duty existed between Wells Fargo and Plaintiff regarding the selection of a HUD Consultant. Wells Fargo merely complied with HUD's 203(k) program requirement that the consultant must be FHA approved 203(k) consultant, like Mr. Kerrigan. Furthermore, Plaintiff did not provide the initial loan agreement between Plaintiff and Wells Fargo.

The Court also finds that logically, based on the intent of the 203(k) program, a duty between Wells Fargo and Plaintiff does not exist. The United States Bankruptcy Court for the District of Columbia elaborated on this principle. In *In Re Brown*, the court noted that

a typical mortgage transaction, where the borrower obtained money from a lender to purchase a home that is *not* in need of rehabilitation, the lender is protected by the value of the collateral. In a 203(k) transaction, however, the lender is severely under-collateralized because the mortgaged is based on the *projected* value of the property as rehabilitated. The 203(k) program protects the lender because HUD endorses the loan.¹¹

The Court finds that the nature of the 203(k) program demonstrates that the 203(k) program requirements, including the selection of a FHA listed consultant, are for

¹¹ See *In Re Brown*, 319 B.R. 278, 282 (2004).

the protection of the lender.¹² Thus, because the intent of the 203(k) program is to protect Wells Fargo and the government on these loans, it cannot logically be inferred that Wells Fargo owed a duty to Plaintiff regarding the selection of Mr. Kerrigan. Therefore, Plaintiff's negligence claim fails as a matter of law because Wells Fargo did not owe a duty to Plaintiff. To address the Parties' filings following the November 15 oral argument, Plaintiff asked the Court to consider an attached July 26, 2000 Mortgagee Letter. HUD has since issued subsequent Mortgagee Letters and updated the Handbook. Handbook 4000.1 states that "HUD will hold Mortgagees and 203(k) Consultants fully accountable for the mortgage proceeds," and "Mortgagees must exercise due diligence with regard to the full scope of the 203(k) Consultant's services."¹³ The Court believes that these provisions are intended to protect HUD, and not the borrower, and no duty between the borrower and the lender exists. For the aforementioned reasons stated above, Defendant Wells Fargo's Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott

The Honorable Calvin L. Scott, Jr.

¹² *See id.* at 282-284.

¹³ U.S. DEP'T OF HOUS. AND URBAN DEV., *FHA Single Family Housing Policy Handbook*, 395 (Dec. 30, 2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf>.