

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EARL STRONG and	:	
LILLIE STRONG,	:	C.A. No. K12C-01-021 WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WELLS FARGO BANK and	:	
THOMAS D.H. BARNETT, ESQ.,	:	
	:	
Defendants.	:	

Submitted: July 13, 2012

Decided: July 20, 2012

ORDER

Upon Defendants' Motion for Summary Judgment.

Granted in part; Deferred in part.

Mr. Earl Strong and Mrs. Lillie Strong, *pro se*

Geoffrey G. Grivner, Esquire of Buchanan Ingersoll & Rooney, P.C., Wilmington, Delaware; attorney for Wells Fargo Bank, N.A.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorney for Thomas D.H. Barnett, Esquire.

WITHAM, R.J.

The issue before the Court is whether Defendants' motion for summary judgment should be granted?

INTRODUCTION

The Court heard oral arguments on July 13, 2012 and dismissed Earl and Lillie Strong's (hereinafter "Plaintiffs") claims of perjury, forgery, and malicious prosecution. At that time, the Court reserved judgment on the remainder of Plaintiffs' claims, which are fraud, misrepresentation, defamation, deceptive trade practices, and civil conspiracy. This is the decision of the Court on whether the motion for summary judgment by Wells Fargo Bank and Thomas D.H. Barnett, Esquire (hereinafter "Defendants") should be granted on the remaining claims.

PROCEDURAL HISTORY

For the sake of clarity and completeness, the Court notes a previous case, *Mortgage Electronic Registration Systems, Inc. v. Strong*,¹ which ultimately led to the case at bar. Although Plaintiffs argued otherwise in submissions to this Court, and at oral argument before this Court on July 13, 2012, everything that the Court decided in its October 19, 2011 ruling in the former case was distilled in its conclusion:

After review of the mortgage and the note, the only reference to a seal is above the signature line: "WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED." According to the precedents mentioned above, this mere recital is inadequate to form a sealed instrument. Thus, under Delaware law, the instrument can only be enforced at equity. Pursuant to Delaware Superior Court Civil Rule 12(h)(3) and 10 Del. C. § 1902, this Court hereby dismisses this case, without prejudice, to be

¹2011 WL 5316766 (Del. Super. Oct. 19, 2011).

filed within 60 days of this order in the Court of Chancery.²

On January 19, 2012, Plaintiffs filed suit against Defendants. In their complaint, Plaintiffs allege that Defendants committed fraud, forgery, misrepresentation, perjury, defamation, conspiracy, malicious prosecution, and deceptive trade practices. As noted above, the Court granted Defendants' motion as to three of these claims. On April 25, 2012, Defendant Wells Fargo Bank filed a motion for summary judgment. On May 4, 2012, Defendant Barnett joined in Defendant Wells Fargo Bank's motion, incorporating by reference all of Defendant Wells Fargo Bank's arguments.

Standard of Review

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.³ The facts must be viewed in the light most favorable to the non-moving party,⁴ and all reasonable inferences must be drawn in favor of the non-moving party.⁵ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the

²*Id.* at *2.

³Super. Ct. Civ. R. 56(c).

⁴*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

⁵*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

facts in order to clarify the application of the law to the circumstances.⁶ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁷ The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.⁸ Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.⁹ Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.¹⁰ If the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law.¹¹

DISCUSSION

As a preliminary matter, the Court must note that Plaintiffs' complaint and response to the motion for summary judgment are riddled with misspellings, run on sentences, and miscapitalizations. Nonetheless, the Court is able to comprehend

⁶*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁷*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁸*Lundeen*, 2006 WL 2559855, at *5 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

⁹*Id.* (citing *Moore* 405 A.2d at 681).

¹⁰*Id.* (citing *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

¹¹*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

Plaintiffs' filings, and they appear to otherwise conform to the minimum threshold of Superior Court Civil Rules.

Plaintiffs claim that the submission of an affidavit stating that Wells Fargo was the holder of a note on the 11 Gooseneck Lane, Smyrna, Delaware property was fraudulent. A common law fraud claim requires the following elements:

- (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance.¹²

Plaintiffs allege that Defendants represented false statements regarding ownership of a note as true before this Court and the United States Bankruptcy Court for the District of Delaware. Defendants state that Plaintiffs have failed to identify the act that was induced or which Plaintiffs refrained from doing as a result of the alleged false representation. Defendants' statement is correct. Therefore, Plaintiffs have failed to make a sufficient showing on an essential element for which they have the burden of proof. The Court grants summary judgment for Defendants on this claim.

With regard to misrepresentation, Plaintiffs do not state what type of misrepresentation they intend to claim. However, from Plaintiffs' description of

¹²*DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005).

Defendants' actions, it appears that Plaintiffs allege intentional misrepresentation.¹³ Intentional misrepresentation requires the following elements: “(1) Deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) That the defendant acted with scienter; (3) An intent to induce plaintiff's reliance upon the concealment; (4) Causation; and (5) Damages resulting from the concealment.”¹⁴ Plaintiffs' claim here fails to show any evidence of deliberate action, scienter, and intent to induce reliance upon concealment. As Plaintiffs' claim fails to present a sufficient showing on essential elements for which they have the burden of proof, Defendants' motion for summary judgment is granted on this claim.

Plaintiffs allege defamation. To establish a claim for defamation, Plaintiffs must plead as follows: “(1) the defamatory character of the communication; (2) publication; (3) that the communication refers to the plaintiff; (4) the third party's understanding of the communication's defamatory character; and (5) injury.”¹⁵ Defendants acknowledge that there was a mistake: Defendant Wells Fargo was not the holder of the note for the Gooseneck Lane Property or of a default judgment at the times that were stated. Viewing the records before this Court, however, Plaintiffs did

¹³Plaintiffs state, “Mr. Barnett alone with Wells Fargo concocted and produced this false document to file into the Bankruptcy Court” Compl. ¶5.

¹⁴*Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

¹⁵*Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479, at *1 (Del. Super. Oct. 3, 2007) (quoting *Read v. Carpenter*, 1995 WL 945544, at *2 (Del. Super. June 8, 1995)).

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owe payments on the note,¹⁶ and there was an outstanding default judgment¹⁷ but neither were in the name of Wells Fargo at the time. Therefore, the only portion of the statement to the bankruptcy court that was false is that Wells Fargo held the note and the default judgment. This Court has held, “It is the function of the court to determine: whether a communication is capable of bearing a particular meaning, and whether that meaning is defamatory. The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.”¹⁸ The false portion of the statements and records made by Defendants is not capable of a defamatory meaning. Therefore, Plaintiffs’ claim fails to present a sufficient showing on essential elements for which they have the burden of proof. Defendants’ motion for summary judgment is granted as to this claim.

Plaintiffs state that Defendants engaged in deceptive trade practices through falsely notarizing the affidavit, which stated that Defendant Wells Fargo Bank was the holder of a note on the Gooseneck Lane Property. They do not state the basis in law for this claim.¹⁹ Superior Court Civil Rule 8(f) states, “All pleadings shall be so construed as to do substantial justice.” Nevertheless, when a claim is so vague as to

¹⁶Plaintiff reaffirmed the note in bankruptcy filings from July 16, 2009.

¹⁷A default judgment was obtained by Mortgage Electronic Registration Systems, Inc.

¹⁸*Re v. Horstmann*, 1987 WL 16710, at *3 (Del. Super. Aug. 11, 1987) (citations omitted).

¹⁹Specifically, Plaintiffs do not state whether the claim arises out of the Deceptive Trade Practices Act, 6 *Del. C.* §§2531-2536, the Consumer Fraud Act 6 *Del. C.* §§2511-2527, or some other statute.

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deprive an adverse party from a clear indication of the nature of the pleader's claim, the Court will not engage in a guessing game to supply that claim on Plaintiffs' behalf. Therefore, within 10 days of this Order, Plaintiffs may file a more definite statement as to their "deceptive trade practices" claim.²⁰ Otherwise, this claim will be dismissed.

A civil conspiracy requires the following: "(i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties."²¹ Further, as implied by the elements of civil conspiracy, there must be an independent tort to support the civil conspiracy claim.²² As Plaintiff case currently stands, they have no independent tort to support this claim. Plaintiffs' claim fails to present a sufficient showing on essential elements for which they have the burden of proof. Defendants' motion for summary judgment is granted as to this claim without prejudice to Plaintiffs.

²⁰See *Twin Coach Co. v. Chance Vought Aircraft, Inc.*, 52 Del. 588, 163 A.2d 278 (Del. Super. 1960).

²¹*Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *10 (Del. Ch. Aug. 26, 2005).

²²See *Nicolet, Inc.*, 525 A.2d at 150.

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CONCLUSION

Defendants' motion for summary judgment is granted in the manner discussed above.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh