IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-9

No. COA21-213

Filed 4 January 2022

Mecklenburg County, No. 20 CVS 7460

JOSEPH FLEMING and REBECCA GARLAND, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CEDAR MANAGEMENT GROUP, LLC, Defendant.

Appeal by plaintiffs from order entered 16 December 2020 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2021.

Milberg Coleman Bryson Phillips Grossman, PLLC, by Scott C. Harris, Patrick M. Wallace, and Jeremy R. Williams, for plaintiffs-appellants.

Cranfill Sumner LLP, by Steven A. Bader and Richard T. Boyette, for defendant-appellee.

ZACHARY, Judge.

¶ 1 Plaintiffs Joseph Fleming and Rebecca Garland appeal from the trial court's order granting Defendant Cedar Management Group, LLC's motion to dismiss. After careful review, we affirm.

I. Background

¶ 2 On 28 February 2020, Plaintiffs sold their home in the Oak Run subdivision in

Charlotte, North Carolina. Prior to the sale of the home, the Oak Run homeowners' association ("HOA") sent Plaintiffs a statement certifying that Plaintiffs were current on their HOA dues and notifying Plaintiffs that a $395 certification fee (the "Fee") was "due and payable directly" to Defendant, the company that provides property-management services to the HOA and its members.

¶ 3 On 27 May 2020, Plaintiffs filed a class-action complaint against Defendant, asserting claims for (1) declaratory judgment and (2) negligent misrepresentation, as well as violations of (3) Chapter 39A of our General Statutes, which prohibits transfer fee covenants, (4) the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), and (5) the North Carolina Debt Collection Act ("NCDCA"). On 3 August 2020, Defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, along with a supporting brief. In response, Plaintiffs submitted a brief opposing Defendant's motion to dismiss.

¶ 4 On 31 August 2020, Defendant's motion to dismiss came on for hearing before the Honorable Lisa C. Bell in Mecklenburg County Superior Court. On 9 September 2020, the trial court informed the parties via email that Defendant's motion would be granted, and requested that defense counsel prepare an order to that effect. Defense counsel shared its proposed order with Plaintiffs' counsel, but the parties could not agree whether Plaintiffs' complaint should be dismissed with or without prejudice.

Accordingly, on 11 September 2020, both parties, through counsel, submitted proposed orders for the trial court's consideration. Plaintiffs submitted a proposed order dismissing their complaint without prejudice and allowing them leave to amend their complaint pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure, while Defendant submitted a proposed order dismissing Plaintiff's complaint with prejudice.

¶ 5 On 16 December 2020, the trial court adopted and entered Defendant's proposed order granting Defendant's motion to dismiss Plaintiffs' complaint with prejudice. On 11 January 2021, Plaintiffs filed timely notice of appeal.

II. Discussion

¶ 6 On appeal, Plaintiffs argue that the trial court erred by granting Defendant's motion to dismiss. Plaintiffs also argue that the trial court erred by denying their request that the dismissal be without prejudice, thus denying their request for leave to amend their complaint. We disagree.

A. Motion to Dismiss

¶ 7 Plaintiffs first argue that they sufficiently pleaded each of their five claims, and that therefore the trial court erred in granting Defendant's motion to dismiss pursuant to Rule 12(b)(6). We address each claim in turn.

1. Standard of Review

¶ 8 Our standard of review of a trial court's dismissal pursuant to Rule 12(b)(6) is

well settled:

> Upon review of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, this Court must determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief could be granted under some legal theory.

Broad St. Clinic Found. v. Weeks, 273 N.C. App. 1, 6, 848 S.E.2d 224, 228 (citation and internal quotation marks omitted), *disc. review denied*, 376 N.C. 550, 851 S.E.2d 614 (2020).

¶ 9 Dismissal pursuant to Rule 12(b)(6) "is proper (1) when the complaint on its face reveals that no law supports the plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; or (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Id.* at 5, 848 S.E.2d at 228 (citation and internal quotation marks omitted).

2. Chapter 39A Claim

¶ 10 Plaintiffs primarily argue that they sufficiently alleged their claim of violation of North Carolina's prohibition of transfer fee covenants, as set forth in Chapter 39A of our General Statutes. Plaintiffs assert that the plain language of Chapter 39A prohibits both transfer fees and transfer fee covenants, and that because they adequately alleged in their complaint that the Fee was an unreasonable transfer fee, the trial court erred by dismissing their Chapter 39A claim.

¶ 11 However, we disagree with Plaintiffs that the Fee in this case was a transfer fee. Accordingly, even under their interpretation of Chapter 39A, Plaintiffs failed to state a claim upon which relief may be granted.

¶ 12 Our General Assembly enacted Chapter 39A to reflect North Carolina's public policy, which "favors the marketability of real property and the transferability of interests in real property free from title defects, unreasonable restraints on alienation, and covenants or servitudes that do not touch and concern the property." N.C. Gen. Stat. § 39A-1(a) (2019). "A transfer fee covenant violates this public policy by impairing the marketability of title to the affected real property and constitutes an unreasonable restraint on alienation and transferability of property, regardless of the duration of the covenant or the amount of the transfer fee set forth in the covenant." *Id.* § 39A-1(b).

¶ 13 Chapter 39A defines a "transfer fee" as

> a fee or charge payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer.

Id. § 39A-2(2). Specifically excluded from Chapter 39A's definition of a "transfer fee" is "[a]ny reasonable fee charged for the preparation of statements of unpaid assessments . . . ." *Id.* § 39A-2(2)(h).

¶ 14 In their complaint, Plaintiffs acknowledged that the Fee was "a fee charged by [Defendant] for the preparation of a statement of unpaid assessments." However, they contend that the Fee was "not reasonable" because it bore "no relation to the actual cost incurred by [Defendant] for providing statements of unpaid assessments[,]" and thus, the Fee was a prohibited transfer fee. With this argument, Plaintiffs put the cart before the horse. By focusing on whether the Fee fits the exception defined in § 39A-2(2)(h) and arguing the issue of reasonableness, Plaintiffs have overlooked the threshold question of whether the Fee satisfies § 39A-2(2)'s definition of a "transfer fee."

¶ 15 Plaintiffs alleged in their complaint that the Fee was payable upon Defendant's preparation of the statement certifying that they had no unpaid assessments. Yet a fee that is payable upon the preparation of such a statement is not the equivalent of a fee that is "payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer[.]" *Id.* § 39A-2(2). Indeed, as Defendant argued to the trial court in its brief in support of dismissal, accepting Plaintiffs' interpretation of Chapter 39A "would result in any payment at closing being a transfer fee if not specifically excepted" by § 39A-2(2)(a)–(j).

¶ 16 Plaintiffs' complaint also contained the following additional allegations relevant to our disposition of this claim:

> Absent a statement of unpaid assessments showing a zero

> balance, a closing attorney will not certify to a title insurance company that the title is free and clear of any OA liens for assessments. In addition, a statement of unpaid assessments showing a zero balance is often a condition of a lender in order to disburse loan funds. Under either scenario, a real estate transaction cannot close until a statement of unpaid assessments is provided by [Defendant].

¶ 17 These allegations establish that a statement of unpaid assessments, for which the Fee here was assessed, is often a prerequisite to obtaining title insurance or financing the purchase of real estate, neither of which constitutes the transfer of an interest in real property. Thus, even construed liberally, these allegations do not establish that the Fee was "payable upon the transfer of an interest in real property or payable for the right to make or accept such transfer[.]" *Id.*

¶ 18 Plaintiffs have not alleged sufficient facts to establish that the Fee in the instant case was a "transfer fee" under § 39A-2(2). Accordingly, Plaintiffs failed to sufficiently plead a violation of Chapter 39A. This argument is overruled.

3. Remaining Claims

¶ 19 Having determined that the Fee was not a "transfer fee" under Chapter 39A, our review of the trial court's dismissal of Plaintiffs' remaining claims becomes straightforward, as each claim relies in some part on that argument.

¶ 20 First, Plaintiffs' claim that Defendant violated the UDTPA relies heavily on Chapter 39A's declaration that transfer fee covenants violate the public policy of

North Carolina. *See id.* § 39A-1(b). However, as we have determined that the Fee was not a "transfer fee" under Chapter 39A, Plaintiffs' argument is unavailing.

¶ 21 Nevertheless, public policy is not the only hook upon which Plaintiffs hang their UDTPA claim. It is well established that, under the UDTPA, a "practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers[.]" *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 91, 747 S.E.2d 220, 228 (2013) (citation omitted). Although the plaintiffs in *Bumpers* alleged that "charging closing fees roughly three times as high as the upper end of a range they f[ou]nd to be reasonable satisfie[d] the 'unfair or deceptive' requirement of a claim" under the UDTPA, our Supreme Court disagreed. *Id.* The Court declined to recognize an excessive-pricing claim where "the closing fees [that the] plaintiffs paid were higher than those charged by attorneys performing similar services at the time[.]" *Id.* at 92, 747 S.E.2d at 229.

¶ 22 In the present case, Plaintiffs maintain that Defendant violated the UDTPA by charging a fee in excess of a range of fees that Plaintiffs would "find to be reasonable[.]" *Id.* at 91, 747 S.E.2d at 228. Yet Plaintiffs pleaded this claim without, for example, alleging any facts regarding fees charged by firms "performing similar services at the time[.]" *Id.* at 92, 747 S.E.2d at 229. In their complaint, Plaintiffs merely alleged that Defendant "[u]nfairly charg[ed] fees for preparation of statements

that [bore] no relation to the actual cost of providing the statements" and "[u]nfairly charg[ed] fees for preparation of statements that exceeded the reasonable expectation of consumers[.]" Absent the public policy argument, however, these assertions amount to little more than allegations of excessive pricing with insufficient factual support that the Fee was "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers[.]" *Id.* at 91, 747 S.E.2d at 228 (citation omitted). Therefore, even when construed broadly, Plaintiffs' complaint reveals "the absence of facts sufficient to make a claim" under the UDTPA. *Broad St.*, 273 N.C. App. at 5, 848 S.E.2d at 228 (citation omitted).

¶ 23 Plaintiffs' claim under the NCDCA similarly relies upon their Chapter 39A argument, and similarly must fail.

¶ 24 In their complaint, Plaintiffs allege that Defendant violated several subsections of the NCDCA. Each assertion revolves around a common theme: Defendant's alleged violation of Chapter 39A. In addition to asserting that a "violation of N.C.G.S[.] § 39A-1 *et seq*[.] constitutes an unfair debt collection attempt under N.C.G.S.[ ]§ 75-50 *et seq*." and that "such unreasonable fees are against the public policy of North Carolina," Plaintiffs also repeatedly describe Defendant's assessment of the Fee as "action not permitted by law" or "fees for unpaid assessment statements without a legal justification." Indeed, in their reply brief to this Court, Plaintiffs confirm this claim's dependence on the success of their Chapter 39A claim.

Plaintiffs argue that "because it was unlawful for [Defendant] to charge transfer fees, it was also unlawful for [Defendant] to claim that transfer fees were owed." In that we have determined that the Fee was not a transfer fee under Chapter 39A, this claim also must fail.

¶ 25 Plaintiffs also assert in their reply brief that their claim for a declaratory judgment "is based on their claim for a violation of Chapter 39A." As such, this claim must fail as well.

¶ 26 Finally, Plaintiffs' claim for negligent misrepresentation arises from Defendant's assertion "that the 'certification fee' or other similar fee charged for the preparation of statements of unpaid assessments was lawfully owed." According to Plaintiffs, "[w]hen [Defendant] made these representations and/or caused these representations to be made, [Defendant] knew that the fees charged were unreasonable or had a reckless disregard for whether the fees were unreasonable." However, as Plaintiffs acknowledge in their reply brief, at its essence, this claim boils down to Plaintiffs' contention that Defendant misrepresented that the $395.00 Fee was lawfully owed to Defendant by Plaintiffs, when it was actually an unlawful transfer fee. For the foregoing reasons, we conclude that this claim must also fail.

¶ 27 In sum, because Plaintiffs have failed to show that the Fee was a "transfer fee" under Chapter 39A, and because the remaining claims rely in whole or in part on this argument, each of the remaining claims must fail. Accordingly, Plaintiffs have failed

to state claims upon which relief may be granted, and the trial court's dismissal of their complaint was proper.

B. Leave to Amend

¶ 28 Plaintiffs also argue that the trial court erred by denying their request for leave to amend their complaint pursuant to Rule 15 of the North Carolina Rules of Civil Procedure. We disagree.

1. Standard of Review

¶ 29 A trial court's denial of a request for leave to amend a pleading, made after the trial court announces its intention to grant the defendant's motion to dismiss, "is addressed to the discretion of the trial judge; [the] ruling is not reviewable absent a clear showing of abuse of discretion." *Stanford v. Owens*, 46 N.C. App. 388, 402, 265 S.E.2d 617, 626, *disc. review denied*, 301 N.C. 95, ___ S.E.2d ___ (1980). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 45, 626 S.E.2d 315, 324 (citation and internal quotation marks omitted), *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006).

2. Analysis

¶ 30 In the present case, following the trial court's email to the parties announcing the court's intention to grant Defendant's motion to dismiss and requesting that defense counsel draft an order to that effect, the parties were unable to agree whether

the dismissal should be with or without prejudice. Each party submitted a proposed order to the trial court, with Plaintiffs' proposed order dismissing their complaint without prejudice and allowing them leave to amend their complaint. When Plaintiffs submitted their proposed order to the trial court via email, they cited Rule 15(a) of the North Carolina Rules of Civil Procedure, which states, in pertinent part, that "[a] party may amend [the party's] pleading once as a matter of course at any time before a responsive pleading is served . . . ." N.C. Gen. Stat. § 1A-1, Rule 15(a).

¶ 31 On appeal, Plaintiffs argue that the trial court erred by denying their request to amend their complaint because Defendant had filed a Rule 12(b)(6) motion to dismiss, but had not yet filed a responsive pleading. As Plaintiffs note, "a Rule 12(b)(6) motion to dismiss is not a responsive pleading and thus does not itself terminate [a] plaintiff's unconditional right to amend a complaint under Rule 15(a)." *Hardin v. York Mem'l Park*, 221 N.C. App. 317, 320, 730 S.E.2d 768, 773 (2012) (citation omitted), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 376 (2013).

¶ 32 However, in this case, the court denied Plaintiffs' motion to amend *after* granting Defendant's motion to dismiss. Moreover, "a motion to amend a pleading is addressed to the discretion of the trial judge; [the] ruling is not reviewable absent a clear showing of abuse of discretion." *Stanford*, 46 N.C. App. at 402, 265 S.E.2d at 626. Here, we cannot conclude that the trial court's denial of Plaintiffs' request to amend was "so arbitrary that it could not have been the result of a reasoned decision."

Bob Timberlake Collection, 176 N.C. App. at 45, 626 S.E.2d at 324 (citation omitted). Plaintiffs' argument is overruled.

III. Conclusion

¶ 33 Plaintiffs did not allege facts sufficient to support a claim for which relief may be granted, and thus, the trial court did not err in granting Defendant's motion to dismiss. Nor did the trial court err in denying Plaintiffs' request for leave to amend their complaint after granting Defendant's motion to dismiss. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

Report per Rule 30(e).