IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 6, 2019
Lyle W. Cayce
Clerk

No. 18-20539

THE ESTATE OF BONELL RASHTI,

Plaintiff - Appellant

v.

BANK OF AMERICA NATIONAL ASSOCIATION; SPECIALIZED LOAN SERVICING, L.L.C.; BANK OF NEW YORK MELLON, As Trustee for the Certificateholders of the CWABS, Incorporated Asset-Backed Certificates Series 2007-9, formerly known as The Bank of New York,

Defendants - Appellees

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-1101

Before CLEMENT, HAYNES, and WILLETT, Circuit Judges.

PER CURIAM:*

The Estate of Bonell Rashti (the "Estate") faces a Catch-22. It needs insurance proceeds to repair flood damage to a house. But the security instrument granting a mortgage over the house says that it cannot have the proceeds until the repairs are complete. While we sympathize with the Estate's

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

predicament, it has not alleged any valid theory of recovery against Bank of America, N.A., Bank of New York Mellon, and Specialized Loan Servicing, L.L.C. (collectively, "Lenders"). We therefore affirm the district court's dismissal of the Estate's claims against them.

I.

In 2007, Edward Rashti borrowed $260,000 from Countrywide Home Loans, Inc. To secure this loan, Edward and his wife Bonell executed a Texas Home Equity Security Instrument ("Security Instrument") granting Mortgage Electronic Registration Systems, Inc. ("Mortgage Electronic") a mortgage over their Houston home. The Security Instrument required Edward and Bonell to purchase flood insurance on the home, and if they failed to do so, then Mortgage Electronic could purchase the coverage at their expense. In either case and in the event of a flood, Mortgage Electronic had the right to hold the insurance proceeds until repairs were completed. In 2016, two relevant transfers related to the Security Instrument occurred: Mortgage Electronic assigned its interest in the Security Instrument to Bank of New York Mellon. And Bank of America—which until that time had serviced the loan—transferred that responsibility to Specialized Loan Servicing.

Edward died in 2013; Bonell died in 2015. Shortly after Bonell's death, a flood washed through Houston and damaged the home, which by that point had passed into the Estate. And then in 2016, a second flood followed. Claims were submitted to the insurance companies. Money was paid out. The Lenders held and are continuing to hold these insurance proceeds in escrow, as repairs have yet to be completed.

In 2017, the Estate[1] sued the Lenders in Texas state court, attempting to pry the insurance proceeds from them.[2] The case was removed to the Northern District of Texas and then transferred to the Southern District of Texas.

On June 19, 2019, the district court held a pretrial conference. At that time, the Lenders had motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) pending. The district court hinted that it would likely grant the motions but then took them under advisement. The next day, the district court issued an order entitled "Dismissal Order." It stated that "[the Estate] must amend its complaint in 12 or fewer pages" and that the Lenders "will be dismissed." On June 26, the Estate filed a second amended complaint. Then, on July 5, the district court entered another order—this time entitled "Order Dismissing Parties," which stated that the Lenders "are dismissed." The district court followed up this order with an opinion. It issued a final judgment on October 19.

The Estate appeals the dismissal of four of its claims against the Lenders: breach of contract, breach of the implied duty to cooperate, gross negligent misrepresentation, and promissory estoppel.

---

[1] The Estate is the only named plaintiff to the suit. Under Texas law, estates are not legal entities of themselves and therefore cannot sue or be sued. *See Price v. Anderson's Estate*, 522 S.W.2d 690, 691 (Tex. 1975); *see also In re Fairfield Fin. Group, Inc.*, 29 S.W.3d 911, 914 (Tex. App.—Beaumont 2000, no pet.). But the Lenders have not raised the issue below or in briefing to our court. We thus need not address it because it is not a jurisdictional issue. *See Rodgers v. Lancaster Police & Fire Dept.*, 819 F.3d 205, 212 n.18 (5th Cir. 2016); *see also Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848–49 (Tex. 2005) (concluding the issue is not a standing issue under the Texas constitution).

[2] The Estate also named the insurance companies that paid out the insurance proceeds as defendants. The Estate and the insurance companies reached a settlement, however, and the Estate does not appeal the voluntary dismissal of its claims against them.

II.

We review de novo a dismissal under Rule 12(b)(6). *Sullivan v. Leor Energy, L.L.C.*, 600 F.3d 542, 546 (5th Cir. 2010). The question to answer is whether the complaint states enough facts, accepted as true, "to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, we normally do not venture outside of the factual world created by the complaint. But there is an exception: We "may also consider documents attached to either a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims." *Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 (5th Cir. 2014).

III.

A.

We must clear up a preliminary point before reaching the merits. The Lenders argue that the operative complaint is the first amended complaint; the Estate contends that the second amended complaint is the operative one. Generally, the filing of an amended complaint renders the previous complaint of no legal effect. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994).

In its July 20 order, the district court gave the Estate permission to file an amended complaint. It did not dismiss the Lenders—stating instead that they "will" be dismissed in the future. But before the district court got around to actually dismissing them, the Estate filed its second amended complaint—rendering the first amended complaint inoperative. We therefore will review whether the second amended complaint states plausible claims.

B.

The Estate first appeals the dismissal of its breach-of-contract and breach-of-the-implied-duty-to-cooperate claims.

"Under Texas law, a plaintiff alleging a breach of contract must show '(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach.'" *Villarreal v. Wells Fargo Bank, N.A.*, 814 F.3d 763, 767 (5th Cir. 2016) (quoting *Wright v. Christian & Smith*, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no writ)). The Estate's complaint states that the Lenders breached the Security Instrument by choosing "to represent that the insurance proceeds would be distributed for repairs to the [house] once certain conditions were met." This, the Estate claims, shows that the Lenders became "*de facto*" insurers and that they breached the contract.

These conclusory facts do not establish a breach-of-contract claim. What are the actual conditions the Lenders allegedly placed on the release of the insurance proceeds? Did the Estate meet those conditions? What provisions of the Security Instrument did the unnamed conditions violate? Without answers to these key questions, the Estate's claim does not get off the ground. What's more, the Security Instrument makes clear that at least one condition is permissible: Paragraph 5 allows the Lenders to hold the insurance proceeds until they "had an opportunity to inspect [the home] to ensure the [repairs have] been completed to [the Lenders'] satisfaction." Nowhere in the complaint does the Estate allege that it repaired the home. Nor could it. The Estate admitted at the motion-to-dismiss hearing that the home has yet to be repaired. Thus, on the facts alleged, the Lenders are currently entitled under the Security Instrument to keep the insurance proceeds. The breach-of-contract claim fails.

The Estate also argues that the Lenders breached the implied duty to cooperate by refusing to release the insurance proceeds. The Estate suggests a very broad interpretation of the implied duty to cooperate. We need not decide the parameters of such a duty because even assuming arguendo it exists in this situation, such a contractual theory fails for the same reason: The Lenders have a right under the Security Instrument to keep the money until repairs are made. If anything, the Estate failed to cooperate by not repairing the home.

C.

The Estate's gross-negligent-misrepresentation claim can be disposed of just as readily.

To begin with, it is unclear if Texas even recognizes a claim for gross negligent misrepresentation. It is also unclear that the tort of negligent misrepresentation has application to these circumstances. But even assuming arguendo that it does, the Estate has not alleged enough facts to sustain a simple-negligent-misrepresentation claim, the elements of which are: "(1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business, (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation." *Mahmoud v. De Moss Owners Ass'n*, 865 F.3d 322, 329 (5th Cir. 2017) (quoting *Fed. Land Bank Ass'n v. Sloane*, 825 S.W.2d 439, 42 (Tex. 1991)). The Estate's negligent-misrepresentation claim is based on two separate theories.

The first is hard to follow, but it essentially seems to be a claim about misrepresentations regarding the home's ownership. This claim begins with some odd phone calls allegedly received by the Lenders from Edward and Bonell after they had died. The complaint alleges that the Lenders "should have known that they could not be receiving phone calls from Edward and Bonell after they died from a phone number different from the last correct phone number listed on the account." These ghost calls allegedly caused the

Lenders to believe that the Estate was not the owner of the home. And because of this belief, the Lenders supposedly stalled in administering the insurance proceeds. And because they stalled, the repairs were never made.

These facts (while strange) do not add up to a negligent-misrepresentation claim because there is no allegation that the Estate relied on the Lender's misstatements concerning the home's ownership. Quite the contrary, the complaint makes clear that the Estate never accepted the Lender's determination and actively fought to correct it. Without an injury caused by justifiable reliance, there can be no negligent-misrepresentation claim. *See Smith v. JPMorgan Chase Bank, N.A.*, 519 F. App'x 861, 864 (5th Cir. 2013) (rejecting a negligent-misrepresentation claim because the plaintiffs "cannot show that they suffered any pecuniary loss by relying on the statement").

The second theory is just a repetition of the Estate's breach-of-contract claim. It argues that it was a misrepresentation for the Lenders to say that they would release the money when certain conditions were met but then not distribute it. Again, without any description of the conditions or how the Estate relied on them, this theory must also fail.

D.

Finally, the Estate appeals the dismissal of the promissory-estoppel claim.

"Under the doctrine of promissory estoppel, if justice requires, a person may be bound by a promise that he reasonably believed would induce action or inaction and that did induce the action or forbearance." *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 256 (5th Cir. 2013) (citing *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex. 1972)). But if the alleged promise is covered by a valid contract, "the plaintiff cannot recover for the promise under promissory estoppel." *Gil Ramirez Grp., L.L.C. v. Hous.*

Indep. Sch. Dist., 786 F.3d 400, 414 (5th Cir. 2015) (quoting *Fertic v. Spencer*, 247 S.W.3d 242, 250 (Tex. 2007)).

The Estate's argument on this claim will sound familiar: It claims that it detrimentally relied on the promise that "funds would be distributed for repairs if certain conditions were met." This claim fails for the same factual deficiencies described in the previous sections, but it also fails because the conditions necessary for the release of the insurance proceeds are the subject of Paragraph 5 of the Security Instrument. The Lenders alleged statements therefore cannot form the basis of a promissory-estoppel claim.

* * *

None of the Estate's appealed claims are plausible. We AFFIRM the judgment of the district court.