IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 8, 2020

Lyle W. Cayce
Clerk

No. 19-40889
Summary Calendar

PAMELA ZIOLKOWSKI MARGOLIS,

Plaintiff - Appellant

v.

JAMES B. NUTTER & COMPANY; BENJAMIN S. CARSON, SR., SECRETARY, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:18-CV-162

Before WIENER, HAYNES, and COSTA, Circuit Judges.

PER CURIAM:*

Appellant Pamela Ziolkowski Margolis appeals the dismissal of her claims against James B. Nutter & Company ("JBNC"). For the following reasons, we AFFIRM.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

A. Background

In 2008, Margolis, her mother, and her husband acquired property together. They sought a home equity conversion mortgage ("HECM"), also known as a reverse mortgage, through which homeowners who are sixty-two or older borrow against their accumulated home equity and receive cash payments secured by a lien against their home while protecting their ability to live in the home. *See generally* 12 U.S.C. § 1715z-20. Margolis, not yet sixty-two, assigned her property interest to her mother and husband, who obtained an HECM.

After Margolis's mother and husband passed away, Margolis became the property's sole owner. In 2016, JBNC, which held the promissory note secured by the property,[1] notified Margolis that the promissory note had become due and payable upon her husband's death. Through counsel, Margolis demanded that JBNC seek to assign the HECM to the U.S. Department of Housing and Urban Development ("HUD") pursuant to the Mortgagee Optional Election ("MOE") Program.[2] In response, JBNC reviewed Margolis's file, sought additional documentation, and notified Margolis that it would "submit her documentation to HUD for final review and approval" and that "[i]f HUD approve[d] the application, Mrs. Margolis [would] be able to continue to occupy the property."

Meanwhile, in May 2017, Margolis received notice of JBNC's intent to foreclose on the property. In August 2017, JBNC communicated to Margolis

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[1] Griffin Financial Mortgage originally held the interest but transferred it to JBNC.

[2] The MOE Program gives lenders the option to assign to HUD eligible HECMs that were obtained before August 4, 2014—like Margolis's—but does not "interfere[] with any right of the mortgagee to enforce its private contractual rights under the terms of the HECM." U.S. DEP'T OF HOUSING AND URB. DEV., Mortgagee Letter 2015-15, at 7 (June 12, 2015).

that the application had been denied because Margolis's "[p]roperty tax statement indicate[d] delinquent taxes" but that once JBNC received relevant documentation, it would resubmit the MOE program application. Margolis paid the property taxes and provided additional documentation to JBNC so that it could resubmit her application to HUD.

Margolis filed suit against JBNC and later added Ben Carson, the Secretary of HUD, as a defendant. Margolis alleged several causes of action; relevant here, she alleged negligence, negligent misrepresentation, and promissory estoppel. JBNC filed a motion to dismiss for failure to state a claim, which the district court granted after wholly adopting the magistrate judge's recommendation. Margolis's claims against Carson were later dismissed for lack of subject-matter jurisdiction. Margolis now appeals the dismissal of her claims against JBNC only.

B. Discussion

We review the district court's dismissal for failure to state a claim de novo. *Haase v. Countrywide Home Loans, Inc.,* 748 F.3d 624, 630 (5th Cir. 2014). Under Rule 12(b)(6), the plaintiff's complaint must contain sufficient factual allegations to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Margolis attached a number of documents, including letters from JBNC, to her complaint, so we can consider them in evaluating whether the motion to dismiss was properly granted. *See United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 379 (5th Cir. 2003). For the following reasons, we affirm the district court's dismissal of Margolis's claims.

First, Margolis contends that the district court erred in interpreting HUD regulations because it assumed that HUD had discretion to deny an eligible loan. She argues that HUD has no such discretion and that, since HUD

was required to accept an eligible loan, it should be presumed that JBNC failed to timely submit the correct paperwork to HUD. However, as demonstrated by the attachments to the complaint, Margolis's argument fails. "HUD regulations govern the relationship between the reverse-mortgage lender and HUD as insurer of the loan" and "do not give the borrower a private cause of action unless the regulations are expressly incorporated into the lender-borrower agreement." *Johnson v. World All. Finan. Corp.*, 830 F.3d 192, 196 (5th Cir. 2016). The regulations were not expressly incorporated here and thus, as a matter of law, Margolis does not have a private cause of action.

Second, Margolis asserts that, relevant to her negligence claim, the district court erred in determining that JBNC did not owe a duty to Margolis because she was not actually a borrower on the loan but instead a non-borrowing spouse. According to Margolis, JBNC had a duty in tort, independent from the contract, to avoid foreseeable injury to Margolis. However, she fails to cite any supporting authority for this overbroad assertion. She also fails to cite any legal authority for her claim of damages—that she paid ad valorem taxes she owed but otherwise wouldn't have paid.[3] Her negligence claim was properly dismissed.[4]

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[3] Although she stated that she was not the borrower, she also claims to be the property owner which makes the taxes her obligation. *See A. J. Robbins & Co. v. Roberts*, 610 S.W.2d 854, 855 (Tex. App.–Amarillo 1980, writ ref'd N.R.E.) (noting that "[t]he obligation for ad valorem taxes on real estate is by statute imposed on the owner of the realty.").

[4] Additionally, under Texas law, "[t]he nature of the injury most often determines" whether the action is one in contract or tort, and "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). Thus, her negligence claim fails. We note that Texas courts have allowed tort recovery for negligent misrepresentation in limited situations, but we conclude none of them apply here. *See LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 245 (Tex. 2014). In any event, as we discuss more fully, there are other problems with her negligent misrepresentation claim.

Third, Margolis argues that the district court erred in determining that she failed to plausibly allege that JBNC's statements were false and therefore did not sufficiently allege a claim for negligent misrepresentation. The elements of negligent misrepresentation 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.

Fed. Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). In addition to issues with the fourth element, Margolis cannot prevail on the second element. She contends that JBNC negligently misrepresented that her HEMC was eligible for the MOE program and would be assigned to the program if she paid her property taxes. Reviewing the relevant documentation attached to the complaint, it shows that JBNC never guaranteed that HUD would accept her application after it was submitted. JBNC said only that it would resubmit her application, and JBNC had made clear that Margolis's application was subject to HUD's "final review and approval." There was no falsity in that statement.

Fourth and finally, Margolis argues that the district court erred in determining that she had not alleged a plausible promissory estoppel claim. "Under Texas law, the requisites of promissory estoppel are: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." *MetroplexCore, L.L.C. v. Parsons Transp., Inc.*, 743 F.3d 964, 977 (5th Cir. 2014) (per curiam) (cleaned up). Margolis asserts that she relied on JBNC's assertion that if she paid her property taxes, her MOE application would be approved. But, as discussed

above, JBNC never promised that HUD would accept Margolis's application; JBNC stated only that it would resubmit it. Because JBNC did not promise that the application would be accepted, Margolis cannot have reasonably relied on such a promise.

AFFIRMED.