IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
June 20, 2023 Session

CLARENCE MITCHELL, ET AL. v. RUSHMORE LOAN MANAGEMENT SERVICES, LLC, ET AL.

Appeal from the Chancery Court for Shelby County
No. CH-17-1758-1 Gadson W. Perry, Chancellor

No. W2022-00621-COA-R3-CV

Plaintiffs brought suit alleging breach of contract and the covenant of good faith and fair dealing against the mortgage servicer of their loan. The mortgage servicer sought summary judgment on two grounds: (1) an absence of privity and (2) its actions did not violate any provision of the contract. The Plaintiffs conceded that the mortgage servicer's actions did not violate any specific term of the contract and indicated their suit exclusively relied on a claim predicated upon breach of the covenant of good faith and fair dealing. The trial court granted summary judgment in favor of the mortgage servicer. The trial court acknowledged but declined to rule upon the mortgage servicer's privity argument and instead granted summary judgment based on its conclusion that a breach of the covenant of good faith and fair dealing cannot occur in the absence of a breach of a specific term of the contract. The Plaintiffs appealed. We affirm the trial court's grant of summary judgment on the ground that there is no privity of contract between the Plaintiffs and the mortgage servicer.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

JEFFREY USMAN, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and KENNY W. ARMSTRONG, JJ., joined.

Webb A. Brewer, Memphis, Tennessee, for the appellants, Clarence Mitchell and Leslie Mitchell.

Bret J. Chaness and Patricia Whitehead, Peachtree Corners, Georgia, for the appellee, Select Portfolio Services, Inc.

OPINION

In June 2005, Clarence and Leslie Mitchell (the Mitchells) borrowed money to purchase a $639,000 home in Collierville, Tennessee; they stopped making payments thereupon in 2014. The loans had been made by Union Planters Bank N.A. d/b/a Regions Mortgage (Regions Mortgage) with one loan for $500,000 and the other for $75,100. The home had two Deeds of Trust.

In 2011, the Mitchells executed a Loan Modification Agreement with Regions Mortgage to lower their interest rate and monthly payments, and the Mitchells executed a new Deed of Trust in conjunction with the mortgage. In 2014, Regions Mortgage assigned the Deed of Trust to the mortgage to TOWD Point Master Funding Trust 2014 with U.S. Bank Trust National Association TR 2014 (U.S. Bank) assigned as trustee. When it became trustee, U.S. Bank selected Select Portfolio Services, Inc. (SPS) as the servicer of the mortgage.

SPS acted as mortgage servicer on the Mitchells' mortgage from May 2014 until October 1, 2017. In this role, SPS was charged with collecting, applying, and accounting payments, as well as communicating with the Mitchells regarding all aspects of the mortgage. SPS was never named as trustee for the Deed of Trust. SPS solely acted as the servicer.

The Mitchells fell behind on their mortgage payments beginning in the summer of 2014. The Mitchells' last payment was on October 17, 2014, which brought the mortgage current through August 2014. There were no payments made on the mortgage after October 2014.

In October 2014, SPS sent the Mitchells a "Notice of Default – Right to Cure." The Mitchells contacted SPS to discuss a loan modification in February 2015. During this call, an SPS representative told the Mitchells that, as of February 2015, the Mitchells owed $17,025.82, the reinstatement amount, to bring the mortgage current. SPS informed the Mitchells that it could not accept a payment unless the payment was for the full reinstatement amount or the Mitchells were approved for a loss mitigation plan and the payment was made pursuant to the approved plan. SPS also instructed the Mitchells on how to apply for a loss mitigation plan.

The Mitchells submitted their first loss mitigation application in October 2015, more than a year after their last payment. SPS reviewed the application and denied the Mitchells for all modifications by letter in November 2015. The denial letter stated, in part, "[a]fter a careful review of your assistance review application, we find that there are no loss mitigation options for which you are approved." The letter also informed the Mitchells that they could appeal the decision if they wanted.

The Mitchells submitted additional loss mitigation applications in January 2016 (the

second application), August 2016 (the third application), February 2017 (the fourth application), and August 2017 (the fifth application). In response to the second and third applications, SPS sent denial letters stating, in part, "[a]fter a careful review of your assistance review application, we find that there are no loss mitigation options for which you are approved." In response to the fourth loss mitigation application, the letter offered a repayment plan stating, "[t]he approved option must be accepted by April 2, 2017, or we will consider the offer rejected." The Mitchells did not accept the repayment plan by April 2, 2017. On April 5, counsel for the Mitchells contacted SPS stating that the repayment plan was not meaningful because it required the full arrearage to be paid over the course of a year. SPS sent a second repayment offer with the same terms stating, "[t]he approved option must be accepted by June 5, 2017, or we will consider the offer rejected." The Mitchells did not accept the terms of either repayment plan.

After the Mitchells rejected the repayment plans offered after the fourth application, SPS began foreclosure proceedings. A foreclosure sale was set for mid-August 2017. The foreclosure sale was postponed when the Mitchells informed SPS they would be submitting a fifth loss mitigation application. The Mitchells submitted their fifth application on August 24, 2017. SPS reviewed the application and denied the Mitchells for all modifications by letter dated September 1, 2017.[1] As with the other letters, the denial letter for the fifth application also stated, in part, "[a]fter a careful review of your assistance review application, we find that there are no loss mitigation options for which you are approved."

On September 17, 2017, SPS sent the Mitchells notice that Rushmore Loan Servicing (Rushmore) would be taking over the servicing of their mortgage. Rushmore began servicing the Mitchells' mortgage on October 1, 2017. After Rushmore took over servicing, it restarted foreclosure proceedings.

The Mitchells filed suit in December 2017, seeking to enjoin the foreclosure sale. Their complaint states causes of action for breach of contract and breach of the implied duty of good faith and fair dealing against Rushmore and SPS. The Mitchells also named U.S. Bank and Rubin Lublin, PLLC, in their complaint. The complaint noted that SPS is a loan servicer and that U.S. Bank is the trustee for TOWD Point Master Funding Trust 2014, recognizing a transfer of their loan had occurred from Union Planters Bank N.A. d/b/a Regions Mortgage. Though listed as defendants in the complaint, the Mitchells did not actually state any causes of action against U.S. Bank or Rubin Lublin, PLLC.

In response to a motion to dismiss, the trial court dismissed Rubin Lublin, PLLC based upon the fact that there were no allegations made in the complaint against it. Following U.S. Bank's motion to dismiss, the trial court gave the Mitchells an opportunity

[1] The Mitchells deny receiving the September 1, 2017 letter, but do not dispute that SPS sent the letter.

to amend their complaint to include allegations against U.S. Bank, but the Mitchells never filed an amended complaint to include claims against U.S. Bank. Rushmore, SPS, and U.S. Bank, subsequently, filed motions for summary judgment. The trial court granted summary judgment to U.S. Bank but initially denied summary judgment for Rushmore and SPS.

After unsuccessfully seeking an interlocutory appeal, Rushmore and SPS filed renewed motions for summary judgment. The Mitchells did not contest Rushmore's motion for summary judgment, which the trial court granted. In seeking summary judgment, SPS argued that it should be granted for two reasons. One, SPS argued it was not in privity with the Mitchells; accordingly, the Mitchells could not maintain claims against SPS for breach of contract. Two, SPS asserted that it had not violated any terms of the contract.

The trial court granted SPS summary judgment. In its order, the trial court stated the following:

> In the Motion, SPS argued that it cannot be liable for breach of contract because it has never been in privity with the Plaintiffs. "Privity of Contract is an essential element to an action founded on the breach of contract." *O'Connel v. Seterus, Inc*, No 13-cv-2916-dkv, 2015 WL 11117943, at *1 (W.D. Tenn. March 27, 2015) (quoting *Tipton v. Sparta Water Co.*, 57 S W.2d 793, 795 (Tenn. 1933)). SPS relied upon *O'Connel* for the proposition that a loan servicer, "having never been a party nor signatory to the Deed of Trust, was never in privity of Contract." *Id.* The Court acknowledges this argument but declines to grant the Motion on this basis.
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> However, this was not SPS's only argument in the Motion, and SPS further argued that even i[f] there was privity, the Plaintiffs have failed to present any evidence showing a breach of any term of a contract[.] The Court finds this argument to be persuasive. Plaintiffs claim SPS breached the contract by refusing to accept payments from the Plaintiffs while a loan modification review was pending. *See* Compl., ¶ 53, 55-56. However, SPS provided evidence showing that after default of the Loan in October 2014, SPS informed Plaintiffs that they would only accept a payment if it was the full reinstatement amount, as allowed by Section 1 of the Deed of Trust. At no time have the Plaintiffs provided the full reinstatement amount to SPS to cure the default and the last payment was received by SPS on October 17,2014.
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> Moreover, at the hearing, Plaintiffs' counsel admitted that there was not a breach of any specific contract term and that the Plaintiffs were focusing only claiming a breach of the covenant of good faith and fair dealing. However, as the Court noted earlier, there is no breach of the covenant of good faith and fair dealing without a breach of a specific contract term. *See* [*Cadence*

> *Bank, N.A. v. The Alpha Tr.*, 473 S.W.3d 756, 773 (Tenn. Ct. App. 2015)]. Since it has been established that there was no breach of contract, there is no breach of the implied covenant of good faith and fair dealing, and the Motion must be granted.

The Mitchells appealed the trial court's decision to grant summary judgment as to SPS. On appeal, the Mitchells assert that the trial court erred in determining that there must be a breach of a specific contract term in order to maintain a claim for breach of the implied duty of good faith and fair dealing. In response, SPS defends the trial court's decision on this issue. SPS also argues the trial court did not need to reach this question. It asserts that summary judgment more appropriately should have been granted based upon the lack of privity of contract between the parties, thereby preventing the Mitchells from maintaining an action predicated upon breach of contract against SPS. In making this argument SPS goes so far as to describe the trial court's ruling as "the right result for the wrong reason." In their reply brief, the Mitchells concede that if this court concludes that SPS's privity argument is correct that this court may affirm the trial court's grant of summary judgment on that basis despite the trial court's failure to rule on this asserted ground for summary judgment. The Mitchells argue, however, that privity should not be a basis for granting summary judgment to SPS. They contend that there is no Tennessee case that applies the privity requirement to a loan servicer. They also contend that, as a matter of policy, requiring privity would be harmful in the context of a mortgage industry in which mortgages are regularly transferred, rather than being maintained by the original lender, and where the borrower often interacts not with the lender but instead with mortgage servicers.

I.

Turning first to our standard of review, this court "review[s] a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, we must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *See id.* We must "view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *Rye*, 477 S.W.3d at 251.

II.

SPS argues that the trial court need not have considered whether a good faith and fair dealings breach of contract claim requires violation of a specific contract provision as

there was no privity between the parties. The Mitchells argue that in accordance with the demands of public policy that privity between a borrower and their mortgage servicer is unnecessary for maintaining a contract claim directly against the mortgage servicer. In their reply brief, the Mitchells state,

> in securitized trust transactions it is not the "lender[,"] but the assignee of the lender, with whom most mortgagors have never had any contact. The borrower may not even know or understand who the assignee is, as all their interactions are likely with the servicer.
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> The frequent transfers of ownership and servicing of mortgages on the secondary market, the high incidence of securitization of mortgage loans into trusts containing very large numbers of individual loans; and the splitting of servicing from the lender's assignee to third-party servicing companies have brought great change in the mortgage lending industry.[2]

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[2] The United States Department of Housing and Urban Development defines the secondary mortgage market as

> a network of mortgage originators who lend money to homebuyers and investors who buy mortgage loans. Primary mortgage lenders make loans to property buyers and underwrite and service the loans, which can be held in lenders' own portfolios or sold to investors. By selling the loans they originate, lenders obtain funds that they can use to make new mortgages. Investors who buy mortgage loans after they have been closed by primary mortgage lenders usually consider the loans as investments, and usually pay the lender a fee to continue servicing the loans.
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> Private secondary market entities increase the availability of financing for residential mortgage loans; they provide credit for innovative as well as traditional types of mortgages, and they serve homebuyers through their purchases of loans above the statutory limits of Freddie Mac and Fannie May.

U.S. Dep.'t of Housing and Urban Development, *The Secondary Market in Residential Mortgages*, 4, 8 (March 27, 2012) available at https://www.huduser.gov/Publications/pdf/HUD-11648.pdf. The first secondary market transaction occurred in 1949, but the secondary mortgage market was created by Congress in 1938 with the formation of Fannie Mae. *Id*. at 12. Congress created the secondary mortgage market to "solve regional differences in the cost and availability of mortgage credit." *Id*. at 4. When mortgages are sold on the secondary market, federal law requires specific information to be disclosed to the mortgagor when a mortgage is sold. *See* 15 U.S.C.A. § 1641(g)(1). This information is required to be disclosed within 30 days after a mortgage is transferred and must include the identity and contact information of the new creditor. *Id*.

It is now commonplace for mortgages to be sold on the secondary market. In 2013, the Bipartisan Policy Center estimated that at least 59% of mortgages were sold on the secondary market. The Bipartisan Policy Center, *The Role of the Secondary Market in Mortgage Financing*, 2 (Dec. 6, 2013) https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/SecondaryMarket-final.pdf.

Turning to Tennessee contract law, as noted by the Tennessee Supreme Court, "there is implied in every contract a duty of good faith and fair dealing in its performance and enforcement." *Wallace v. Nat'l Bank of Com.*, 938 S.W.2d 684, 686 (Tenn. 1996) (quoting *TSC Industries, Inc. v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. Ct. App. 1987)). Though "every contract contains an implied covenant of good faith and fair dealing, . . . there must be a contract to contain the covenant." *Jones v. LeMoyne-Owen Coll.*, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citation omitted). An assertion of a "claim based on the implied covenant of good faith and fair dealing is not a stand alone claim; rather, it is part of an overall breach of contract claim." *Cadence Bank, N.A. v. The Alpha Tr.*, 473 S.W.3d 756, 773 (Tenn. Ct. App. 2015) (quoting *Jones*, 308 S.W.3d at 907). In a breach of contract action, "claimants must prove the existence of a valid and enforceable contract, a deficiency in the performance amounting to a breach, and damages caused by the breach." *Fed. Ins. Co. v. Winters*, 354 S.W.3d 287, 291 (Tenn. 2011). "A breach of contract claim cannot be asserted against a non-contracting party who has no obligation to perform." *Le-Jo Enters., Inc. v. Cracker Barrel Old Country Store, Inc.*, No. M2013-01014-COA-R3-CV, 2013 WL 6155622, at *5 (Tenn. Ct. App. Nov. 20, 2013). "Privity of contract has indeed been described as an essential element in breach of contract actions." *Bynum v. Sampson*, 605 S.W.3d 173, 182 (Tenn. Ct. App. 2020) (citing *Tipton v. Sparta Water Co.*, 57 S.W.2d 793, 795 (1933)). Privity of contract has been defined as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." Black's Law Dictionary (11th ed. 2019).

Though the Mitchells contend that no Tennessee state appellate court has addressed the question of whether a mortgage servicer can be held liable for breach of contract in the absence of privity, multiple courts in various jurisdictions have considered precisely this question. "Courts have consistently held that there is no contractual privity between a borrower and a loan servicer with respect to a note and mortgage, and, therefore, the borrower cannot prevail against the servicer on a breach of contract claim." *In re Jackson*, 622 B.R. 321, 331 (Bankr. D. Mass. 2020); *see e.g.*, *Galope v. Deutsche Bank Nat'l Tr. Co.*, 666 F. App'x 671, 674 (9th Cir. 2016) (stating "there is no contractual relationship between a mortgagor and a loan servicer. . . . Therefore, there was no contractual relationship between the two parties, and summary judgment was appropriate."); *Mazzei v. Money Store*, 308 F.R.D. 92, 109 (S.D.N.Y. 2015) ("A significant majority of courts have concluded that loan servicers are not in privity of contract with mortgagors where the servicers did not sign a contract with the mortgagors or expressly assume liability."); *Edwards v. Ocwen Loan Servicing, LLC*, 24 F. Supp. 3d 21, 28 (D.D.C. 2014) ("Judges around the country . . . have held that a loan servicer, as a lender's agent, has no contractual relationship or privity with the borrower and therefore cannot be sued for breach of contract."); *see also*, *e.g.*, *Chirchir v. Citizens Bank, N.A.*, No. CV 3:20-0416, 2022 WL 407091, at *6 (S.D.W. Va. Feb. 9, 2022) ("[W]here a loan servicer is not named in the Deed of Trust and there are no facts showing contractual privity between the servicer and the plaintiff, the servicer cannot be liable for a breach of contract. Nor can the servicer be

held liable under an agency theory because 'under West Virginia law, [even] an agent . . . contracting for and on behalf of a principal known or disclosed to the person with whom the contract is made, is not personally bound by it, nor liable for breach, thereof, unless the credit extended to him or he has expressly bound himself by the contract in some form.'" (citation omitted)); *Beltran v. Select Portfolio Servicing Inc.*, No. CV-21-00864-PHX-SMB, 2021 WL 5634313, at *1 (D. Ariz. Dec. 1, 2021) ("Plaintiff offers no authority for the proposition that the loan servicer can be held responsible for the contract between a borrower and lender. . . . Mere loan servicers are not often found to be in privity with borrowers."); *Brown v. Loancare, LLC*, No. 3:20-CV-00280-FDW-DSC, 2020 WL 7389407, at *6 (W.D.N.C. Dec. 16, 2020) ("An allegation that a defendant services or subservices a mortgage loan agreement is not, without more, sufficient to bind the servicer to the terms of the agreement."); *Englert v. Nationstar Mortg., Inc.*, No. 1:15-CV-303-GBL-MSN, 2015 WL 9275662, at *4 (E.D. Va. Dec. 18, 2015) ("As the loan servicer, Nationstar acts on behalf of BONY to collect payments on the loan; but lacking evidence of a contract creating legal obligations between Plaintiff and Nationstar, Nationstar is not in contractual privity with Plaintiff and therefore cannot be liable for breach of contract."); *Perron v. JP Morgan Chase Bank, N.A.*, No. 1:12-CV-01853-TWP-TAB, 2014 WL 931897, at *4 (S.D. Ind. Mar. 10, 2014) ("Homeowners have failed to cite to any case law, let alone Indiana case law, in which contractual privity between the borrower and the holder of a note was imputed to the loan servicer."); *James v. Litton Loan Servicing, L.P.*, No. 4:09-cv-147(CDL), 2011 WL 59737, at *11 (M.D. Ga. Jan. 4, 2011) ("As a loan servicer, Litton is not a party to or an assignee of the Note itself. In the absence of evidence of a contract between Plaintiffs and Litton, Plaintiffs' breach of contract claim fails."); *Kehoe v. Aurora Loan Servs. LLC*, No. 3:10-cv-00256-RCJ-RAM, 2010 WL 4286331, at *8 (D. Nev. Oct. 20, 2010) (". . . Plaintiffs assert that Aurora, as their loan servicer, assumed the duties of the lender under the deed of trust. . . . [T]he fact that Aurora serviced Plaintiff's loan does not create contractual privity between Aurora and the Plaintiffs.").

One circumstance where courts have reached or at least suggested a divergent conclusion has been where "the lender validly assigned some or all of its contractual obligations to the loan servicer." *Phillips v. Caliber Home Loans, Inc.*, No. 19-CV-2711 (WMW/LIB), 2020 WL 5531588, at *3 (D. Minn. Sept. 15, 2020); *see also*, *e.g.*, *Brown v. Loancare, LLC*, No. 320-CV-00280-FDW-DSC, 2020 WL 7389407, at *6 (W.D. N.C. Dec. 16, 2020) (indicating that a "valid assignment of the Mortgage Agreement" would be critical to establishing contractual liability of the mortgage servicer); *Austin v. Lakeview Loan Servicing, LLC*, No. Civil Action No. RDB-20-1296, 2020 WL 7256564, at *6 (D. Md. Dec. 10, 2020) ("The Plaintiff, however, has failed to allege how LoanCare actually became an assignee of the Mortgage Agreement. Absent assignment of the loan to a servicer, no privity exists and a servicer cannot be held liable for breach of contract."). The Mitchells have made no showing that contractual assignment occurred in the present case.

Instead, the Mitchells' argument is focused on the tumult of the secondary mortgage market and the uncertainty and confusion that it creates for borrowers as to who actually

owns their loans. Images of a parade of potential horribles from undisclosed principals to violations of loan transfer disclosure laws emerge. It is to the dangers of confusion that the Mitchells point. Assuming for purposes of argument that such an argument could find traction, the Mitchells fail to show why these concerns are applicable in this case. Whatever confusion may befall some other borrowers or whatever untoward actions may occur among some parties in the secondary mortgage marketplace with regard to disclosure and notice, the Mitchells have not developed an argument or offered any evidence showing that any of those concerns are actually applicable in the present case. To the contrary, from the initial filing of their complaint through their briefs in this court, the Mitchells have demonstrated their keen understanding that US Bank is the trustee for TOWD Point Master Funding Trust 2014, which is an investor pool, which owns the mortgage-backed security pool in which the Mitchells' loan is included. They have also, from the complaint through their appellate briefs, clearly reflected their understanding that SPS is instead the mortgage servicer of that loan. The Mitchells, nevertheless, are continuing to pursue a breach of contract claim solely against SPS, who is not a party to the contract. Ultimately, in the absence of privity, "[t]o attempt to hold someone liable on a contract to which it is not a party is contrary to common reason." *Bonham Grp. Inc. v. City of Memphis*, No. 02A01-9709-CH-00238, 1999 WL 219782, at *7 (Tenn. Ct. App. Apr. 16, 1999). The Mitchells do not contend that SPS is a party to the contract or that they are in privity with SPS. It is not ultimately SPS that owes contractual duties to the Mitchells; therefore, assuming for purposes of argument a breach of contract occurred, it was not SPS that owed a contractual duty to the Mitchells. Accordingly, we affirm the judgment of the trial court in granting summary judgment for breach of contract.

III.

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellants, Clarence Mitchell and Leslie Mitchell, for which execution may issue if necessary.

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JEFFREY USMAN, JUDGE