IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 21, 2015 Session

ELIZABETH E. CROCKETT v. MUTUAL OF OMAHA, ET AL.

Appeal from the Circuit Court for Davidson County
No. 12C889; 12C986 Joseph P. Binkley, Jr., Judge

No. M2014-01038-COA-R3-CV – Filed July 30, 2015

This appeal arises from the dismissal of a complaint filed by a pro se litigant. The complaint sought injunctive and declaratory relief against several banks and a corporation, alleging that the banks and the corporation colluded to foreclose on her property. The trial court, after giving the complainant several opportunities to amend, dismissed her complaint for failure to state a claim upon which relief can be granted. We affirm the dismissal of the complaint.

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

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Elizabeth E. Crockett, Nashville, Tennessee, appellant, pro se.

Courtney H. Gilmer and Jaime L. DeRensis, Nashville, Tennessee, for appellee, Mutual of Omaha Bank.

Lauren Paxton Roberts, Nashville, Tennessee, for appellees HSBC Bank, N.A., USA and Mortgage Electronic Registration Systems, Inc.

Edward D. Russell, Brentwood, Tennessee, for appellee M&T Bank.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 29, 2012, Elizabeth Crockett filed, pro se, a complaint against Mutual of Omaha Bank ("Mutual of Omaha"), M&T Bank Corp. ("M&T"), HSBC Bank

("HSBC"), and Mortgage Electronic Registration Systems ("MERS") (collectively, "Appellees") in Davidson County Circuit Court. The complaint alleged that Appellees attempted to foreclose on certain property in which Ms. Crockett claims an interest. Ms. Crockett also alleged that Appellees failed to produce an "original, unaltered, genuine wet ink signature contract" and failed to respond to her "notices and demands" requesting information about her account. Ms. Crockett demanded two forms of relief: (1) a temporary restraining order and injunction preventing Appellees from foreclosing on unspecified property; and (2) a declaratory judgment that Appellees had a duty to respond to her requests for information.

Despite its length, the complaint provides little factual detail. The complaint does not specify any particular real property, loan or deed of trust, or include any documents relating to a loan, deed of trust, or foreclosure. However, Ms. Crockett filed a "Petition to Perpetuate Discovery," to which she attached several exhibits, including a promissory note, a deed of trust, allonges, and a foreclosure notice. From those exhibits, we can determine that Ms. Crockett received a loan from the Bank of Arizona on December 12, 2003, for the purchase of a property on Kenner Avenue in Nashville, Tennessee. The loan was transferred to HSBC Bank USA as Trustee. Ms. Crockett received a foreclosure notice regarding the Kenner Avenue property in December 2011. Ms. Crockett also attached as an exhibit her nine-page letter to M&T and Mutual of Omaha requesting information related to her account under the Real Estate Settlement Procedures Act ("RESPA"). 12 U.S.C.A. §§ 2601-2617 (2012); *see also* Regulation X, 12 C.F.R. § 1024 (2015); Regulation Z, 12 C.F.R. § 226 (2015).

Appellees moved to dismiss Ms. Crockett's complaint, among other grounds, for failure to state a claim upon which relief can be granted. After a hearing, the trial court granted Ms. Crockett an additional sixty days to file and serve an amended complaint. The court also continued the hearing on the motions to dismiss.

Ms. Crockett filed an amended complaint, which was similar to her first complaint. The amended complaint added a request for a declaration that Appellees were required to produce a "bona fide claim." Appellees again moved to dismiss Ms. Crockett's complaint for failure to state a claim. After a hearing, the trial court allowed Ms. Crockett another opportunity to file an amended complaint.

In her second amended complaint, Ms. Crockett alleged that Appellees "colluded to initiate a fraudulent foreclosure action against" her; "failed to produce a bona fide claim"; and failed to respond to Ms. Crockett's requests for information regarding their claims against her. Further, Ms. Crockett alleged that "unless a TRO [temporary restraining order] and preliminary injunction is [sic] granted, [Ms. Crockett] will suffer irreparable injury, damage and loss of [her] real property." Later in the complaint, Ms. Crockett alleged that it was in the public interest to grant her the relief sought because, without relief, she would "continue to be harmed." However, she did not

specify what harm would ensue. Appellees renewed their motions to dismiss for failure to state a claim.

After a hearing on the motions, the trial court entered an order of dismissal. In its order of dismissal, the court noted the lack of factual allegations relating to Appellees and their involvement with Ms. Crockett, stating as follows:

> The Court finds that [Ms. Crockett] has failed to state a claim against any of the named Defendants. In each complaint filed, [Ms. Crockett] recites facts from actions that are unrelated to the parties subject to this proceeding. No facts are alleged against any of the named Defendants to show how [Ms. Crockett] would be entitled to relief.

II. ANALYSIS

Tennessee Rule of Civil Procedure 8 requires any pleading to include: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks." Tenn. R. Civ. P. 8.01. Rule 8.05 expands on the requirements for pleadings, particularly those that allege a statutory violation:

> Each averment of a pleading shall be simple, concise and direct. . . . . Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.

Tenn. R. Civ. P. 8.05(1).

A complaint that fails to comply with the pleading requirements of Rule 8 may be dismissed under Tennessee Rule of Civil Procedure 12.02(6) for failure to state a claim upon which relief can be granted. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 425-26 (Tenn. 2011); *see also Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn. Ct. App. 1994). A Rule 12.02(6) motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Webb*, 346 S.W.3d at 426. Therefore, in resolving a Rule 12.02(6) motion, courts examine the pleadings alone. *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010). In that examination, we construe the complaint liberally in a manner that promotes "substantial justice." *See* Tenn. R. Civ. P. 8.06; *see also Webb*, 346 S.W.3d at 426.

In addition to the liberality used in construing the complaint, we are mindful that Ms. Crockett represented herself in the trial court and does so now on appeal. We have previously discussed the standards that should be applied in evaluating the claims of self-represented parties:

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to the pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.
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> The courts give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs. Accordingly, we measure the papers prepared by pro se litigants using standards that are less stringent than those applied to papers prepared by lawyers.

Young v. Barrow, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003) (citations omitted). Courts give effect to substance over form of a pro se litigant's pleadings and other papers. *Id*. at 63.

On appeal, we review a dismissal under Tenn. R. Civ. P. 12.02(6) for failure to state a claim de novo, without a presumption of correctness. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). We will affirm the trial court's decision to grant the motion to dismiss "only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief." *Young*, 130 S.W.3d at 63.

Construing the complaint liberally, Ms. Crockett conceivably claimed a RESPA violation. Under RESPA, a servicer may be liable to a borrower for failing to respond to certain requests for information. 12 U.S.C.A. §§ 2605(e)-(f). Ms. Crockett alleged that she sent M&T and Mutual of Omaha a letter asking the banks to "produce a bona fide claim," a "verified accounting," and other official documents related to her account. She also alleged that neither M&T nor Mutual of Omaha timely responded to her request for information.

RESPA requires "any servicer of a federally related mortgage loan" to respond to "borrower inquiries." *Id.* § 2605(e)(1)(A). Upon the receipt of a "qualified written

request[1] from the borrower . . . for information relating to the servicing of such loan," the servicer must do two things: (1) acknowledge receipt of the borrower's correspondence within five days, unless "the action requested is taken within such period"; and (2) take action on the borrower's inquiry within thirty days of receipt of the qualified written request. *Id.* § 2605(e)(1)-(2). A servicer may be required to make appropriate corrections to the borrower's account, conduct an investigation, and provide the borrower with a written explanation or clarification. *Id.* § 2605(e)(2). If a servicer fails to timely respond to a borrower's qualified written request, the servicer is liable for the "actual damages to the borrower as a result of [the servicer's] failure" to respond. *Id.* § 2605(f)(1)(A). "Actual damages" are an "amount awarded to a complainant for a proven injury or loss; damages that repay *actual losses*." *Black's Law Dictionary* 445 (9th ed. 2009) (emphasis added).

To state a claim for failure to respond to a qualified written request under RESPA, a borrower must satisfy four elements: (1) the defendant services her loan; (2) her written request for information was qualified; (3) the servicer failed to respond to her qualified written request; and (4) she suffered actual damages as a result of that failure to respond. *See* 12 U.S.C.A. § 2605(f)(1)(A); *see also Ford v. New Century Mortg. Corp.*, 797 F. Supp. 2d 862, 870 (N.D. Ohio 2011). Even assuming, for the sake of argument, that Ms. Crockett satisfied the first three elements, Ms. Crockett failed to allege any actual damages stemming from a lack of response to her requests. As a result, Ms. Crockett failed to state a claim under RESPA. *See, e.g.*, *Dunkle v. Bank of N.Y. Mellon*, No. 3:11-CV-1242, 2013 WL 1910310, at *6 (M.D. Tenn. Apr. 16, 2013) (holding that a RESPA claimant must show that he suffered "'actual, demonstrable damages, and the damages must occur as a result of that specific violation.'"); *Mekani v. Homecomings Fin., LLC*, 752 F. Supp. 2d 785, 795-96 (E.D. Mich. 2010) (requiring a RESPA plaintiff to demonstrate a causal link between his actual damages and the servicers' failure to respond); *Byrd v. Homecomings Fin. Network*, 407 F. Supp. 2d 937, 945-46 (N.D. Ill. 2005) (holding that plaintiff's RESPA claim failed as a matter of law where it did not allege actual damages).

We also conclude that Ms. Crockett's claims for injunctive relief and a declaratory judgment were not sufficiently pled. A claimant must plead at least some facts giving rise to a claim for relief. *Webb*, 346 S.W.3d at 427. Although "minute detail" is not required, the complaint must contain sufficient allegations "from which an inference may be fairly drawn that evidence on these material points will be introduced at trial." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 704 (Tenn. 2002). We are not required to accept mere legal arguments or legal conclusions as true, even when presented as facts. *See Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997).

[1] A qualified written request is written correspondence that "enables the servicer to identify, the name and account of the borrower, and includes a statement of the reasons for the belief of the borrower . . . that the account is in error . . . ." 12 U.S.C.A. § 2605(e)(1)(B)(i)-(ii).

In her complaint, Ms. Crockett sought to enjoin Appellees "from pursuing any further judicial or non-judicial foreclosure action." In order to enjoin a foreclosure sale, Tennessee Code Annotated § 29-23-202 (Supp. 2014) requires a party to "distinctly state how, when, and to whom the debt or any part of the debt secured aforementioned has been paid, or any circumstances of fraud which vitiate the contract." Tenn. Code Ann. § 29-23-202; *Dauenhauer v. Bank of N.Y. Mellon*, No. 3:12-CV-01026, 2013 WL 209250, at *3 (M.D. Tenn. Jan. 16, 2013) (concluding that Tenn. Code Ann. § 29-23-202 only presents grounds for an injunction where the party alleges repayment of the debt owed or fraud that would vitiate the mortgage contract). Here, the complaint failed to allege either payment or fraud in connection with the execution of any agreement between Ms. Crockett and Appellees.

Ms. Crockett also requested a declaratory judgment that the appellees "owe a duty, and are obligated to . . . produce a bona fide claim, [including] a verified accounting"; "failed and refused to comply with, or object to, [Ms. Crockett's] pre-suit Notices and Demands to produce a bona fide claim"; "owed a duty, and were obligated to [Ms. Crockett], to substantively respond to [her] Notices and Demands"; and "failed and refused to comply with state and federal law . . . by failing to produce a bona fide claim." Ms. Crockett's complaint did not identify the contract or state or federal statutes under which she requested a declaration of rights.

In Tennessee, declaratory judgments are governed by Tennessee Code Annotated § 29-14-103 (2012). Rule 12.02(6) motions to dismiss are "rarely appropriate" in declaratory judgment actions. *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005). Generally, if the requesting party "alleges facts demonstrating the existence of an actual controversy concerning a matter covered by the declaratory judgment statute," the court should proceed and render a declaratory judgment. *Id.* However, if the complaint fails to establish that a justiciable controversy exists, dismissal is appropriate. *Blackwell v. Haslam*, No. M2011-00588-COA-R3-CV, 2012 WL 113655, at *9 (Tenn. Ct. App. Jan. 11, 2012). Dismissal is also appropriate where the declaration will not be a "final determination of rights." *Ball v. Cooter*, 207 S.W.2d 340, 342 (Tenn. 1947); *see also* Tenn. Code Ann. § 29-14-106 (2012) ("The enumeration in §§ 29-14-103 — 29-14-105 does not limit or restrict the exercise of the general powers conferred in § 29-14-102, in any proceeding where declaratory relief is sought, in which a *judgment or decree will terminate the controversy* or remove an uncertainty.") (emphasis added). A declaratory judgment "will not be given in aid of another proceeding." *Ball*, 207 S.W.2d at 342.

We conclude that Ms. Crockett failed to adequately plead a claim for declaratory relief. Although Ms. Crockett did not identify the statute or contract under which she was requesting a declaration of rights, we construe the complaint liberally to request a declaration of her rights under RESPA. As to Mutual of Omaha, HSBC, and MERS, there is no justiciable controversy over the parties' rights and obligations under RESPA.

The complaint did not allege that Mutual of Omaha, HSBC, and MERS were servicers, and RESPA was not shown to be applicable. As to M&T, Ms. Crockett did allege that it was a servicer of her loan, which could create a justiciable controversy. However, absent an allegation of actual damages stemming from M&T's failure to respond to a qualified written request, a declaratory judgment would be "purely theoretical." *Id.*

III. CONCLUSION

Because Ms. Crockett's complaint failed to comply with Tennessee Rule of Civil Procedure 8, the complaint was subject to dismissal for failure to state a claim upon which relief can be granted. Therefore, we affirm judgment of the trial court.

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W. NEAL McBRAYER, JUDGE