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BARBARA A. RES and PETER RES, Plaintiffs, vs. BANK OF AMERICA, N.A., Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-3346-17 CIVIL ACTION OPINION

Argued: **August 4, 2017**
Decided: **August 8, 2017**

Honorable Robert C. Wilson, J.S.C.

Barbara A. Res, Esq. appearing for the Plaintiffs Barbara A. Res and Peter Res, (from the Law Office of Barbara A. Res, Esq.).

Heather E. Saydah, Esq. appearing for the Defendant Bank of America, N.A. (from the law offices of Winston & Strawn LLP).

FACTUAL BACKGROUND

On or about August 29, 2007, the Plaintiffs executed an Equity Maximizer Agreement and Disclosure Statement governing a Home Equity Line of Credit Account with BANA with a credit limit of $500,000.00. (the "HELOC"). To secure the HELOC, the Plaintiffs executed a mortgage on the property located at 91 Ogle Road, Old Tappan, New Jersey 07675 (hereinafter, the "Property") in favor of BANA (the "First Mortgage"). On or about September 16, 2009, BANA loaned the Plaintiffs $600,000.00 (the "Loan") in exchange for a note executed by the Plaintiffs in favor of BANA ("Note One"). To secure Note One, the Plaintiffs executed a mortgage on the Property in favor of BANA (the "Second Mortgage"). On or about September 17, 2009, the Plaintiffs and BANA executed a Real Estate Subordination Agreement, which subordinated Note One and the HELOC (the "Subordination Agreement").

On or about May 11, 2017, the Plaintiffs filed a Complaint alleging causes of action arising out of the allegation that BANA refused to modify these loans. Specifically, the Plaintiffs allege six separate causes of action: breach of the covenant of good faith and fair dealing (Count One), lender liability (Count Two), mistake (Count Three), misrepresentation (Count Four), common law fraud (Count Five), and violation of the New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1, *et. seq.*, ("CFA") (Count Six).

MOTION TO DISMISS STANDARD

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1513 (2016) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

Courts lack jurisdiction to hear matters that are subject to exclusive agency jurisdiction. See Pressler, Current N.J. Court Rules, Comment 2.6 to R. 4:6-2, at 1559 (2016). In Wallace v. City of Bridgeton, 121 N.J. Super. 559, 561 (Law Div. 1972), the Court noted that a motion filed under R. 4:6-2(e) for failure to state a claim could have been dismissed for lack of subject matter jurisdiction due to exclusive agency jurisdiction under R. 4:6-2(a). In the event that the Court tries a matter judicially despite clear exclusive agency jurisdiction, the ensuing judgment must be vacated. See Cortes v. Interboro Mut., 232 N.J. Super. 519 (App. Div. 1988).

RULE OF LAW AND DECISION

1. Counts Three and Four Fail as the Plaintiffs Cannot State a Cognizable Claim for Negligence Under New Jersey Law, as well as Being Time-Barred.

The statute of limitations for negligence accrues either: on the date of the act or omission giving rise to the claim, or on the date the injured party discovers, or reasonably should have discovered, that he may have a basis for an actionable claim. See Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 109 (2006). The Plaintiffs' Complaint states that the alleged negligent conduct occurred in 2009. The applicable six-year statute of limitations expired in 2015. As such, Counts Three and Four of the Plaintiffs' Complaint are time-barred.

Even if, *arguendo*, Counts Three and Four are not time-barred, the Plaintiffs fail to state a cognizable claim for negligence. To state a claim for negligence in New Jersey, a plaintiff must allege facts to support such a claim. These facts must demonstrate : (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) proximate causation; and (4) injury or harm to the plaintiff as a result of the breach. Anderson v. Sammy Redd & Associates, 278 N.J. Super. 50, 56 (App. Div. 1995). It is well-established in New Jersey that a bank does not owe a legal duty to a borrower. United Jersey Bank v. Kensey, 306 N.J. Super. 540, 552 (App.

Div. 1997). There is a general presumption that the "relationship between lenders and borrowers is conducted at arms-length, and the parties are acting in their own interest." Id. at 553.

Here, BANA lent money to the Plaintiffs, owing no legal duty to them. Absent new facts, the Plaintiffs cannot have a cognizable claim of negligence against BANA. See Globe Motor Car v. First Fidelity, 273 N.J Super. 388, 393 (Law Div. 1993), aff'd, 291 N.J. Super. 428 (App. Div. 1996) ("[T]here must be a finding that the defendant owed some duty to the party complaining and a breach of that duty."). Absent a showing of a duty owed by BANA to the Plaintiffs, Counts Three and Four must be dismissed.

2. The Plaintiffs Do Not State Cognizable Claims Against BANA for Counts One and Two of Their Complaint.

In order to succeed on a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must prove: (1) a contract exists between the plaintiff and defendant; (2) the plaintiff performed under the terms of the contract [unless excused]; (3) the defendant engaged in conduct, apart from its contractual obligations, without good faith and for the purpose of depriving the plaintiff of the rights and benefits under the contract; and (4) defendant's conduct caused the plaintiff to suffer injury, damage, loss or harm. Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985).

Here, the Plaintiffs fail to identify which contract BANA allegedly breached. Instead of establishing the elements for either claim, they allege that they requested that BANA lower the interest rate and BANA refused. The Plaintiffs also allege that subject to verification and acceptability of Plaintiffs' income, BANA agreed to subordinate the HELOC but only up to $581,951.00, the existing balance of Mortgage One. However, there is no provision in the HELOC, Note One, Mortgage One or Mortgage Two that requires BANA to honor the Plaintiffs' request for modification. Furthermore, New Jersey does not recognize a claim for "lender liability"

(Count Two). The Plaintiffs do not provide any legal authority for such a claim. As such, Counts One and Two must be dismissed.

3. Counts Five and Six Fail as the Plaintiffs Cannot State Cognizable Claims for Common Law Fraud and Violation of the CFA.

In order to state a claim for violation of the CFA, a plaintiff must allege (1) an unlawful practice; (2) that he suffered an ascertainable loss; and (3) a causal relationship between the unlawful practice and the ascertainable loss. Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div. 2005); New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13 (App. Div. 2003), cert. denied, 178 N.J. 249 (2003). The Supreme Court of New Jersey stated that "[t]o violate the Act, a person must commit an 'unlawful practice' as defined in the legislation. Unlawful practices fall into three general categories: affirmative acts, knowing omissions, and regulation violations." Cox v. Sears Roebuck & Co., 138 N.J. 2, 17 (1994). The CFA defines "unlawful practice" as:

> The act, use or employment by any person of *any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission*, in connection with the sale or advertisement of any merchandise or real estate.

N.J.S.A. § 56:8-2 (emphasis added).

In addition to alleging each of the elements of common law fraud, allegations of fraud must be pled with particularity, pursuant to the New Jersey Court Rules. R. 4:5-8; Levinson v. D'Alfonso & Stein, 320 N.J Super. 312, 315 (App. Div. 1999). Mere conclusory statements are insufficient to satisfy the particularity requirement of R. 4:5-8. Rego Indus., Inc. v. Am. Mod. Metals Corp., 91 N.J. Super. 447, 456 (App. Div. 1966). If "the allegations do not set forth with specificity,[]or … constitute as pleaded, satisfaction of the elements of legal or equitable fraud[,]" a court may dismiss the complaint. State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v.

Qwest Commc'ns Intern., Inc., 387 N.J. Super. 469, 484-85 (App. Div. 2006); see also Lippmann v. Hydro-Space Tech., Inc., 77 N.J. Super. 497, 505 (App. Div. 1962) (finding that a complaint which "consisted of no more than only general and entirely conclusory charges of fraud" fails to plead such material facts as necessary to state a claim upon which relief could be granted).

Here, the Plaintiffs allege that BANA misrepresented or failed to disclose material facts related to the interest rate offered to them on the 2009 loan. They also assert that BANA engaged in a violation of the CFA. However, the Plaintiffs do not identify an employee of BANA who allegedly engaged in fraudulent activity. They do not identify an act taken by BANA which constitutes as fraudulent activity. They do not provide dates or times of when BANA made fraudulent communications or misrepresentations. Plaintiffs also do not allege how any fraudulent or deceptive communications were transmitted to them by BANA. Without such factual allegations, the Plaintiffs cannot articulate a claim for fraud. R. 4:5-8. As such, Count Five must be dismissed. Rego Indus., Inc., 91 N.J. Super. at 456.

Furthermore, the Plaintiffs fail to provide facts to show that BANA's conduct amounted to an "unconscionable commercial practice", as is required under the CFA. A plaintiff must allege "substantial aggravating circumstances." Cox, 138 N.J. at 18. Instead, the Plaintiffs merely set forth conclusory allegations that BANA misrepresented or failed to disclose material facts, which is insufficient. They also fail to establish an ascertainable loss, where they must be able to quantify or measure what loss they suffered or will suffer as a result of BANA's alleged unlawful conduct. Arcand v. Brother Int'l Corp., 673 F. Supp. 2d 282, 300 (D.N.J. 2009). As such, Count Six must be dismissed.

For the foregoing reasons, BANA's Motion to Dismiss the Plaintiffs' Complaint is **GRANTED**.

It is so ordered.