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NO. COA11-321
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

ALEXANDER EVANS and
ALICE FAYE EVANS,
Plaintiffs,

v.

Cumberland County
No. 09-CVS-6428

DAVID W. NEILL, ELIZABETH B.
ELLS, DOROTHY DEBRA,
CITIFINANCIAL SERVICES, INC.,
CITIFINANCIAL SERVICES,
INC., 309, LLC and UPTON TYSON,
Defendants.

Appeal by Plaintiffs from orders entered 19 November 2009 and 29 November 2010 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 14 September 2011.

Stark Law Group, PLLC, by Thomas H. Stark and Seth A. Neyhart, for Plaintiff-Appellants.

Shapiro and Ingle, by Jason K. Purser, for Defendant-Appellees.

BEASLEY, Judge.

Alexander Evans and Alice Faye Evans (Plaintiffs) appeal from the 19 November 2009 order dismissing their claim for

breach of fiduciary duty against Defendants David W. Neill, Elizabeth B. Ells, and Dorothy Debra (Substitute Trustees) and the 29 November 2010 order denying Plaintiffs' motion for relief from order. For the following reasons, we affirm.

On 29 December 2000, Plaintiffs executed a note payable to Associates Financial Services of America, Inc., predecessor to Citifinancial Services, Inc. 309, LLC (Citi). They also executed a Deed of Trust to secure the debt. The Deed of Trust described the collateral, but did not specify the address of the property.

Plaintiffs made payments on the note until December 2005. Plaintiffs failed to pay the remaining balance and Defendant Substitute Trustees (Substitute Trustees) instituted foreclosure proceedings on or about 13 April 2006.

The Substitute Trustees attempted to serve Plaintiffs with notice of hearing at three different addresses: 1012 Vesper Lane, 1437 Halsey Loop, and 1319 Cypress Lake Road. The Sheriff was not able to personally serve Plaintiffs and posted service at 1012 Vesper Lane. The 1012 Vesper Lane property was not the collateral described in the Deed of Trust.

On 17 May 2006, the Cumberland County Clerk, unaware that the notice was deficient and without the presence of Plaintiffs, entered an order permitting foreclosure on the property described as collateral in the Deed of Trust. Consequently, the

property was sold and conveyed to Defendant Upton Tyson (Tyson) in July 2006.

On 6 July 2009, Plaintiffs filed a complaint that sought to quiet title, alleged breach of fiduciary duty by David W. Neill, Elizabeth B. Ells, and Dorothy Debra (Substitute Trustees), and claimed violation of due process based on improper notice of the foreclosure hearing. The complaint also named Citi and Tyson as Defendants.

The Substitute Trustees filed a 12(b)(6) motion to dismiss as to the claim of breach of fiduciary duty. After hearing arguments, the trial court granted Defendants' motion to dismiss on 19 November 2009. The trial court proceeded as to the remaining issues and by order entered on 29 November 2010 set aside the foreclosure as void. Prior to the final order, Plaintiffs filed a motion for relief from the order granting Substitute Trustees' motion to dismiss. On 29 November 2010, the trial court denied the motion for relief from order. Plaintiffs filed notice of appeal on 29 December 2010 from the 12(b)(6) dismissal and the denial of the motion for relief from order pursuant to Rule 60(b)(2).

The sole issue on appeal is whether the trial court erred in granting the Substitute Trustees' 12(b)(6) motion. Plaintiffs assert that the complaint states a claim for breach of fiduciary duty against the Substitute Trustees. We disagree.

"In reviewing the grant of a motion to dismiss for failure to state a claim, the question for an appellate court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *George v. Administrative Office of the Courts*, 142 N.C. App. 479, 482, 542 S.E.2d 699, 702 (2001) (internal quotation marks and citations omitted). "The complaint should be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 473, 665 S.E.2d 526, 531 (2008) (internal quotation marks and citations omitted).

"Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim."

Shepard v. Ocwen Fed. Bank, FSB, 172 N.C. App. 475, 477, 617 S.E.2d 61, 63 (2005) (quoting *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citations omitted)). "To state a claim for breach of fiduciary duty, a plaintiff must

allege that a fiduciary relationship existed and that the fiduciary failed to act in good faith and with due regard to [plaintiff's] interests[.]” *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005) (internal quotation marks and citations omitted). Good faith is

[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.

Black’s Law Dictionary (7th ed. 1999). Although our Courts have not explicitly defined “good faith” in the context of the duties of fiduciaries, we have discussed the distinction between negligence of a fiduciary and a fiduciary acting in bad faith. See *Edwards v. Bank*, 39 N.C. App. 261, 268, 250 S.E.2d 651, 656-57 (1979). The *Edwards* Court explained the distinction between negligence and bad faith.

The distinction between them is that bad faith, or dishonesty, is, unlike negligence, wilful. The mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction, that is to say, where there is an intentional closing of the eyes or stopping of the ears.

Id. at 268, 250 S.E.2d at 657 (internal quotation marks and citations omitted).

A review of the complaint shows that Plaintiffs properly alleged the existence of a fiduciary duty, but did not plead that Substitute Trustees acted in bad faith. Plaintiffs argue that "[d]espite the fact that the substitute trustees had actual knowledge of the Plaintiffs physical address, the Substitute Trustee Defendants failed to properly serve notice upon Plaintiff in breach of their fiduciary duties prior to foreclosing and selling the property." Although Plaintiffs allege a breach of duty, the complaint fails to explain how Defendants' error in serving notice constituted a failure of their duty to exercise good faith and due regard to Plaintiffs' interest. See *Toomer*, 171 N.C. App. at 70, 614 S.E.2d at 337. Further, the record indicates that the Substitute Trustees had three addresses for Plaintiffs, the Sheriff had difficulty personally serving Plaintiffs, and the deed of trust did not give a physical address for the property. Because an assertion that Defendants failed to act in good faith is a necessary element to state a claim of breach of fiduciary duty, the trial court properly granted Defendant trustees' 12(b)(6) motion to dismiss.

Plaintiffs also state as an issue in the record on appeal that the trial court erred by denying their Rule 60 motion for relief from order. We dismiss this issue.

Pursuant to the North Carolina Rules of Civil Procedure, Rule 60(b)(2) permits the court to "relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(2) (2009). Here, Plaintiffs gave notice of appeal based on the trial court's denial of their Rule 60(b)(2) motion, but failed to make any argument in their brief as to this contention. Therefore, this issue is dismissed.

Affirmed.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).