S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

XPRESS APPRAISAL GROUP, INC., a/k/a X-PRESS APPRAISAL GROUP, INC., and ASIL ZAYA, a/k/a TONY DALLO,

Plaintiffs-Appellants,

UNPUBLISHED
February 14, 2013

v

FLAGSTAR BANK,

Defendant-Appellee.

No. 305991
Oakland Circuit Court
LC No. 2010-111373-CB

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

The circuit court summarily dismissed the claims that plaintiffs, Xpress Appraisal Group, Inc. (a/k/a X-Press Appraisal Group, Inc.) and Asil Zaya (a/k/a Tony Dallo), brought against defendant, Flagstar Bank, pertaining to an altered residential real estate appraisal. Plaintiffs accused Flagstar’s employees of forging the altered appraisal and submitting it to Chase Bank. When Chase discovered the false information in the altered appraisal, it removed plaintiffs from its approved property appraiser list, leading to plaintiffs’ substantial loss of business. Because plaintiffs cannot establish that Flagstar is liable for any potential forgery by its employees or that Flagstar acted inappropriately in sharing the altered appraisal with Chase, we affirm.

I. BACKGROUND

Asil Zaya is the sole shareholder of Xpress Appraisal Group. On May 6, 2008, Lisa Pierce, a Flagstar Bank employee, faxed an order to Xpress for an appraisal of residential property located in Bloomfield Hills. Pierce requested the appraisal to determine if Flagstar could broker a “jumbo loan”[1] through Chase Bank for the property. An unidentified broker for

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[1] According to Flagstar’s website, a jumbo mortgage is one “[r]anging from $417,001 - $2 million.” <https://www.flagstar.com/personal/borrowing/home-loans/jumbo-mortgage.html> (accessed January 30, 2013). Chase’s site defines a “jumbo loan” as “[a] loan that is for a larger dollar amount than the limits set by the Federal National Mortgage Association (FNMA) or Federal Home Loan Mortgage Corporation (FHLMC) guidelines.”

an individual named Marshall Saleh had earlier contacted Flagstar loan officer Keith Wade to inquire about securing the jumbo loan. Wade had provided Saleh's broker with a list of approved appraisal companies and the broker chose Xpress because he was "familiar" with the company and "preferred to use" it.

On May 12, 2008, Zaya, on behalf of Xpress, forwarded the requested appraisal to Pierce at Flagstar. Zaya had valued the property at $1,250,000. According to Wade, the appraisal value "was significantly lower than was needed to broker the loan." Wade therefore contacted Saleh's broker who apparently "indicated that he would speak to the appraiser and see if different comparables would be used."

Zaya denied that Saleh's broker contacted him. Zaya also claimed that he did no further work on the appraisal. Wade and Pierce averred, however, that they received an altered appraisal the next day and it was purportedly sent by Xpress. The original appraisal had described the property as having 10 rooms, 2.1 bathrooms, 1 fireplace, and an 85-percent-finished basement. The altered appraisal described the home as having 11 rooms, 4.1 bathrooms, 3 fireplaces, and a fully finished basement. The altered documents valued the property at $1,672,000.

Wade submitted the altered appraisal to Chase. Ultimately, Saleh never closed on a loan with Chase but the record is silent regarding the reason. Subsequently, while conducting appraisal quality assurance reviews, Chase determined that the altered appraisal was not in compliance with the Uniform Standards of Professional Practice guidelines. Chase therefore notified Zaya on September 17, 2008, that his status as an appraiser for Chase Home Lending had been reduced to "ineligible." Zaya was not again accepted as a Chase-approved appraiser until March 25, 2010.

Plaintiffs filed suit against Flagstar Bank, Wade and Pierce. Plaintiffs accused all three defendants of negligence for altering the appraisal and then circulating it to third parties without plaintiffs' consent in contravention of the appraisal documents. Plaintiffs accused defendants of tortiously interfering with their business relationship with Chase by altering the appraisal and forwarding that document to Chase. Plaintiffs further asserted that defendants breached the contract created by accepting the appraisal documents by forwarding the altered appraisal report to third parties without first acquiring plaintiffs' written consent.

Wade and Pierce did not respond to the complaint and the circuit court entered defaults against them. Flagstar subsequently terminated Wade's employment and Pierce voluntarily resigned, although the reasons for these actions are not clear in the record.

Flagstar, on the other hand, sought summary disposition of plaintiffs' claims pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (failure to create a genuine issue of material fact). Flagstar contended that it was entitled to dismissal of the negligence claim because plaintiffs had produced no evidence that Flagstar had altered the appraisal. In fact, Zaya stated in his deposition that he had no evidence

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<https://www.chase.com/online/Home-Lending/mortgage-terms.htm#13> (accessed January 30, 2013).

regarding who altered the appraisal and had “no idea” who had taken such action. In seeking dismissal of the tortious interference claim, Flagstar argued that plaintiffs could not demonstrate the necessary intent absent evidence regarding who altered the appraisal. In relation to plaintiffs' breach of contract claim, Flagstar asserted that no contract required it to obtain plaintiffs' permission before forwarding the appraisal to Chase. Only the appraisal cover letter included such a statement and Flagstar contended that the letter was not a contract. Further, the appraisal report itself permitted Flagstar to distribute the report to “another lender at the request of the borrower . . . without having to obtain [plaintiffs'] consent.”

The circuit court dismissed the complaint in its entirety, agreeing that there was absolutely no evidence supporting plaintiffs' claim that Flagstar was responsible for altering the appraisal report. The circuit court dismissed the breach of contract claim, noting that plaintiffs admitted knowledge that the appraisal, along with other loan documents, would be submitted to Chase Bank as the actual proposed lender.[2] Absent any evidence that Flagstar altered the appraisal or wrongfully submitted the document to Chase, the court determined that plaintiffs could not establish that Flagstar interfered with plaintiffs' business relationship with Chase.

II. ANALYSIS

The circuit court properly dismissed plaintiffs' claims although on less than completely accurate grounds. Even if Wade and Pierce had altered the appraisal report as plaintiffs' speculate, their conduct would amount to active fraud, not negligence. An employer is not vicariously liable for such ultra vires acts on the part of its employees. Accordingly, plaintiffs' negligence claim is insupportable. Moreover, even if the appraisal report cover letter was a contract, Flagstar was within its rights to forward the appraisal reports to Chase, the actual lender in this situation. Absent any evidence of wrongdoing on Flagstar's part, plaintiffs' claim of interference with a business relationship must fail.

We review de novo a circuit court's resolution of a summary disposition motion. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005). A motion brought pursuant to MCR 2.116(C)(8) “tests the legal sufficiency of the complaint on the basis of the pleadings alone to determine if the opposing party has stated a claim for which relief can be granted.” *Begin v Mich Bell Tel Co*, 284 Mich App 581, 591; 773 NW2d 271 (2009). We must accept all well-pleaded allegations as true and construe them in the light most favorable to the nonmoving party. *Id*. The motion should be granted only if no factual development could possibly justify recovery. *Id*.

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[2] Plaintiffs challenge this ruling in the circuit court's order and deny any knowledge that the appraisal would be shared with Chase. In their response to Flagstar's motion for summary disposition, however, plaintiffs did admit knowledge of this fact: “The appraisal was ordered by Flagstar Bank in connection with an application for a jumbo home equity loan. The jumbo loan was intended to be brokered by Flagstar Bank but underwritten by Chase Home Lending.”

A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

A. NEGLIGENCE

Plaintiffs speculate that Wade or Pierce altered the appraisal report. Plaintiffs characterize their claim as involving negligence, which is defined as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights." Black's Law Dictionary (9th ed). It is well-recognized, however, that a plaintiff's characterization of his or her claim is not dispositive. Rather, "the court may look behind the technical label that a plaintiff attaches to a cause of action to the substance of the claim asserted." *Local 1064, RWDSU AFL–CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995). Plaintiffs have not actually raised a negligence claim. Plaintiffs specifically aver that Flagstar, and its employees Wade and Pierce, actively and intentionally altered the appraisal and knowingly submitted the altered and fraudulent appraisal to Chase. These actions cannot be accurately characterized as negligent behavior; rather, they imply malfeasance and fraud.

Plaintiffs could not succeed in an active tort claim against Flagstar, the only remaining defendant in this case because, even if Wade or Pierce altered the appraisal, their actions would have been an intentional fraud and beyond the scope of their employment. "Our Supreme Court has repeatedly held that liability cannot be imposed against an employer for torts intentionally committed by an employee that are outside the scope of the employment." *Salinas v Genesys Health Sys*, 263 Mich App 315, 317; 247 NW2d 521 (1976), citing *McCann v Michigan*, 398 Mich 65, 71; 247 NW2d 521 (1976), *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951), and *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). See also *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 79; 761 NW2d 832 (2008) ("[A]n employer is only vicariously liable for the acts its employees commit while performing a duty within the scope of employment, and an employer is not liable for torts intentionally or recklessly committed by an employee beyond the scope of his master's business.").

The fact that Wade and Pierce would not have been able to engage in this alleged fraud absent their employment by Flagstar is irrelevant:

> This Court has held that an employee is not aided in accomplishing the tort by the existence of the agency relation . . . just because of the mere fact that an employee's employment situation may offer an opportunity for tortious activity. . . . Rather, the Restatement exception will only apply where the agency itself empowers the employee to commit the tortious conduct. [*Cawood v Rainbow Rehabilitation Ctrs, Inc*, 269 Mich App 116, 120-121; 711 NW2d 754 (2005) (quotation marks and citations omitted.]

There was nothing to suggest that Wade or Pierce were empowered by Flagstar to engage in the fraudulent alteration of appraisals. Because the existence of the employment relationship with Flagstar served simply to provide Wade and Pierce with an opportunity to engage in inappropriate conduct, plaintiffs' assertion of vicarious liability could not have been sustained even if properly raised as claims of active malfeasance.

Even if plaintiffs had actually pleaded a negligence claim, dismissal would have been appropriate as plaintiffs presented no evidence supporting their claim that someone at Flagstar altered the appraisal. A party "may not rest upon the mere allegations . . . of his or her pleading" to avoid summary disposition. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Moreover, contrary to plaintiffs' appellate assertion, the doctrine of res ipsa loquitur would not save their claim. The doctrine of res ipsa loquitur "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). Its main purpose "is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id*. When applicable, the doctrine functions as an evidentiary shortcut by allowing proof by circumstantial inferences rather than direct evidence. To invoke the doctrine, a plaintiff must demonstrate that: (1) the event was of a kind that ordinarily does not occur in the absence of negligence; (2) it was caused by an agency or instrumentality within the exclusive control of the defendant; (3) it was not due to any voluntary action of the plaintiff; and (4) evidence of the true explanation of the event was more readily accessible to the defendant than to the plaintiff. *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005).

Again, plaintiffs' claim actually sounds in fraud, not negligence. As res ipsa loquitor is a means to prove negligence, it is inapplicable here. Moreover, plaintiffs failed to demonstrate that the instrumentality for the wrong (the altered appraisal) was in Flagstar's exclusive control, and instead based that claim on pure conjecture.

B. BREACH OF CONTRACT

The circuit court also properly dismissed plaintiffs' breach of contract claim. Zaya admitted in his deposition testimony that an actual contract restricting the use or provision of the appraisal did not exist. Yet, plaintiffs rely on the following language contained in a letter accompanying the appraisal: "This appraisal is prepared f*or the sole and exclusive use of the client*. A written authorization by the appraiser is needed before releasing the report to any other party." (Emphasis added.) In disputing plaintiffs' claims, Flagstar emphasized the following language contained within the appraisal report itself:

> ¶ 21. The lender/client may disclose or distribute this appraisal report to: the borrower; *another lender at the request of the borrower*; the mortgagee or his successors and assigns; mortgage insurers; government sponsored enterprises; other second market participants . . . *without having to obtain the appraiser's or supervisory appraiser's (if applicable) consent*. Such consent must be obtained before this appraisal report may be disclosed or distributed to any other party (including, but not limited to, the public through advertising, public relations, news, sales, or other media.) [Emphasis added.]

Even if the cover letter was a contract, plaintiffs presented no evidence that Flagstar breached it. There is no indication that Flagstar's use of the document violated the parties' intent. Flagstar retained plaintiffs to provide a service—to conduct a property appraisal. In turn, Flagstar could use the appraisal consistent with its role as either the provider of a mortgage or as a broker in securing a mortgage. Any use of the appraisal for either of these purposes was consistent with the "sole and exclusive use" language in the cover letter. Flagstar did not provide the document to an uninvolved third party or someone foreign to the particular financing efforts and therefore did not violate the "sole and exclusive use" provision.

Flagstar's conduct was also consistent with ¶ 21 of plaintiffs' appraisal report, which explicitly permitted Flagstar to "disclose or distribute this appraisal report to . . . another lender." Flagstar was not required to obtain plaintiffs' permission to share the report with Chase, as it was another lender under that provision.

C. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

We also agree with the dismissal of plaintiffs' tortious interference claim. Plaintiffs failed to support their claim that a Flagstar employee altered the appraisal report. And plaintiffs' claim that Flagstar improperly shared the appraisal report with Chase is contradicted by the language of that report and the accompanying letter. Accordingly, plaintiffs cannot establish that Flagstar took any improper action that interfered with plaintiffs' relationship with Chase.

To establish a tortious interference with a business relationship claim, a plaintiff must establish "an intentional interference by the defendant inducing or causing a breach or termination of the relationship." *Cedroni Assoc, Inc v Tomblinson, Harburn, Assoc*, 492 Mich 40, 45; 821 NW2d 1 (2012). The plaintiff must also prove "that the interference was improper." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003). "The 'improper' interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship." *Id.* Stated another way, plaintiffs had to proffer evidence that Flagstar "did something illegal, unethical or fraudulent." *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 324; 788 NW2d 679 (2010).

As already noted, plaintiffs failed to present any evidence that Flagstar or its employees altered the appraisal report; their claims were based on pure speculation. Plaintiffs also cannot establish that Flagstar or its employees improperly or intentionally submitted a fraudulent report to Chase; no evidence suggests that Flagstar knew the altered report was fraudulent, and Flagstar

was permitted to share the report with Chase as the potential underwriter of the subject loan. Accordingly, plaintiffs failed to overcome Flagstar's summary disposition motion in this regard.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher