IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 25, 2018
Lyle W. Cayce
Clerk

No. 17-10599

FAYE M. SEARCY; BOBBY C. SEARCY,

Plaintiffs - Appellants

v.

CITIMORTGAGE, INCORPORATED,

Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:14-CV-2744

Before ELROD, COSTA, and HO, Circuit Judges.

PER CURIAM:*

Faye and Bobby Searcy defaulted on their home loan. So their loan servicer CitiMortgage, Inc. (Citi) foreclosed on the property. The Searcys contend that Citi's conduct violated provisions of the Real Estate Settlement Procedures Act (RESPA) and Texas Fair Debt Collection Practices Act. We agree with the district court that the Searcys have no viable claims under either statute.

I.

In 2007, the Searcys purchased a home with a 30-year mortgage. They

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

had trouble making their loan payments and defaulted in October 2012. By the middle of the next year the property was on the verge of foreclosure. The Searcys sought to modify the terms of their mortgage. Citi offered a trial period modification plan that the couple rejected because it "just . . . didn't look legitimate." They instead wanted to find enough money to "reinstate the loan." Unfortunately, they could not.

In December 2013, Citi sent the Searcys a letter indicating that it had referred the loan to foreclosure counsel. In February, that counsel told the Searcys that Citi had elected to accelerate repayment and proceed with a foreclosure sale on March 4, 2014 unless they paid all sums past due. But Citi's December letter had left open the possibility that the couple could keep their home by modifying the loan. Then, on January 28 and February 24, Citi sent identical letters thanking the Searcys for "submitting [the] request for loss mitigation assistance. This letter acknowledges that we have recently received and are processing your documents." The letters, however, did not indicate when the Searcys had submitted that request.

The Searcys now claim they submitted a loan modification application to Citi on February 25. But Faye said in her deposition that Citi "never knew" about that application because it was sent to the North Texas Housing Coalition rather than the bank. When she was asked directly whether they provided an application to Citi between August 2013 and the March foreclosure sale, Faye said "I don't think so." Citi records likewise indicate that the Searcys made no modification request after rejecting the trial plan in August 2013.

On March 3, Citi sent the Searcys a letter informing them that their request for loan modification had been denied.[1] Citi held a foreclosure sale the next day, and the Searcys received a notice to vacate a few weeks after that. Yet years later they remain on the property while Citi pays the taxes and insurance.

The Searcys filed suit in Texas state court, and Citi removed to federal court. The couple alleged violations of RESPA and the Texas debt collection law. Citi moved for summary judgment. The district court, agreeing with a magistrate judge's recommendation, granted that motion.

II.

We review a grant of summary judgment de novo, applying the same standard as the court below. *Haase v. Countrywide Home Loans, Inc.*, 748 F.3d 624, 629 (5th Cir. 2014). We first examine the Searcys' contention that the district court erred in dismissing the RESPA claim. The statute protects consumers from unjustifiably high settlement charges and abusive mortgage practices. 12 U.S.C. § 2601(a)–(b); *Moreno v. Summit Mortg. Corp.*, 364 F.3d 574, 576 (5th Cir. 2004).

The Searcys' claim rests on a RESPA regulation addressing the appeals process after a servicer has denied a borrower's application for loan modification. *See* 12 C.F.R. § 1024.41(h)(1). The provision requires that servicers allow borrowers to appeal the denial of a modification application under two circumstances.

First, borrowers can appeal if they submitted a complete application 90 days or more before a foreclosure sale. *Id.* The parties disagree about whether and when the Searcys submitted a complete application seeking modification.

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[1] Faye testified that she contacted Citi "immediately" after reading the letter but admitted that she had no evidence to contradict Citi phone records indicating that she reached out on March 5, a day after the foreclosure sale.

This dispute ends up not mattering. The relevant RESPA provisions went into effect on January 10, 2014, and do not apply retroactively. CFPB Regulation X, 12 C.F.R. § 1024.41 (2014); Amendments to the 2013 Mortgage Rules Under RESPA (Regulation X), 78 Fed. Reg. 60,381, 60,382 (Oct. 1, 2013); *Gresham v. Wells Fargo Bank, N.A.*, 642 F. App'x 355, 358 (5th Cir. 2016). This means that in order to avail themselves of these protections, Citi would have needed to receive the Searcys' application on or after January 10. *See Lage v. Ocwen Loan Servicing LLC*, 145 F. Supp. 3d 1172, 1184–86 (S.D. Fla. 2015) (noting that the amendments to the 2013 RESPA mortgage rules included a provision announcing that "the new regulations would apply to transactions for which applications were received on or after January 10, 2014"). The March 4th foreclosure sale, however, took place just over 50 days from the effective date of the regulation. This places the Searcys in a catch-22: they could not have submitted an application on or after January 10 *and* at least 90 days before the March foreclosure sale. Their RESPA claim relying on this provision thus fails.

Under section (h), borrowers may also appeal a denial during the period outlined in section (f). 12 C.F.R. § 1024.41(f), (h)(1). The Searcys likely invoked this provision too late, not citing it until oral argument in this court. But even if preserved, the effective date of section (f) also dooms the Searcys' section (h) claim. Section (f) prohibits a loan servicer from giving an initial notice of foreclosure if the borrower is fewer than 120 days delinquent. *Id.* § 1024.41(f)(1)(i). That 120-day clock began to run by the fall of 2012, when the Searcys had gone into default. Subject to a few conditions section (f) also prohibits a servicer from noticing the foreclosure if the borrower submits a complete modification application before the servicer provides the first notice that foreclosure proceedings are commencing. *Id.* § 1024.41(f)(2). Citi notified the Searcys in May 2013 that their property could soon be referred for

foreclosure and sent a letter in December 2013 indicating that the foreclosure process was starting. So in this case both of the section (f) time periods occurred prior to the January 10, 2014 effective date of these RESPA provisions.[2] Because the provisions do not apply retroactively, the Searcys do not have a RESPA claim under section (f).

These timing problems mean that even if there is a fact question about whether the Searcys sent Citi a valid and complete loan modification application,[3] federal law in effect at that time did not entitle them to appeal the application's denial.

III.

We next address whether the district court erred in granting summary judgment on the state debt collection claim alleging misrepresentations in Citi's March 3rd letter. *See* TEX. FIN. CODE § 392.304(a)(8), (19). That letter gave the Searcys 30 days to appeal the denial of their modification request and noted that no foreclosure sale would be carried out during that time. The letter, which Citi admits was sent in error, made little sense given that the foreclosure sale was scheduled for the next day. To sustain a claim under the

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[2] Even if the effective date were not a problem, the Searcys' section (f) claim would still fail. Servicers cannot give an initial notice of foreclosure if a borrower is not yet 120 days delinquent. 12 C.F.R. § 1024.41(f)(1)(i). But Citi did not do so until May 2013, well over that 120-day mark since the Searcys had defaulted. Additionally, subject to some conditions, a servicer cannot notice the foreclosure if the borrower has submitted a complete modification application. *Id.* § 1024.41(f)(2). The Searcys submitted no such application before May 2013. And even if they argued—they didn't—that the "first notice" occurred in December 2013, when Citi referred their loan to foreclosure counsel, their section (f) claim would be unavailing. Though the Searcys arguably submitted a complete application in July 2013, Citi would have still been permitted to make the first foreclosure notice that December because the couple rejected the trial period plan offered to them in August of that year. *Id.* § 1024.41(f)(2)(ii) (prohibiting a servicer from making the first notice of the foreclosure process *unless* "[t]he borrower rejects all loss mitigation options offered by the servicer").

[3] There is little evidence to suggest they did, despite what the Searcys now claim. In her deposition, Faye said they submitted a February 2014 application to the North Texas Housing Coalition—an application Citi never knew about. And Citi confirmed that the Searcys made no modification request after August 2013.

Texas Fair Debt Collection Practices Act, the Searcys have to demonstrate that Citi is a "debt collector" that committed a wrongful act "in debt collection or obtaining information concerning a consumer." *Id.* § 392.304(a). If they can do that, they also need to prove damages. *Clark v. Deutsche Bank Nat'l Tr. Co.*, 2016 WL 931216, at *6 (N.D. Tex. Mar. 11, 2016) (citing *Brown v. Oaklawn Bank*, 718 S.W.2d 678, 680 (Tex. 1986)). Recoverable damages include those resulting from financial harms or mental anguish. The Searcys can show neither.

As with just about any civil claim, there must be a causal connection between the improper debt collection practice and the harm suffered. *See Elston v. Resolution Servs., Inc.*, 950 S.W.2d 180, 185 (Tex. App.—Austin 1997, no writ) (holding plaintiff failed to carry his burden because he did not "link" his alleged injuries to the violations of which he complained); *cf. Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670, 674–75 (5th Cir. 2015) (finding claimed damages too speculative for recovery when plaintiffs provided no evidence that they were entitled to a loan modification). The Searcys argue that they suffered a variety of financial harms: "the March 4, 2014 foreclosure sale that took place, the loss of title to [their] home, [and] the subsequent litigation to defend a forcible detainer suit." But the March 3rd letter caused none of these harms; the Searcys' failure to pay their home loan and the subsequent foreclosure did. Indeed, Faye admitted that the couple suffered no financial harm from the March 3rd letter. When asked what harm that letter caused, either financial or emotional, she replied "[e]motionally is all." There is no evidence of financial harm resulting from the March 3rd letter nor does it make sense that there would be given the sequence of events leading to the foreclosure.

Although damages for mental anguish are recoverable under the state statute, *see McCaig v. Wells Fargo Bank (Tex.), N.A.*, 788 F.3d 463, 482–83 (5th

Cir. 2015), the Searcys also fail to tie their distress to the March 3rd letter as opposed to the foreclosure itself. Bobby testified that the situation with Citi "had worn on his health" because of the stress of trying to keep his property. But he went on to admit that his stress dated back to when the couple started missing loan payments in 2007 and spiked after the foreclosure notice and unrelated family events. He never linked that stress to the March 3rd letter, which he had not even seen before this litigation. In response to a question regarding whether she had been harmed by the letter, Faye also failed to specify any particular harm it caused. She referred instead to the entire course of events in explaining that "you're on a roller coaster. . . . You're sending letters out every other day. . . . [I]t's just emotional distress . . . ." She further explained that the general situation, not the March 3rd letter in particular, created "emotional turmoil," such that she did not "know how to spend [her] time, [or] what [to] do next."

This evidence discussing mental anguish resulting from the entire course of events fails to establish a link between the challenged misrepresentations contained in a single letter and the Searcys' alleged suffering. Although the letter may have gotten the Searcys' hopes up, the understandable anguish they described was the result of being unable to consistently make their mortgage payments over a number of years and facing impending foreclosure proceedings.

The absence of damages means the state debt collection claim fails.

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The judgment of the district court is AFFIRMED.