

[Cite as *Childs v. Charske*, 129 Ohio Misc.2d 50, 2004-Ohio-7331.]

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CHILDS et al. : Case No. 03-8072
: :
: Judge Jeffrey E. Froelich
: :
: DECISION AND ENTRY DENYING
: MOTIONS TO DISMISS OF
v. : FIDELITY LAND TITLE AND
: CHELSEA TITLE AGENCY AND
: DENYING MOTION OF FIDELITY
CHARSKE et al. : LAND TITLE TO STRIKE EXHIBITS
: TO THE COMPLAINT AND ORDERING
: PLAINTIFFS TO AMEND THEIR
: COMPLAINT FOR FRAUD BY
: APRIL 2, 2004

JEFFREY E. FROELICH, Judge.

{¶ 1} The plaintiffs have filed a complaint for damages and other relief against numerous individuals and companies arising "out of a massive and complex multi-property and multi-player predatory lending scheme involving mortgage companies, appraisers, title companies, lenders and their respective employers, agents, and principals." The plaintiffs allege that this scheme is generally known as "flipping" and involves, among other things, "blind eye title companies," which are "fully aware of what is actually transpiring."

{¶ 2} Fidelity Land Title Agency of Cincinnati, Inc., and Chelsea Title Agency of Dayton, Inc., were allegedly "privy to the essence of what was transpiring." Fidelity and/or Chelsea are alleged to have provided for seven of the properties title and closing services that included "processing certain documents for and making certain representations to Plaintiffs and other participants."

{¶ 3} The defendants (spoken of collectively in most of the complaint) are allegedly responsible for damages to the plaintiffs as a result of fraudulent misrepresentation, promissory estoppel, fraudulent concealment, negligent misrepresentation, civil conspiracy, fraudulent inducement to contract, breach of duty of loyalty and good faith, fraud, conversion, unconscionability, negligence, and violation of Ohio's Consumer Sales Practices Act.

{¶ 4} Fidelity and Chelsea have filed motions to dismiss, basically arguing that neither had any duty to the plaintiffs, since the title agencies' responsibility was only to provide title and closing services, which each states it performed appropriately.

STANDARD ON MOTION TO DISMISS

{¶ 5} Civ.R. 12(B)(6) permits the court, upon motion of an adverse party, to dismiss a claim or claims for relief for failure to state a claim upon which relief may be granted. Such a motion necessarily asserts that the pleader has failed to plead the operative grounds constituting a claim. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190. The motion may be granted only when, from the face of the pleadings in a complaint, the court "finds beyond doubt * * * that the plaintiff [can] prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. For this purpose, all factual allegations in the complaint are presumed true, and all reasonable inferences are made in favor of the nonmovant. *Id.* A complaint may be dismissed pursuant to Civ.R. 12(B)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

that would entitle him to relief. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242. Furthermore, in order for a Civ.R. 12(B)(6) motion to be sustained, the court must determine that no amendment to the pleading could cure the defect. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545.

{¶ 6} In other words, in order to sustain a Civ.R. 12(B)(6) motion, the court must find beyond doubt from the allegations in the pleadings and without resort to any extraneous material that there are no facts that could conceivably be proved (even with amended pleadings) by the party against whom the motion is made that would allow the case to be submitted to the jury. "Rule 12(B)(6) basically is a 'so what?' provision that allows a court to summarily dismiss a cause of action by finding beyond cavil that even if everything the Plaintiff claims were true, the law simply does not provide a remedy." *Hull-Kitchen v. Merrill, Lynch, Pierce, Fenner & Smith* (Jan. 8, 2004), Montgomery C.P. 03-4008.

ANALYSIS

{¶ 7} The title agencies state that since they provided only "closing services" or "settlement services," they had no contract or privity with the plaintiffs and, further, that anything the agencies did or any statements they made were after the plaintiffs had made their decisions about purchasing the properties under certain terms; therefore, they argue, they owed no duty to the plaintiffs and, even if they did, the plaintiffs could not have relied to their detriment on anything that happened at the

closings.

{¶ 8} The plaintiffs respond that "regardless of [the title agencies'] direct involvement, however, at a minimum all the Defendants were negligent in that they turned a blind eye to the scheme when a reasonable person in their position would have acted appropriately."

DOES THE COMPLAINT STATE A CLAIM OF ACTION FOR NEGLIGENCE?

{¶ 9} "[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." 2 Restatement of the Law 2d, Torts (1965), Section 282. This "standard established by law" can be set by a statute or developed by the common law. *Wallace v. Ohio DOC* (2002), 96 Ohio St.3d 266.

{¶ 10} Examples of statutory duty in the state context are the dram shop laws, R.C. Chapter 4301, political subdivision liability, R.C. Chapter 2744, and laws for a safe work environment, R.C. Chapter 4101, and, in the federal context, the money-laundering laws, e.g. Section 1956, Title 18, U.S.Code, and, more recently, the inclusion of title agencies as "financial institutions" in the reach of the laws pursuant to the USA Patriot Act, Section 5312(a)(2)(U), Title 31, U.S.Code.

{¶ 11} "It is rudimentary that in order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom. * * * The existence of a duty depends on the foreseeability of the injury. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

performance or nonperformance of an act. * * * The foreseeability of harm usually depends on the defendant's knowledge." *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶ 12} Identically, in a case of nonfeasance, the existence of a legal duty is critical and, unless a duty is established, the defendant's failure to act does not create liability. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, 135.

WAS THERE A DUTY OWED?

{¶ 13} "Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Commerce & Industry Ins. Co.* (1989), 45 Ohio St.3d 96, 98; see, also, *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217. The Supreme Court "has often stated that the existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 271; *Commerce & Industry*, 45 Ohio St. 3d at 98, 543 N.E.2d 1188; *Menifee v. Ohio Welding Products*, 15 Ohio St. 3d at 77, 15 OBR 179, 472 N.E.2d 707. In addition, we have also stated that the duty element of negligence may be established by common law, by legislative enactment, or by the particular circumstances of a given case. *Chambers v. St. Mary's School* (1998), 82 Ohio

St.3d 563, 565, 697 N.E.2d 198; *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph one of the syllabus. Admittedly, however, the concept of duty in negligence law is at times an elusive one." *Wallace*, 96 Ohio St. 3d at 274.

{¶ 14} "Duty '* * * is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, *Law of Torts* (4th ed.1971) pp 325-326). Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concept of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953), 52 Mich.L.Rev. 1, 15). * * * *Weirum v. RKO General, Inc.* (1975), 15 Cal.3d 40, 46, 123 Cal.Rptr. 468, 471, 539 P.2d 36, 39." *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶ 15} As Dean Prosser said in his seminal work, "The statement that there is or is not a duty begs the essential question – whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. * * * '[D]uty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." (Footnote omitted.) Prosser, *Law of Torts* (5th Ed. 1984) 357-358, Section 53.

{¶ 16} It follows from the considerations set out in *Mussivand* that if the defendant title agencies were aware of fraud being committed upon innocent parties for whom they were providing

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

services and if they were also aware that their involvement was contributing to the fraud, they owed a duty to those parties not to proximately cause damages to them.

{¶ 17} "Black's Law Dictionary (5th Ed. 1979) 38 defines a contract of adhesion as a '[s]tandardized contract offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumers cannot obtain desired product or services except by acquiescing in form contract.'" *Sekeres v. Arbaugh* (1987), 31 Ohio St. 3d 24, 31, quoted in *Williams v. Aetna Finance Co.* (1998), 83 Ohio St. 3d 464, 482.

{¶ 18} Moreover, given the "particular circumstances" of real estate financing, which is confusing to the average person, and of the typical closing, with its multipart, preprinted forms, governmental regulatory requirements, arcane monetary calculations, and its simultaneously helter-skelter and perfunctory pro forma nature, all participants are "entitled to protection."

WAS THERE FORESEEABILITY?

{¶ 19} There are no facts before the court supporting any knowledge on the part of the title agencies; however, again, for purposes of a motion to dismiss, the court must presume to be true the allegations that the defendant title agencies "made representations" and were "fully aware" of and participated in fraudulent transactions.

{¶ 20} The law still requires scienter. Phelps, Validity,

Construction, and Application of 18 USCA §1956, Which Criminalizes Money Laundering (1994), 121 A.L.R.Fed. 525; Eggert, Held Up in Due Course: Predatory Lending, Securitization and the Holder in Due Course Doctrine (2002), 35 Creighton L.Rev. 503 (on the responsibility of secondary markets); Cox, Securities Litigation: Just Desserts for Accountants and Attorneys After Bank of Denver (1996), 38 Ariz.L.Rev. 519, discussing the expanding theories of liability of participants to certain financial transactions.

{¶ 21} The plaintiffs argue that the defendant title agencies "were negligent in that they turned a blind eye to the scheme." Supposedly, this expression arises out of Horatio Nelson's naval victory over the French at the Battle of Copenhagen in 1801. Lord Nelson's superiors hoisted signal flags directing him to retreat; however, Nelson made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. *Manifest Shipping Co. v. Uni-Polaris Ins. Co.* (2001), 2 W.L.R. 170, 208 (H.L.).

{¶ 22} Ohio has addressed "willful blindness" as long ago as *Woodworth v. Paige* (1855), 5 Ohio St. 70, where the court examined a transfer of property for any evidence that the grantee knew or should have known of an existing dower interest or whether he was a bona fide purchaser without notice. Quoting *Jones v. Smith*, 1 Hare 43, the court held, "If there is no fraudulent turning away from a knowledge of the facts which the *res gestae* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

-- then the purchaser will in equity be considered, as in fact he is, a bona fide purchaser without notice.'" Id. at 76. Mere "vague reports from persons not interested in the property, will not affect the purchaser's conscience.'" Id. at 76, quoting Sugden on Vendors, 1040.

{¶ 23} Willful blindness exists "only where it can almost be said that the defendant actually knew. He suspected the fact; he realised [sic] its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge." G. Williams, *Criminal Law: The General Part*, [Chapter] 57 at 159, 2d Ed.1961.'" *State v. McKoy* (Feb. 17, 2000), Cuyahoga App. No. 74763, quoting *United States v. Jewell* (1976), 532 F.2d 697, 700, fn. 6.

{¶ 24} Sometimes, especially in a criminal setting (which requires more culpability than is required for tort responsibility) a "deliberate ignorance" or "ostrich" instruction is appropriate depending on the facts. See, e.g., *State v. Washington* (Dec. 30, 1999), Cuyahoga App. No. 74850; *State v. Smith* (June 15, 1995), Cuyahoga App. No. 67524; *United States v. Williams* (C.A.6 1997), 117 F.3d 1421. In a civil context, an instruction is sometimes given that "knowledge exists where a person believes that it is probable that something is a fact, but deliberately shuts his or her eyes or avoids making reasonable inquiry with a conscious purpose to avoid learning the truth." *Hoffman v. Stamper* (2004), 155 Md.App. 247, 292, 843 A.2d 153.

{¶ 25} In a decision that was upheld by the Sixth Circuit, the

district court referred to the concept of "willful blindness" and defined it as the "conscious tort of deliberate ignorance that's meant to be imposed when a defendant refuses to take basic investigatory steps." *United States v. Certain Real Property* (C.A.6 1993), 1 F.3d 1242. See, also, von Kaenel, *Willful Blindness* (1993), 71 Wash.U.L.Q. 1189; *United States v. Cassiere* (C.A.1 1993) 4 F.3d 1006.

{¶ 26} "In our universe, all events can be analyzed as caused by all other events. It is a weary truism now, thanks to the explorations of chaos theory, that 'but for' the flapping of a butterfly's wings in Mexico, Dorothy would never have been blown to Oz." *Didier v. Johns* (1996), 114 Ohio App. 3d 746, 754. However, if they were aware of, or should have been aware of, or were "willfully blind" to a fraud, they had a duty to prevent harm to the plaintiffs.

{¶ 27} "The determination whether in a specific case the defendant will be held liable to a third party not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Biakanja v. Irving* (1958), 49 Cal.2d 647, 650, cited in *Boye v. Consol. Stores Corp.* (March 5, 2002), Franklin App. No. 01AP-758.

{¶ 28} Generally, a purchaser has no claim for relief against a

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

title examiner who makes a mistake in conducting a title exam without privity of contract, because the action does not sound in tort, but must be founded on contract. *Thomas v. Guar. Title & Trust* (1910), 81 Ohio St. 432; *Cedar Dev., Inc., v. Exchange Place Title Agency*, Summit App. No. 21014, 2002-Ohio-5545; *James v. Partin*, Clermont App. No. 01-11-086, 2002-Ohio-2602; *Kenney v. Henry Fischer Builder, Inc.* (1998), 129 Ohio App. 3d 27.

{¶ 29} Although the Second District Court of Appeals has questioned the over-140-year-old justification for the privity-of-contract limitation (see, for example, *Simon v. Zipperstein* [July 29, 1986], Montgomery App. No. 9655), this reservation has been rejected by the Supreme Court, *Simon v. Zipperstein* (1987), 32 Ohio St. 3d 74. The Second District has since ruled that a title company that is not in privity with the plaintiff is entitled to summary judgment in an action alleging negligent misrepresentation of the title to plaintiffs' real estate. *Lutz v. Rathman* (June 25, 1999), Greene App. No. 98-CA-69.

{¶ 30} The Montgomery County Court of Appeals recently discussed issues that are somewhat analogous to those raised by Fidelity and Chelsea. In *Collins v. Natl. City Bank*, Montgomery App. No. 19884, 2003-Ohio-6893, National City was the depository of monies held by Dayton Title ("DTA") in an escrow account. DTA deposited in the account several checks that had been forged by a real estate broker and then directed National City to issue two checks drawn on the escrow account on the provisional credit of those forged checks. Shortly after National City had issued and honored the two DTA

checks, it learned that the checks deposited by DTA were forged. By that time, DTA's escrow account had been drained of funds.

{¶ 31} The account contained funds that were owed by DTA to plaintiff Collins and were generated by a sale of real estate. Collins sued National City, alleging 11 separate claims for relief, including breach of fiduciary duty, fraudulent transfer, conversion, negligence, civil conspiracy, contract, and common-law fraud.

{¶ 32} The appellate court upheld the trial court's dismissal, pursuant to Civ.R. 12(B)(6), of the claim that National City had violated its "fiduciary relationship to Collins." The court found that National City merely acted as DTA's depository institution and did not owe any fiduciary duty to Collins, who was never a customer of National City. The court also sustained the dismissal of the conversion claim, finding that the funds were in an account owned by DTA, not Collins. Further, the court sustained the dismissal of the finding that the bank owed no duty to Collins and that if any duty ran to Collins's benefit, it was owed by DTA, not National City.

{¶ 33} However, there was no allegation in *Collins* that the bank knew of any fraud and acted with that knowledge. Further, since the "title and settlement services" involved in the matter sub judice are alleged to be more than, or other than, "simple" title examination, they do not require privity, as in *Lutz*, for duty to exist.

{¶ 34} At least in a multiparty complex transaction, if a party, without which a "scheme to defraud" could not achieve its intended

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

objective, knows, actually or constructively, of the scheme and of the party's integral function and chooses to participate, that party owes a duty to the foreseeable victims of the scheme not to cause them injury by its actions or to permit injury to occur by its inaction.

{¶ 35} Whether or not that duty was owed here and, if so, whether it was violated are questions of fact and are not appropriate for a motion to dismiss.

FRAUD ALLEGATIONS

{¶ 36} The *Collins* court, given the precise pleadings in the case, also dismissed the civil conspiracy claim, finding that Ohio does not recognize claims for aiding and abetting common-law fraud. One who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abettor to fraud. *Federated Mgt. Co. v. Coopers & Lybrand* (2000), 137 Ohio App.3d 366.

{¶ 37} A case for common-law fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167. Civ.R. 9(B) states that "[i]n all averments of fraud or mistake the circumstances

constituting fraud or mistake shall be stated with particularity.”

{¶ 38} Since the title companies cannot be liable as aiders and abettors to fraud and since the specific fraud allegations against the defendant title companies are grouped together with all the defendants, the plaintiffs are given until April 2, 2004, to amend their complaint concerning the fraud allegations against the title companies.

{¶ 39} Regarding the other counts in the complaint, the plaintiffs allege that the wrongful acts were done with the knowledge and participation of the defendant title companies, and as stated above, for a Civ.R. 12(B)(6) motion, all factual allegations are presumed to be true and are sufficient.

CONSUMER SALES PRACTICES ACT

{¶ 40} The Supreme Court has held that the Consumer Sales Practices Act (“CSPA”) has no application to “pure” real estate transactions. *Brown v. Liberty Clubs, Inc.* (1989), 45 Ohio St.3d 191. The CSPA, however, is “applicable to the personal property or services portion of a ‘mixed’ transaction that also involves the sale of real estate.” *Id.* at 193. This court has examined such issues in *Harris v. First Union Natl. Bank of Delaware* (Aug. 28, 2003), Montgomery C.P. No. 02-1461, but given the allegations and, again, the presumptions that exist at the motion-to-dismiss stage, the CSPA allegations remain viable.

MOTION TO STRIKE

{¶ 41} Civ.R. (12)(F) provides that upon motion made by a party, the court may order stricken from any pleading “an insufficient

[Cite as *Childs v. Charske*, ___ Ohio Misc.2d ___, 2004-Ohio-____.]

claim or defense or any redundant, immaterial, impertinent or scandalous matter." The "FBI letters" are arguably immaterial as to Fidelity and Chelsea; however, they do not appear "redundant, immaterial, impertinent or scandalous" concerning all the defendants.

MOTION FOR ORAL ARGUMENT

{¶ 42} There has been a request for oral argument. The court gave notice of when the pending motions would be considered submitted for decision and the parties filed very thorough memoranda. At this state of the proceedings, the court would not be aided by oral arguments, and the request is denied. *Hooten v. Safe Auto Ins. Co.* (2003), 100 Ohio St.3d 8.

CONCLUSION

{¶ 43} Depending on the facts, the defendant title companies may owe a duty to the plaintiffs, purchasers of certain real estate, based on the allegations (which are presumed true for purposes of a motion to dismiss) that the title companies knew, should have known, or were willfully ignorant of their participation in a scheme that damaged the plaintiffs.

{¶ 44} The ultimate question before the court is not whether "flipping" is a good or bad thing or even whether it took place, but only whether or not a particular defendant violated the plaintiffs' rights to the extent that the law provides a remedy. The defendants' motions to dismiss are denied; the defendants' motion to strike the exhibits is denied; the plaintiffs are granted until April 2, 2004, to amend their complaint regarding the fraud

allegations against the defendants Fidelity and Chelsea.

Scott L. Braum and Timothy R. Rudo, for plaintiffs.

Robert B. Holman and John A. Mazi, for defendant Chelsea Title Agency of Dayton, Inc.

William G. Knapp III, for defendant William Cole.

Thomas H. Pyper, for defendants Leroy T. Culp and Tim Purcell.

Hans H. Soltau, for defendant Southwest Title Agency.

Ralph E. Burnham and George D. Jonson, for defendant Yvonne Frey.

James A. Matre, for defendant Fidelity Land Title Agency of Cincinnati, Inc.

James T. Ambrose, for defendant Gregory Romer.

Richard W. Schulte, for defendant Neal Charske.