

County Civil Court: CIVIL PROCEDURE—Dismissal—Error to dismiss with prejudice and without leave to amend a section 559.72(18), Fla. Stat. (2012), action without stating basis of dismissal when correspondence allegedly violating statute not attached to complaint. Motion to dismiss may not act as substitute for motion for summary judgment. Reversed and remanded for further proceedings. *Hermenegildo Huerta v. Bank of America, N.A., Appeal No. 12-000058AP-88A* (Fla. 6th Cir. App. Ct. July 9, 2013).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION**

**HERMENEGILDO HUERTA and
RUFINA HUERTA,
Appellant,**

**Case No.: 12-000058AP-88A
UCN: 522012AP000058XXXXCI**

v.

**BANK OF AMERICA, N.A.,
Appellee.**

Opinion Filed _____/

Appeal from Final Judgment
Pinellas County Court
Judge Walt Fullerton

Barry M. Elkin, Esq.
Carl J. Hognefeldt, Esq.
Attorneys for Appellant

No Appearance by Appellee

PER CURIAM.

Hermenegildo Huerta and Rufina Huerta appeal the final order of the trial court dismissing with prejudice their complaint against Bank of America, N.A. for alleged violations of the Florida Consumer Collection Practices Act, section 559.72(18), Florida Statutes (2012) ("FCCPA"). Reversed and remanded for further proceedings.

Statement of Facts

The underlying case, Hermenegildo Huerta v. Bank of America, N.A., Case No. 12-002591CO-39, in the Civil Division of the County Court was brought solely by Mr. Huerta. Rufina Huerta was not a party in the action. Therefore, Ms. Huerta is not properly an appellant in this appeal.

In the County Court case Mr. Huerta alleges that on October 18, 2011, an action was filed by Bank of America in the Sixth Judicial Circuit Court in Bank of America, N.A. v. Hermenegildo Huerta and Rufina Huerta, Case No. 11-009673CI-20 to foreclose a mortgage.¹ It is asserted that, notwithstanding having notice that Mr. Huerta was represented by an attorney, Bank of America on January 27, 2012; February 6, 2012; and February 11, 2012, contacted Mr. Huerta directly via mail "for the purpose of collecting the debt which forms the subject matter" of the foreclosure action in Circuit Court. The correspondence that allegedly violated the FCCPA is not attached to the complaint and the content of the correspondence is not set forth in the complaint.

Mr. Huerta also alleges that Bank of America lacked the procedures for following the requirements set forth in section 559.77(3)², or, in the alternative, disregarded the procedures set forth in section 559.77(3). Mr. Huerta claims he suffered statutory damages as a result of Bank of America contacting him in violation of section 559.72(18) when it had notice he had retained counsel in the Circuit Court foreclosure action.

In its Motion to Dismiss and in its Reply, Bank of America raises a total of six arguments in support of dismissal of the County Court case: (1) the claim relates to a foreclosure action and therefore there is a "litigation privilege" that cannot form the basis of Mr. Huerta's FCCPA claim; (2) Mr. Huerta fails to allege any ultimate facts to support his allegations; (3) the complaint fails as a matter of law because a mortgage foreclosure action is not "debt collection" under the FCCPA; (4) the facts upon which the complaint is based are so erroneous that "it would be inequitable and an injustice to allow Leave of Court to Amend the Complaint" (5) Bank of America requests that the

¹ As of the date of this opinion, the foreclosure action still is proceeding in the circuit court against Mr. and Ms. Huerta.

² §559.77(3) states: "A person may not be held liable [for civil remedies] in any action brought under this section if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid such error."

complaint be dismissed with prejudice because allowing amendment would clearly prejudice Bank of America and/or would materially change the issue to be determined; and (6) Mr. Huerta's cause of action should have been raised as a counterclaim in the foreclosure action.

After a hearing, the trial court entered a final order summarily granting Bank of America's Motion to Dismiss with prejudice. No reason for the entry of the dismissal with prejudice was given by the trial court. The final order of dismissal with prejudice acted as an adjudication on the merits of the complaint. Fla. R. Civ. P. 1.420(b). This appeal followed. Bank of America has not entered an appearance in this appeal.

Review Standard

An appellate court reviews an order granting a motion to dismiss de novo. Swope Rodante, P.A. v. Harmon, 85 So. 3d 508, 509 (Fla. 2d DCA 2012). "A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact." Roberts v. Children's Med. Servs., 751 So. 2d 672, 673 (Fla. 2d DCA 2000).

"There is a clear distinction between a motion to dismiss and a motion for summary judgment. A motion to dismiss may not act as a substitute for summary judgment." Reyes ex rel. Barcenas v. Roush, 99 So. 3d 586, 591 n.5 (Fla. 2d DCA 2012). When an original complaint fails to state a cause of action public policy favors the liberal amendment of pleadings, notwithstanding that ultimately it may be established that amendment will be futile. See Id. at 590.

Analysis

In the present case, the trial court did not state the basis of the dismissal with prejudice. However, as noted above, the January 27, 2012; February 6, 2012; and February 11, 2012, correspondence that allegedly violated the FCCPA is not attached to the complaint and has not been filed of record by either party. Whether correspondence from a mortgage holder is in fact an attempt to enforce a debt that violates section 559.72 rather than "just an attempt to enforce or secure a security interest" is a factual issue to be determined by the trial court either through a motion for summary judgment, through an evidentiary hearing on the merits of the complaint, or through trial. See Hurtubise v. PNC Bank, N.A., 20 Fla. L. Weekly Supp. 704b (Fla. 6th

Jud. Cir. Ct. Feb. 28, 2013), appeal pending, Case No. 13-00003-APAX-WS (Fla. 6th Jud. Cir. App. Ct.); see also Wells Fargo Bank, N.A. v. Siegman, 18 Fla. L. Weekly Supp. 835a (Fla. 4th Jud. Cir. Ct. May 23, 2011); Deutsche Bk. Nat'l Trust Co v. Sherrouse, 18 Fla. L. Weekly Supp. 588a (Fla. 4th Jud. Cir. Ct. April 14, 2011); Bayview Loan Servicing, LLC v. Corey, 18 Fla. L. Weekly Supp. 590a (Fla. 4th Jud. Cir. Ct. April 14, 2011); c.f. Levin v. Countrywide Bank, 19 Fla. L. Weekly Supp. 406a (Fla. 13th Jud. Cir. Ct. Feb. 9, 2012)(holding section 559.72 applies to parties who are excluded from the definition of "debt collector").

This Court has conducted a de novo review of the motion to dismiss, the record, and applicable law. We conclude that the trial court erred in dismissing Mr. Huerta's cause of action with prejudice and thereby entering final judgment for Bank of America based on Bank of America's motion to dismiss the original complaint. This Court has granted the relief sought by Mr. Huerta and, therefore, does not rule on the merits of the other issues raised on appeal.

Reversed and remanded for further proceedings consistent with the holding in this opinion.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ____ day of July, 2013.

Original order entered on July 9, 2013, by Circuit Judges Linda R. Allan, John A. Schaefer, and Jack R. St. Arnold.

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