

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WALTER D. CAMPBELL and	:	
MARLENE A. CAMPBELL, h/w,	:	
	:	
Plaintiffs,	:	
v.	:	No. 05-CV-972
	:	
BANK OF AMERICA, N.A.,	:	
	:	
Defendant.	:	

Green, S.J.

October 25, 2006

MEMORANDUM

Presently pending is Defendant’s Motion for Summary Judgment (Dkt. # 23), and the response thereto. For the reasons articulated below, Defendant’s Motion will be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Walter D. Campbell and Marlene A. Campbell (“Plaintiffs”) are owners of property located in Langhorne, Pennsylvania (“the Property”). Plaintiffs seek to hold Bank of America¹ (“Defendant”) liable for allegedly failing to record the satisfaction of the mortgage of the Property.

On November 3, 2000, Plaintiffs obtained a mortgage from Defendant’s predecessor-in-interest, for \$389,200 and secured the mortgage with the Property. Plaintiffs paid the full amount of the mortgage with interest and recording fees to Summit Bank on May 18, 2001. Plaintiffs then began, between May 18, 2001, and August 24, 2004, to request that Defendant record the satisfaction of the mortgage, which Defendant did not do until September

¹Plaintiffs originally filed their suit against Summit Bank. However, through a number of acquisitions, Bank of America ultimately acquired the interest. Accordingly, the parties have substituted Bank of America as the party Defendant.

8, 2004. Plaintiffs' contend that Defendant's failure to promptly record the satisfaction of the mortgage created a cloud upon the Property's title.

On January 21, 2005, Plaintiffs filed their Complaint in Pennsylvania state court alleging that: (1) Defendant refused to record the satisfaction of the mortgage of the Property; (2) by not timely recording the satisfaction of the mortgage, Defendant violated its contractual and/or statutory responsibilities; (3) Defendant should have to pay penalties, including legal fees; and (4) Defendant engaged in fraudulent practices. These claims were made pursuant to 21 P.S. §§ 681 and 682, 21 P.S. § 721-6(d)(1), Pa. C.S.A. § 8104, and Pennsylvania consumer protection laws, including the Unfair Trade Practices and Consumer Protection Law. Defendant subsequently removed the case to this court based on diversity of citizenship.

II. LEGAL STANDARD

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2025 (1986).

A party seeking summary judgment bears the initial responsibility of identifying the basis for its motion, along with evidence clearly demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Rule 56(e) of the Federal Rules of Civil Procedure requires the nonmoving party to supply sufficient evidence, not mere allegations, for a reasonable jury to find in the non-movant's favor. See Oldson v. General Elec. Astropace, 101 F.3d 947, 951 (3d Cir. 1996).

This evidence must be viewed in the light most favorable to the nonmoving party. See Anderson, 477 U.S. at 256.

III. DISCUSSION

Defendant initially argues that the Mortgage Satisfaction Act, 21 P.S. § 721-6(d)(1), applies to Plaintiffs claims, the Act having repealed the previous statute, 21 P.S. §§ 681 and 682. Defendant argues that Plaintiffs have failed to meet the new Act's more stringent notice requirements to compel production of a satisfaction piece. In their Motion to Dismiss (Dkt. # 2) Defendant advanced the very same argument, which the court rejected in its order of December 21, 2005 (Dkt. # 14), denying the Defendant's Motion to Dismiss. Defendant advances no new argument on this point, and consequently, the court once again concludes that the Mortgage Satisfaction Act, 21 P.S. § 721-6(d)(1), does not apply to this case.²

A. Statute of Limitations

Several of Plaintiffs' claims are barred by the applicable statute of limitations. Pennsylvania's two year statute of limitations, which governs actions for civil penalty or forfeiture, controls a plaintiff's claims under the previous statute for failure to satisfy a mortgage upon request. See Estate of Ortlieb v. Hudson United Bank, 128 Fed. Appx. 214 (3rd Cir. 2005). Under the previous statute, a mortgagee who fails to enter satisfaction within 45 days of a mortgagor's request may be held liable, and liability for such failures to satisfy a mortgage applies "for every such offense." 21 P.S. § 682. Thus, each request to mark a mortgage as satisfied that is not timely complied with is actionable as a separate claim. Pantuso Motors, Inc. v. Corestates Bank, N.A., 745 A.2d 614, 618-19, (Pa. Super. Ct. 1999). Each request must also comply with the two year statute of limitations.

²Counsel is directed to the court's order of December 21, 2005 (Dkt. # 14) for the rationale underlying the court's decision.

Plaintiffs' filed the instant action on January 21, 2005. Thus, any request for satisfaction made prior to January 21, 2003, is untimely, and summary judgment will be granted as to those claims. There are five requests identified in the record, some in writing, and some verbal, made after January 21, 2003. (See Ex. B at pp. 109 -114, 117-118, 120-121, 123-126; Ex. E at pp 22-23, 26-29, 35-38). Defendant admits they failed to enter a satisfaction piece in response to within the 45 day period as required by the previous statute. (Def. Mem. of Law in Support of Mot. for Summary Judgment at 6). Those claims are not barred by the statute of limitations and, as noted in the court's order denying Defendant's motion to dismiss, under the previous mortgage satisfaction statute, a verbal request is sufficient to invoke the 45 day period for response. See O'Donoghue, 556 Pa. at 357-58.

B. Plaintiffs' common law fraud and UTPCPL claims

Plaintiffs also raise claims of common law fraud and violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). In order to recover under the UTPCPL Plaintiffs must prove all of the elements of common law fraud. Colaizzi v. Beck, 895 A.2d 36, 39 (Pa. Super. 2006). To survive a summary judgment motion under common law principles, Plaintiffs must establish that Defendant committed a misfeasance, which is the improper performance of a contracted obligation. Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 604 (Pa. Super. 1988). The commission of a nonfeasance, the failure to perform a contract obligation, is not actionable under common law fraud. Id. Plaintiffs argue that Defendant's repeated failures to deliver the satisfaction piece creates an inference of misfeasance. This argument is not persuasive. Repeated acts of nonfeasance cannot create an inference of misfeasance, and since Plaintiffs have no other evidence to support a claim of misfeasance, their common law fraud and UTPCPL claims cannot survive a summary judgment motion.

C. Plaintiff's claim for "Penalties and Legal Fees"

Finally, Plaintiff's Complaint includes a count for "Penalties and Legal Fees."

There is no independent cause of action for "penalties" under Pennsylvania law, they are simply incident to a separate cause of action. Shanks v. Alderson, 582 A.2d 883, 885 (Pa. Super. 1990). Plaintiffs' claims for legal fees also fail, as there is no statutory allowance or agreement between the parties that would allow such recovery. See Chatham Communications, Inc. v. General press Corp., 344 A.2d 837, 842 (Pa. Super. 1975) (holding that there can be no recovery for counsel fees from the adverse party to a cause, in the absence of express statutory allowance of the same or clear agreement by the parties). Accordingly, Count III of Plaintiffs' complaint cannot survive a summary judgment motion. An appropriate order follows.