MEMORANDUM DECISION

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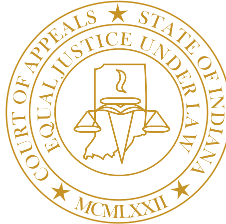

IN THE

Court of Appeals of Indiana

Neil R. Klunder and Marilyn S. Klunder,

Appellants-Defendants/Counterclaim Plaintiffs

v.

The Bank of New York Mellon f/k/a The Bank of New York as indenture trustee for CWHEQ Revolving Home Equity Loan Trust, Series 2007-A; and Specialized Loan Servicing LLC,

Appellees-Plaintiffs/Counterclaim Defendants

October 29, 2024

Court of Appeals Case No.
23A-MF-2585

Appeal from the Porter Superior Court

The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No.
64D02-2104-MF-3361

Memorandum Decision by Judge Kenworthy

Judges Felix and DeBoer concur.

Kenworthy, Judge.

Case Summary

[1] After The Bank of New York Mellon f/k/a The Bank of New York as indenture trustee for CWHEQ Revolving Home Equity Loan Trust, Series 2007-A ("BONYM") sued to foreclose on Neil and Marilyn Klunder's Porter County home, the Klunders counterclaimed, alleging violations of, among other things, Indiana's Deceptive Consumer Sales Act ("DCSA").[1] The trial court granted BONYM and the loan servicer—Specialized Loan Servicing LLC ("SLS")—summary judgment. The Klunders now appeal, raising the following dispositive issue: Did a genuine issue of material fact preclude summary judgment for BONYM and SLS on the Klunders' claim under the DCSA? We affirm.

Facts and Procedural History

[2] In 2006, the Klunders obtained a home equity line of credit ("Note") in the principal amount of $51,200. The Klunders secured the Note by executing a second mortgage ("Mortgage") on their home.[2] Three years later, the Klunders

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[1] Ind. Code ch. 24-5-0.5.

[2] The Mortgage was assigned to BONYM in March 2021.

filed for Chapter 7 bankruptcy. As a result, the Klunders' personal liability on the Note was discharged.

[3] SLS began servicing the Note in February 2013. At that time, the Klunders were current on their monthly payments. In April 2013, Neil contacted SLS to "find out why [he] wasn't receiving [his] monthly billing statement" as he had received from the prior servicer of the Note. *Appellant's App. Vol. 2* at 152. Neil continued: "If I am not receiving any billing statements, I can only assume that my second mortgage was discharged in the bankruptcy." *Id.* About a month later, SLS responded to Neil's correspondence:

> Our records indicate the account was included in a Chapter 7 Bankruptcy which was discharged on July 27, 2009. As such, you are no longer responsible for the debt. . . . As a result, we cannot generate billing statements. . . .
>
> For your information, the account is now due for the April 25, 2013 billing in the amount of $247.77. This information is provided as a direct response to your inquiry and does not constitute a demand for payment.
>
> You may continue to make voluntary monthly payments in order to protect the interest in the property[.]

Id. at 153. Around this time, the Klunders stopped making payments on the Note.

[4] In early 2020, SLS started sending statements to the Klunders regarding the Note. The statements specified the amount past due on the Note and the bottom of each statement included a notice, which read:

> Bankruptcy Notice - If you are a customer in bankruptcy or a customer who has received a bankruptcy discharge of this debt: Please be advised that this notice is to inform you of the status of the mortgage secured by the subject property. This notice constitutes neither a demand for payment nor a notice of personal liability to any recipient hereof, who might have received a discharge of such debt in accordance with applicable bankruptcy laws. . . . If you received a discharge of the debt in bankruptcy, we are aware that you have no personal obligation to repay the debt. We retain the right to enforce the lien against the collateral property, which has not been discharged in your bankruptcy, if allowed by law and/or contract.

Id. at 166 (capitalization removed). The Klunders did not make any payments following their receipt of several statements from SLS.

[5] Because the Klunders had not made a payment since 2013, SLS sent the Klunders pre-suit notice on October 16, 2020, saying if the Klunders remained in default, BONYM may foreclose on their property. In March 2021, the Klunders' attorney sent SLS a letter sharing his view SLS had violated the DCSA and provided SLS an opportunity to "cure" the alleged violation by paying the Klunders $1,500. *Id.* at 65.

[6] In April 2021, BONYM sued to foreclose on the Klunders' home. The Klunders counterclaimed, asserting, in part, BONYM and SLS "committed a deceptive, unfair and abusive act and practice by sending deceptive

correspondence to the Klunders despite knowing they were not personally liable for the Note, in violation of the Deceptive Consumer Sales Act, particularly Indiana Code § 24-5-0.5-3(a)." *Id.* at 73. The Klunders then sought leave to file a second amended counterclaim to include class action allegations, which the trial court denied. In February 2023, BONYM and SLS moved for summary judgment on the Klunders' counterclaims. After a hearing, the trial court granted BONYM and SLS summary judgment.[3]

Summary Judgment Standard of Review

[7] We review a trial court's summary judgment decision *de novo*, applying the same standard as the trial court. *Cave Quarries, Inc. v. Warex LLC*, 240 N.E.3d 681, 684 (Ind. 2024). We consider only the evidence designated to the trial court and draw all reasonable inferences in the non-movant's favor. *Cosme v. Clark*, 232 N.E.3d 1141, 1150 (Ind. 2024). "And '[a]lthough the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court.'" *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909–10 (Ind. 2009)).

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[3] After the trial court granted BONYM and SLS summary judgment on the Klunders' counterclaims, BONYM moved for summary judgment on its *in rem* foreclosure complaint. Before the trial court ruled on this motion, the Klunders sold their home and paid BONYM. BONYM then filed a motion to dismiss its foreclosure action, which the trial court granted.

[8] A party seeking summary judgment must establish "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley*, 15 N.E.3d at 1003 (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)).

[9] Once the moving party satisfies its initial burden, the burden "shifts to the non-movant to 'come forward with contrary evidence' showing an issue for the trier of fact." *Id.* (quoting *Williams*, 914 N.E.2d at 762). The non-moving party, however, cannot "rest upon the mere allegations or denials of his pleading." T.R. 56(E). Instead, the party opposing summary judgment must, by affidavit or other evidence, "set forth specific facts showing that there is a genuine issue for trial." *Id.* Mere speculation is insufficient. *Cave Quarries*, 240 N.E.3d at 685.

The trial court did not err in granting BONYM and SLS summary judgment.

[10] Before analyzing whether the trial court properly granted BONYM and SLS summary judgment on the Klunders' DCSA claim, we pause to provide some background about the nature of a mortgage interest that survives a Chapter 7 bankruptcy. Chapter 7 bankruptcy is a "liquidation type bankruptcy" in which "the debtor surrenders his assets (subject to certain exemptions) and in

exchange is relieved of his debts (with certain exceptions)[.]" *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820, 826 (Ind. 2017) (quoting *Palomar v. First Am. Bank*, 722 F.3d 992, 995 (7th Cir. 2013)). In this sense, a Chapter 7 discharge gives a homeowner debtor a "fresh start" by eliminating the homeowner's personal liability for his mortgage loan. *Id.* at 826–27 (explaining discharge under Chapter 7 "wipes out" a homeowner's obligation to pay back the loan, thereby giving the debtor a "new opportunity in life with a clear field for future efforts, unhampered by the pressure of preexisting debt") (internal quotation omitted).

[11] That said, "such a discharge extinguishes *only* 'the personal liability of the debtor.'" *Id.* at 827 (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 82 (1991)). In other words, "discharge of debt has no bearing on the validity of the mortgage lien." *Id.* So, although a Chapter 7 discharge "removes the ability of creditors to seek to collect against the debtor individually (known as *in personam* liability)," liens—like a mortgage—are "*in rem* meaning they are rights against the property which are enforceable" even after Chapter 7 discharge. *Id.* at 827–28. With this context in mind, we now turn to the Klunders' DCSA claim.

[12] The Klunders contend the trial court improperly granted BONYM and SLS summary judgment because genuine issues of material fact exist concerning whether SLS and BONYM violated the DCSA by sending the Klunders "deceptive correspondence . . . despite knowing they were not personally liable

for the Note." *Appellant's App. Vol. 2* at 73.[4] More specifically, the Klunders maintain the alleged violations amount to both uncured and incurable deceptive acts under the DCSA, entitling them to treble damages and attorney fees.

[13] The DCSA is a "remedial statute," *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 332 (Ind. 2013), designed to "protect consumers from suppliers who commit deceptive and unconscionable sales acts," I.C. § 24-5-0.5-1(b)(2) (2006). Under the DCSA, a supplier "may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction." I.C. § 24-5-0.5-3(a) (2019). To effectuate its purpose and enforce its prohibition, the DCSA allows a "person relying upon an uncured or incurable deceptive act [to] bring an action for the damages actually suffered[.]" I.C. § 24-5-0.5-4(a) (2019). But the DCSA "does not apply" to an act or practice "required or expressly permitted by federal law, rule, or regulation . . . or . . . state law, rule, regulation, or local ordinance." I.C. § 24-5-0.5-6 (2006).

[14] Here, the DCSA does not apply to the alleged deceptive acts because the acts were permitted by law. Under federal law, for example, a creditor shall—to the extent applicable—furnish a consumer with a periodic statement disclosing

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[4] The Klunders also allege BONYM and SLS violated the DCSA by foreclosing on the Klunders' home "in retaliation" for the letter sent by the Klunders' attorney. *Id.* at 71. In their view, "the motivation for filing the lawsuit was to punish and harass the Klunders for asserting a claim against SLS and was intended to discourage the Klunders from bringing a lawsuit against SLS." *Id.* In so arguing, however, the Klunders overlook the initiation of the *in rem* foreclosure process by SLS by sending them pre-suit notice on October 16, 2020—over seven years after the Klunders defaulted on the Note. *See* I.C. § 32-30-10.5-8(a) (2018) (requiring a creditor to send pre-suit notice to the debtor at least thirty days before filing a foreclosure action). The trial court properly granted BONYM and SLS summary judgment on this counterclaim.

several items, including some information particular to home-equity plans. *See* 12 C.F.R. § 1026.7(a); *see also* 12 C.F.R. § 1026.5(b)(2)(i) ("The creditor shall mail or deliver a periodic statement as required by § 1026.7 for each billing cycle at the end of which an account has a debit or credit balance of more than $1 or on which a finance charge has been imposed."). And because the Klunders defaulted by not making payments on the Note since 2013, BONYM could lawfully "foreclose the equity of redemption" contained in the Mortgage. I.C. § 32-30-10-3(a) (2016) (allowing a mortgagee or its assigns to sue in a court of the county where the real estate is located to foreclose on the equity of redemption contained in the mortgage if the mortgagor defaults in the performance of any condition contained in the mortgage); *McCulloch*, 70 N.E.3d at 828 (noting a mortgage lien can survive a Chapter 7 bankruptcy and "is enforceable as an *in rem* action"). All in all, the alleged deceptive acts were permitted by law and not actionable under the DCSA. *See Koehlinger v. State Lottery Comm'n of Ind.*, 933 N.E.2d 534, 542 (Ind. Ct. App. 2010) (affirming a grant of summary judgment against plaintiffs on a DCSA claim based on an activity permitted by state law), *trans. denied*.

[15] The Klunders' counterclaims boil down to a misunderstanding of two different but interrelated concepts: the loan due on the mortgage as shown by the Note, and the lien on the property as shown by the Mortgage. By obtaining a discharge in their Chapter 7 bankruptcy, the Klunders protected themselves from personal liability on debts otherwise due to their creditors, including on the Note. But the mortgage lien survived and is enforceable as an *in rem* action.

See McCulloch, 70 N.E.3d at 828. The trial court correctly granted BONYM and SLS summary judgment on the Klunders' DCSA counterclaims. *See id.* (considering "altogether proper" the grant of summary judgment to a mortgagee seeking an *in rem* foreclosure on a mortgage lien which survived a Chapter 7 discharge).

Conclusion

[16] The trial court did not err in granting BONYM and SLS summary judgment on the Klunders' DCSA claims.[5]

[17] Affirmed.

Felix, J., and DeBoer, J., concur.

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[5] Based on this conclusion, we need not decide whether the trial court erred in denying the Klunders leave to file a second amended complaint to add class-action allegations.