

[Cite as *Yunker v. Citizens Commercial Bank & Trust Co.*, 2004-Ohio-4162.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
MERCER COUNTY**

**THERESA A. YUNKER, EXECUTOR
OF THE ESTATE OF
WALTER LLOYD YUNKER**

PLAINTIFF-APPELLANT

CASE NO. 10-04-05

v.

**THE CITIZENS COMMERCIAL BANK
AND TRUST COMPANY**

OPINION

DEFENDANT-APPELLEE

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: August 9, 2004

ATTORNEYS:

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SHAW, P.J.

{¶1} Plaintiff-Appellant, Theresa A. Younker, appeals the March 2, 2004 judgment of the Court of Common Pleas of Mercer County, Ohio, granting Summary Judgment to Defendant-Appellee Citizens Commercial Bank and Trust Company (“Citizens Bank”).

{¶2} In 1991 Theresa was in financial trouble and had many outstanding debts. With the help of her father, Walter L. Younker, she refinanced her mortgage with Citizens Bank. The mortgage was for her personal residence which she and her father owned as tenants in common. The refinanced mortgage with Citizens Bank allowed her to consolidate her outstanding debts and pay for some home remodeling. As a consequence of Theresa’s financial troubles, her father had to put up additional security for the loan, which required him to mortgage his personal residence.

{¶3} The closing for the mortgage was held on June 21, 1991. On or about this date, Citizens Bank offered Theresa a Credit Life and Disability Insurance Policy. However, the same insurance was not offered to Walter, even though he was a co-signor on the loan. On the Truth in Lending Disclosure Statement, Theresa signed accepting the credit life insurance while the space where Walter would have been offered credit life insurance was marked “n/a” for “not available.”

{¶4} Theresa submits, and Citizens Bank does not appear to contest, that Citizens Bank generally offered the insurance policy to its eligible borrowers. Representatives of Citizens Bank testified that the insurance was generally offered to eligible persons 66½ years old or younger. Walter Younker was 55 years old in 1991, but was not offered the life insurance policy that was offered to Theresa.

{¶5} Defendant asserted in the lower court that Walter was not offered the credit life insurance because it would have added substantially to the monthly payment owed to the bank. Since Theresa was making the monthly payments to the bank and not Walter, this would have constituted an added expense which she could not afford. Citizens Bank contends that it did not offer Walter credit life insurance because of Theresa's financial situation.

{¶6} Moreover, Citizens asserts that Walter had a prior medical history which included diabetes, high blood pressure, and angina. Because of this medical history, the bank's insurer would have denied Walter coverage had he been offered the credit life insurance policy.

{¶7} On November 28, 1994 Walter L. Younker died. He did not receive the benefits of the credit life insurance offered to his daughter. There were insufficient funds to pay off the mortgage and in 1995 Citizens Bank asserted its lien and foreclosed on the personal residence of Walter Younker.

{¶8} On January 24, 2000 Theresa filed this action against Citizens Bank seeking damages for their failure to offer credit life insurance to her father, Walter Younker. Theresa thereafter amended her complaint, and asserted three causes of action: (1) breach of fiduciary duty, (2) common law fraud, and (3) age discrimination. Defendant Citizens Bank filed a Motion for Summary Judgment, which the trial court granted on March 2, 2004. In entering summary judgment for Citizens Bank, the trial court held that Citizens Bank owed no fiduciary duty to the Younkers, that because there was no duty to offer credit life insurance Citizens did not commit fraud by stating on the Truth in Lending Statement that credit life insurance was not available to Walter Younker, and that both the breach of fiduciary duty and age discrimination causes of action were barred by the statute of limitations. Theresa now appeals.

{¶9} Appellate review of a motion for summary judgment is de novo. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129, 572 N.E.2d 198. We must conduct an independent review of the record, and “stand in the shoes of the trial court.” *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103, 701 N.E.2d 383. Summary judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). After evaluating the record in a light

most favorable to the nonmoving party, the grant of summary judgment must be overruled if reasonable minds could find for the nonmoving party. *Id.*

{¶10} The moving party bears the initial burden of demonstrating that he is entitled to summary judgment; thereafter the burden shifts to the non-moving party to show why summary judgment in favor of the moving party should not be had. See Civ.R. 56(E). The nonmoving party cannot rest on the allegations in the pleadings, but must set forth specific facts by affidavit or as otherwise provided by Civ.R. 56 which would entitle him to relief. *Id.* The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. See *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

{¶11} For ease of discussion, we will discuss appellant's assignments of error out of order.

Breach of Fiduciary Duty and Age Discrimination Causes of Action

{¶12} Theresa's complaint includes causes of action for breach of fiduciary duty and age discrimination. In her second and fourth assignments of error Theresa challenges the trial court's holding that these causes of action were barred by their respective statutes of limitations. The second and fourth assignments of error assert:

The court erred in holding that the applicable statute of limitation for the first cause of action was R.C. 2305.09(D), a four year statute, when the correct statute to be applied was R.C. 2305.07, a six year statute.

The court erred in holding that the third cause of action, a violation of the federal discrimination statute was time barred by a statute of limitations.

{¶13} The trial court held that the breach of fiduciary duty cause of action was governed by R.C. 2305.09(D), a four year statute of limitations. In addition, the court held that the latest date on which this cause of action could have accrued was Walter's death on November 28, 1994. Therefore, the statute of limitations for the cause of action expired November 28, 1998; because the complaint was not filed until January 4, 2000 the cause of action was time barred.

{¶14} Theresa argues that the court erred by applying R.C. 2305.09(D) to the breach of fiduciary duty cause of action. Instead, she argues, the proper statute of limitations was six years, pursuant to R.C. 2305.07, which provides:

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

Theresa contends that because the breach of fiduciary duty arose out of the failure to disclose the availability of credit life insurance on the Truth in Lending Disclosure Statement, the liability was created by Federal Regulation Z which required the truth in lending disclosures. This regulation was enacted pursuant to 15 U.S.C. § 1700 et seq., and therefore, Theresa argues, Citizens Bank's liability was "created by statute."

{¶15} This argument misstates the nature of the cause of action. The cause of action did not allege a violation of Federal Regulation Z, nor did it seek damages because of such a violation. Instead, the cause of action alleges that by failing to make credit life insurance available to Walter Citizens Bank breached a “customary fiduciary duty.” Theresa contends that Citizens Bank did not make credit life insurance available to Walter; there is nothing in Regulation Z which requires lending institutions to provide credit life insurance to borrowers. Therefore, the liability created by the cause of action did not arise pursuant to any statute, and R.C. 2305.07 is not the correct statute of limitation.

{¶16} The trial court correctly held that R.C. 2305.09(D) was the applicable statute of limitations. This is not a statutory claim, and therefore R.C. 2305.07 is inapplicable. Appellant’s second assignment of error is overruled.

{¶17} Theresa also challenges the court’s holding that the age discrimination cause of action was barred by the statute of limitations. The court noted that this cause of action was based on 15 U.S.C. § 1691(a)(1), which has either a one year statute of limitations under 15 U.S.C. § 1640(e), or the six year statute of limitations under R.C. 2305.07 because defendant’s liability was created by statute. Either way, the trial court held that the cause of action accrued in 1991 when the loan was closed, thus, the cause of action was time barred under either statute of limitations.

{¶18} We need not determine which statute of limitations applies in this situation, because the trial court correctly held that the cause of action was time barred under either statute. Even assuming Theresa is correct and the six year statute of limitations in R.C. 2305.07 applies because the liability arose based upon a violation of the federal statute the action was still not timely filed.

{¶19} The general rule is that the statute of limitations commences to run when the cause of action accrues. 25 Ohio Jur. 532. A cause of action based upon a violation of a statute accrues when the violation of the statute occurs. Thus, the statute of limitations commences to run when the violation of the statute occurs. *Arbor Village Condominium Assn. v. Arbor Village Ltd.* (1994), 95 Ohio App.3d 499, 642 N.E.2d 1124 (citing *Squire v. Trust Co.* (1947), 79 Ohio App. 371, 72 N.E.2d 137). Therefore, if Theresa's cause of action can correctly be characterized as a statutory violation, the six year statute of limitations in R.C. 2305.07 started to run when the statutory violation occurred.

{¶20} In the instant case, the cause of action for age discrimination arose when Citizens Bank allegedly violated 15 U.S.C. § 1691(a)(1). This alleged statutory violation occurred, at the latest, on the date the loan closed without Citizens Bank having offered credit life insurance to Walter because of his age. This occurred on June 21, 1991. Since the complaint was not filed until almost a decade later, in January of 2000, even the six year statute of limitations in R.C.

2305.07 had lapsed. Thus, Theresa's third cause of action is time barred and the fourth assignment of error is overruled.

{¶21} In her first assignment of error, Theresa asserts:

The court erred when it held that there was not a fiduciary relationship between a bank and its customer regarding the obligation of the bank to be truthful in its truth in lending disclosure regarding credit life insurance.

We need not address this issue, because, as we previously held, the trial court correctly found that the cause of action alleging a breach of Citizens Bank's "customary" fiduciary duty is barred by the statute of limitations, rendering this assignment of error moot.

{¶22} However, even if this action were not time barred, the trial court was correct in holding that there was not a fiduciary relationship between Citizens Bank and Theresa in regards to credit life insurance. A fiduciary relationship arises when a "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence." *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115. This requires more than the mere giving of advice; a fiduciary relationship is created "only when both parties understand that a special trust or confidence has been reposed." *Umbaugh Pole Bldg. CO., Ind. v. Scott* (1979), 58 Ohio St.2d 282, ¶1 of the syllabus.

{¶23} Theresa relies on the Ohio Supreme Court's decision in *Stone v. Davis* (1981), 66 Ohio St.2d 74, for the proposition that a fiduciary duty arises

between a bank and its customer requiring the bank to disclose information regarding insurance. The reliance on *Stone* for this proposition is misplaced. *Stone* merely held that a lending institution has a duty to advise the customer about procuring insurance when it broaches the subject with the customer. *Stone*, 66 Ohio St.2d at 80. In that case, the Court found that when a bank uses a Regulation Z disclosure to ascertain whether the individual is interested in obtaining insurance, the bank has a duty to inform the customer how he or she may obtain insurance.

{¶24} The case *sub judice* is distinguishable from *Stone* on its facts. This case is similar to the situation in *Warren v. Percy Wilson Mortgage & Finance Corp.* (1984), 15 Ohio App. 3d 48, wherein the Fifth District Court of Appeals distinguished *Stone* and held that the mere broaching of the subject of insurance does in itself not create a fiduciary relationship. *Id.* at 51. Here, as in *Warren*, there is nothing in the record to demonstrate a fiduciary relationship; there is nothing to distinguish this case from the normal situation of lender and creditor.

{¶25} Walter Younker sought out Citizens Bank to procure a loan on behalf of his daughter, and there is nothing in the record demonstrating that he reposed a special trust or confidence in Citizens Bank. Moreover, Walter did not seek credit life insurance for himself, even though it was made available to his daughter. In fact, the record indicates that Theresa would not have been able to

afford the additional cost for insuring her father, and she was making the payments on the loan. Under these circumstances, there was not a sufficient relationship to create a fiduciary duty on the part of Citizens Bank to disclose or make available credit life insurance. See *McMurray v. Surety Federal Savings & Loan Assn.* (1986), 82 N.C.App. 729, 732 (evaluating *Stone*, *supra*).

{¶26} Furthermore, unlike in *Stone* Citizens Bank did not use the Regulation Z disclosure to ascertain whether Walter wanted credit life insurance, it indicated on the disclosure that insurance was not available to him. Citizens Bank therefore did not “broach” the subject of credit life insurance with Walter and then fail to disclose how to obtain it, as was the situation in *Stone*. Instead, Citizens Bank affirmatively stated that credit life insurance was not available to Walter. Because Citizens Bank is not required to offer credit life insurance under Regulation Z, it did not breach a duty to Walter by failing to offer the insurance coverage.

{¶27} Based on the foregoing, Theresa’s first assignment of error is overruled.

Common Law Fraud Cause of Action

{¶28} The remaining cause of action in the complaint alleges common law fraud. Theresa’s third assignment of error asserts:

The trial court erred in holding that “there is no evidence in the record that credit life insurance was applicable to Plaintiff’s

decedent or that it should have been. Since citizens had no legal duty to make credit life insurance available to plaintiff's decedent, and in fact did not, the bank did not commit fraud by making the statement on the federal Truth in Lending Disclosure statement that credit life insurance was not applicable to him."

Theresa asserts that summary judgment was improper for this cause of action because Citizens Bank did not produce evidence demonstrating that credit life insurance was not available to Walter. Citizens Bank, as the moving party, bears the burden of showing that no genuine issue of material fact exists for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330. Theresa asserts that Citizens Bank has failed to fulfill this burden and therefore summary judgment is not appropriate.

{¶29} However, Citizens Bank need only "demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. Theresa, as the non-moving party, must produce evidence on any issue for which she bears the burden of production at trial. *Celotex*, 477 U.S. at 322–23 ("[Summary judgment is appropriate] against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."), ruling followed by *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, at ¶3 of the syllabus. Therefore, Citizens

Bank need only demonstrate that there is no genuine issue of material fact on any one element of the fraud claim.

{¶30} The elements of fraud are stated in *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169, 462 N.E.2d 407:

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) 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,
- (d) with the intent of misleading another into relying upon it,
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance.”

Id. (quoting *Friedland v. Lipman* [1980], 68 Ohio App.2d 255, 429 N.E.2d 456, paragraph one of the syllabus).

{¶31} In the case *sub judice*, there is no evidence that Citizens Bank ever knowingly made a false statement. Theresa claims that Citizens Bank committed fraud by indicating that credit life insurance was not applicable to Walter when in fact it was. However, Citizens Bank has no legal duty to provide its customers with credit life insurance. As the trial court found, “[t]here is no evidence in the record that credit life insurance was applicable to plaintiff’s decedent or that it should have been.” Citizens Bank was not obligated, either legally or contractually, to make credit life insurance available to its members. It is clearly permissible for Citizens Bank not to offer this service on an individual basis.

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{¶32} Therefore, there is no evidence that credit life insurance was available to Walter, which would make Citizens Bank's representation false. Theresa has failed to make any showing that Citizens Bank made a false statement at any time, and summary judgment in favor of Citizens Bank on the issue of fraud is appropriate. Based on the foregoing, Theresa's third assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUPP and ROGERS, JJ., concur.