In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1667

JEFF FOSTER,

Plaintiff-Appellant,

v.

PNC BANK, NATIONAL ASSOCIATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 12-cv-3130 — **Mary M. Rowland**, *Judge*.

ARGUED DECEMBER 1, 2021 — DECIDED OCTOBER 18, 2022

Before MANION, BRENNAN, and JACKSON-AKIWUMI, *Circuit Judges*.

JACKSON-AKIWUMI, *Circuit Judge*. Jeff Foster appeals the district court's decision granting PNC Bank, National Association's motion for summary judgment. Because we find almost no error, we affirm on all fronts, except that Foster's Fair Credit Reporting Act ("FCRA") claim should be dismissed for lack of standing.

I

In 2004, Foster, a real estate investor, purchased property in Fort Lauderdale, Florida, with a $1.1 million loan secured by a mortgage on the property.[1] In May 2010, the parties modified the loan to extend the payment period and lower the interest rate, thereby lowering the monthly payments. Since then, Foster and PNC's relationship has fallen apart after a flurry of disputes over required insurance policies, loan payments, credit reports, and an escrow account—all of which are now the subject of this litigation.

Foster and PNC's clashes first began with his insurance obligations under the mortgage. Section 5 of the mortgage required Foster to maintain certain levels of insurances "against loss by fire, hazards included within the term 'extended coverage,' and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance" on the property or PNC would force-place such insurance. The cost of the force-placed insurance would "become additional debt of [Foster] secured by [the mortgage]." The mortgage stated that PNC was "under no obligation to purchase any particular type or amount of coverage" and that Foster acknowledged "that the cost of the insurance coverage so obtained [by PNC] might significantly exceed the cost of insurance that [he] could have obtained." PNC could change the insurance requirements during the loan term.

In March 2011, Foster and PNC separately learned that Foster underpaid his flood insurance. In April, PNC mailed Foster a letter that stated that his flood insurance coverage

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[1] Foster also purchased property in Illinois that is involved in the underlying litigation but not at issue in this appeal.

was below the required amount. The next month, Foster paid the insurance company the outstanding balance, which was $82, but PNC mailed him another letter stating that he had not provided proof of coverage, and that it would impose the appropriate force-placed flood insurance in 24 days. Foster did not receive this letter.

In May 2011, PNC, pursuant to its letter, obtained force-placed flood insurance for the property, paid for it through the escrow account associated with the loan, and increased Foster's monthly payments to cover the premiums. Foster contacted several PNC employees and stated he had the appropriate coverage; these representatives advised him to continue paying his original monthly payment. In July 2011, Foster provided PNC with proof of his flood insurance, and PNC refunded the total amount of the force-placed insurance to the escrow account. The refund did not result in a reduction of his monthly payments.

Then, there was the wind insurance. PNC maintains that it has always required wind insurance as part of the loan it gave Foster, but he claims that the loan did not initially require wind insurance. Nonetheless, Foster had wind insurance for the property in September 2010. When Foster's policy lapsed in September 2011, PNC mailed him a letter asking him to provide proof of insurance. As with all the others, Foster did not receive this letter. In October, PNC mailed him a second letter stating that it had acquired temporary wind insurance. Yet again, Foster did not receive this letter. A month later, Foster did a receive a letter—PNC's third letter about wind insurance, which informed him that PNC had acquired force-placed wind insurance. Foster did not acquire his own wind insurance policy until January 2012, which went into

effect the following month. PNC refunded most of the cost of the force-placed insurance to the escrow account, except for the premiums paid during the time when coverage lapsed. Because of this gap, Foster's monthly payments again increased and did not drop after reimbursement. Foster spoke with PNC representatives, who advised him to continue making the original payments. When his new wind insurance lapsed in March 2013, PNC mailed three more letters once a month, and in May 2013, PNC yet again acquired force-placed wind insurance. In 2014, after still not hearing from Foster about any wind insurance, PNC mailed a letter indicating it would continue to renew its force-placed policy.

All this time, Foster only made payments in the amount originally specified in the May 2010 modification—despite the fact that the payments had increased as a result of the force-placed insurance policies. In April 2012, PNC began returning Foster's payments as partial (incomplete) payments, which it was allowed to do under Section 1 of the mortgage. That same month, PNC mailed Foster a letter informing him that he was in default, and that it would accelerate the entire amount of the loan if he did not cure the default. After two years of receiving and returning partial payments from Foster, PNC decided to place the incomplete payments in a suspense account, which now contains just under $350,000. As of May 2019, PNC claimed Foster owed just over $1.75 million.

Since the partial payments were incomplete, PNC reported Foster's July and August 2011 payments as 60 days or more late to TransUnion and Equifax. In November 2011, Foster's credit score dropped. According to Foster, the drop in his credit score prevented him from obtaining new loans (though he never applied for any), purchasing new property (though

he never attempted to do so), and refinancing his current loans (though he never tried to). He also alleges the drop in his score forced him to sell his property and forgo rental income. In January 2012, Foster contacted TransUnion and Equifax to dispute PNC's reports that his loan payments were late. The credit reporting agencies notified PNC about the disputes. PNC reported that Foster's account was current through September 2011 and became past due from October 2011 through January 2012.

Foster's final dispute with PNC concerns PNC's use of the escrow account. Section 3 of the mortgage requires Foster to make payments to an escrow account to cover taxes, leasehold payments, and insurance premiums. In July 2010, Foster made his first payment under the May 2010 modification, part of which was credited to cover shortages in the escrow account. Each time PNC acquired force-placed flood and wind insurance policies, it advanced the premiums for those policies from the escrow account. When PNC received proof of insurance from Foster, it refunded the balance back to the escrow account.

The foregoing disputes led Foster to sue PNC. Foster's lawsuit presented multiple claims, only four of which remain on appeal: a claim under the FCRA for PNC's failure to investigate the two credit reporting disputes; a breach of contract claim regarding the force-placed flood and wind insurance policies; a breach of implied duty of good faith and fair dealing claim for the wind insurance; and a breach of fiduciary duty claim for the alleged mishandling of the escrow

account.[2] PNC counterclaimed to seek judgment on the loan. PNC filed for summary judgment and attached an affidavit from its business representative regarding PNC's records on the Florida property. Foster opposed the motion with his own affidavit. In his affidavit, in addition to alleging the injuries regarding his low credit score, Foster alleged that PNC's conduct resulted in loss of income and forced him to sell a variety of his possessions for below market value. After determining that Foster's affidavit was conclusory and speculative as to proof of insurance and his loan payments (plus a third issue regarding the Illinois property that is not relevant to this appeal) and that his evidence of damages was too general and conclusory, the district court granted PNC's motion. The district court then entered partial judgment as to the Florida property. Foster appeals the district court's judgment on the Florida property, and raises issues regarding his affidavit, PNC's affidavit, and the merits.

II

We review a district court's grant of summary judgment de novo. *Flexible Steel Lacing Co. v. Conveyor Accessories, Inc.*, 955 F.3d 632, 643 (7th Cir. 2020) (citation omitted). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "We draw 'all justifiable inferences' in the favor of the nonmoving party." *Flexible Steel*, 955 F.3d at 643 (citation omitted).

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[2] Foster also appealed claims for fraud and unjust enrichment but did not address these in his opening brief, so any arguments on those counts are waived. *Lisle v. Welborn*, 933 F.3d 705, 722 n.4 (7th Cir. 2019) (citations omitted).

A. Foster's Affidavit

We first begin with Foster's main piece of evidence—his affidavit. Foster argues that the district court erred because it did not appreciate the details in his affidavit, and it found his whole affidavit conclusory even though the court pointed to, by Foster's count, just three examples. Affidavits must be based on personal knowledge. FED. R. CIV. P. 56(c)(4); FED. R. EVID. 602. A nonmoving party's own affidavit can indeed be "a legitimate method of introducing facts on summary judgment." *McKinney v. Office of Sheriff of Whitley Cnty.*, 866 F.3d 803, 814 (7th Cir. 2017) (citation omitted). Evidence "presented in a 'self-serving' affidavit or deposition is enough to thwart a summary judgment motion," unless it fails to meet the usual requirements of any other form of evidence at the summary judgment stage. *Kellar v. Summit Seating, Inc.*, 664 F.3d 169, 175 (7th Cir. 2011) (citation omitted). While it is true that courts should generally not make credibility determinations at the summary judgment stage, *McCottrell v. White*, 933 F.3d 651, 657 (7th Cir. 2019) (citation omitted), a nonmoving party at the summary judgment stage cannot rest "upon conclusory statements in affidavits; [they] must go beyond the pleadings and support [their] contentions with proper documentary evidence." *Weaver v. Champion Petfoods USA Inc.*, 3 F.4th 927, 934 (7th Cir. 2021) (citation omitted). Mere speculation cannot "be used to manufacture a genuine issue of fact." *Id.* (citation omitted)

Foster's argument about his affidavit is incorrect on the law and in its application. As an initial matter, courts are allowed to find affidavits and other forms of evidence as insufficient or conclusory as a legal matter at the summary judgment stage; that is not an impermissible credibility

determination. *See, e.g.*, *id.* at 935–36 (plaintiff failed to survive summary judgment by relying solely on his own testimony of how a reasonable person would interpret "biologically appropriate"). Moreover, the district court did not cherry-pick three examples and declare Foster's affidavit conclusory in its entirety. Instead, it pointed to two relevant, specific instances where it believed Foster engaged in pure conjecture: whether he provided any proof of his flood insurance and whether he was current on his loan payments. In fact, the district court relied on parts of Foster's affidavit that were *not* conclusory, including when Foster learned that PNC required wind insurance and what quotes he received. The district court did not throw the baby out with the bathwater. It only determined two aspects of the affidavit were conclusory. We review those determinations for abuse of discretion. *See Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) (citation omitted).

On the proof of flood insurance, Foster stated that he provided the proof of insurance to PNC by May 2011, but he does not cite to any documentation or even specify how he provided PNC proof except to say that he spoke to PNC employees. But PNC has no record of Foster's proof of flood insurance until July 2011. Foster attempts to manufacture a factual dispute despite the dearth of evidence. The district court did not abuse its discretion in declining to join him on that journey.

As for whether he is current on his loan payments, Foster again provides no supporting documentation, such as bank statements, payment confirmations, or correspondence with PNC about the payment amounts. Moreover, his affidavit states that he made payments that were returned. Even taking these statements at face value, the facts do not elucidate how

much Foster paid. All these statements show is that he made *some* payments on the loan; they do not indicate whether those payments made him current. Because Foster's affidavit lacks substance on both the proof of flood insurance and the status of the loan payments, we see no abuse of discretion in the district court's determination of these issues.

B. PNC's Affidavits

Foster also argues that the district court erred because it accepted PNC's affidavits from its corporate representatives. As relevant here, Foster argues that PNC's affidavit is faulty because PNC's employee had no personal knowledge about the Florida loan and only "sets out the dates that PNC sent letters to Mr. Foster telling him that he had insufficient flood insurance."[3] Foster has waived that argument because he did not challenge the validity of the affidavit before the district court. *Mahran v. Advocate Christ Med. Ctr.*, 12 F.4th 708, 713 (7th Cir. 2021) (citation omitted). Putting aside waiver, Foster's argument is frivolous. The underlying documents regarding PNC's records on the Florida loan are permissible under the business records exception to hearsay, and the affidavits provide the authenticity of these records. FED. R. EVID. 803(6), 901(b)(1); *Steffek v. Client Servs., Inc.*, 948 F.3d 761, 769 (7th Cir. 2020) (citation omitted) ("Documents must be authenticated by an affidavit that lays a proper foundation for their admissibility, even at the summary judgment stage."); *United States v. Reese*, 666 F.3d 1007, 1017 (7th Cir. 2012) (citation omitted) ("A qualified witness need not be the author of

[3] Foster also argues that the other PNC affidavit is similarly conclusory. But that affidavit is about the Illinois property—which, again, is not at issue on appeal.

the document [admitted under the business records exception] but must have personal knowledge of the procedure used to create and maintain the document.").

C. Foster's FCRA Claim

Turning to the merits, Foster's first claim is that PNC violated the FCRA by failing to reasonably investigate the disputes in January 2012 about his loan payments. We affirm the district court's grant of summary judgment to PNC on this claim, but on a different ground than that reached by the district court. Specifically, although the district court erred in requiring Foster to prove damages as an element of his FCRA claim, Foster ultimately lacked standing to bring this claim.

The district court relied on *Walton v. BMO Harris Bank, N.A.* (*Walton II*), 761 F. App'x 589 (7th Cir. 2019), to suggest that proof of damages is an element of an FCRA claim. *Walton II* stated that damages are an element of FCRA claims under 15 U.S.C. § 1681e(b) for failure to follow reasonable procedures for accuracy of credit reports. *Id.* at 591–92 (citations omitted). But Foster's FCRA claim is for failure to conduct a reasonable investigation after receiving a dispute from a consumer reporting agency regarding inaccurate or incomplete information under 15 U.S.C. § 1681s-2(b)(1)(A). *See Walton v. EOS CCA*, 885 F.3d 1024, 1028 (7th Cir. 2018) (*Walton I*). *Walton II* dealt with an entirely different provision of the FCRA than the one at issue here. Therefore, regardless of whether damages is an element of a § 1681e(b) claim under *Walton II*, that case simply does not address the elements of a claim under § 1681s-2(b)(1)(A).

Nonetheless, Foster's claim fails on a different ground: standing. A plaintiff must show an injury under Article III

beyond just a statutory violation. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341–42 (2016); *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 880–81 (7th Cir. 2020). At the summary judgment stage, a plaintiff can establish standing through an affidavit with specific facts demonstrating "a concrete and particularized injury that is both fairly traceable to the challenged conduct and likely redressable by a judicial decision." *Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282, 284 (7th Cir. 2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Assuming Foster has provided enough to show an injury-in-fact,[4] he still lacks standing because the injury is not fairly traceable. The causation requirement requires the plaintiff to show "that the defendant's actual action has caused the substantial risk of harm." *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 696 (7th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). According to Foster's affidavit and the rest of the record, PNC received only two notices from credit reporting agencies in January 2012, both of which Foster insists PNC failed to reasonably investigate. Foster claims that this conduct by PNC caused his credit score to drop—a drop that happened in November 2011. But PNC's conduct in 2012 (i.e., its alleged failure to reasonably investigate) cannot have caused Foster's credit score to drop in late 2011. Therefore, Foster's FCRA claim must be dismissed for lack of standing.

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[4] Foster argued on appeal that the district court erred in finding that his affidavit relied on hearsay to prove his FCRA damages. Specifically, the district court found that his reliance on the lender's statements about his inability to obtain a loan was hearsay. Regardless of whether those statements are hearsay, Foster cannot pursue his FCRA claim due to the breakdown in causation. Therefore, we need not address this hearsay argument.

D. Remaining Arguments

As for the remaining three claims, all state law claims, Foster argues that there are genuine disputes of material fact with each one.[5] We disagree.

First, his breach of contract and breach of fiduciary duty claims fail because his evidence of damages is speculative, which vitiates an element of those claims. *People's Trust Ins. Co. v. Valentin*, 305 So. 3d 324, 326–27 (Fla. Ct. App. 2020) (citation omitted) (breach of contract); *Columbia Bank v. Turbeville*, 143 So. 3d 964, 970 (Fla. Ct. App. 2014) (citation omitted) (breach of fiduciary duty). He avers that he sold valuable possessions for less than market value without any evidence of a single item that he actually sold, how much it sold for, and what the fair market value was.

Second, damages aside, the breach of contract claim is doubly undermined by the fact that Foster received notice pursuant to the mortgage regarding the need to maintain wind insurance. Foster asserts multiple times that he did not receive many of PNC's letters, including most of the ones regarding the wind insurance. But Section 15 of the mortgage states that notice is "deemed to have been given to [Foster] when mailed by first class mail" or when he receives it "if sent by other means." Thus, it is irrelevant that Foster claims that he did not receive the letters; under the terms of the loan, he received notice and therefore knew he needed to acquire wind insurance. *See Roman v. Wells Fargo Bank*, 143 So. 3d 489, 490 & n.1 (Fla. Ct. App. 2014) (concluding plaintiff received notice based solely on mailing where mortgage included

[5] Florida law applies to the state law claims under the mortgage's choice of law provision.

language identical to this case). And since Florida law prohibits standalone claims for breach of the implied duty of good faith and fair dealing without an alleged breach of an express contract term, *Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc.*, 785 So. 2d 1232, 1234 (Fla. Ct. App. 2001) (citations omitted), he cannot survive summary judgment on that count either.[6] His breach of fiduciary duty claim additionally fails because Foster relies on his inadmissible statement regarding his proof of flood insurance, discussed above, and he did not substantively address the wind insurance.

Finally, Foster cannot succeed on PNC's counterclaim because he relies only on his conclusory statements that he was in full compliance with his loan obligations, and he admits that PNC had been returning his payments as partial payments for two years.

III

Finding almost no error in the district court's decision, we AFFIRM the judgment on all counts except the FCRA claim, which we VACATE and REMAND to dismiss for lack of standing.

[6] To the extent that Foster relies on a separate breach of contract under Section 3 of the mortgage regarding the escrow account, that claim fails as well because Foster waived the underlying argument by not properly raising it at the district court level. *Mahran*, 12 F.4th at 713 (citation omitted).