OPINION SUMMARY
MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION FOUR

PARK RIDGE ASSOCIATES, ET AL.,	)	No. ED108740
	)	
Appellant,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	
	)	Honorable Brian H. May
U.M.B. BANK, ET AL.,	)	
	)	
Respondent.	)	Filed: November 17, 2020

Appellants Park Ridge Associates Limited Partnership, SM-T.E.H. Realty 9 LLC, and Michael Fein (collectively "Appellants") appeal the trial court's grant of U.M.B. Bank ("U.M.B."), Spenserv-St. Louis, Inc. ("Spenserv"), Sugar Creek Finance Company, and Meramec Enterprise Holdings II LLC's (collectively "Respondents") motion to dismiss. Appellants raise four points on appeal. In Point I, Appellants argue the trial court erred by dismissing their breach of fiduciary duty claim because the petition alleged facts sufficient to establish U.M.B. and Spenserv ("Trustees") acted as trustees under the deed of trust during foreclosure, failed to treat Appellants fairly and impartially during the foreclosure process, failed to secure the best possible foreclosure price, negotiated in bad faith, and colluded to transfer the property to a holding company at a price below its true value. In Point II, Appellants argue the trial court erred by dismissing their conspiracy to breach fiduciary duty claim. In Point III, Appellants argue the trial court erred by dismissing their claim Respondents breached the implied covenant of good faith and fair dealing. In Point IV, Appellants argue the trial court erred by dismissing their unjust enrichment claim and request for a constructive trust.

AFFIRMED.

DIVISION IV HOLDS: Appellants' Point I is denied. Section 432.047 of the Missouri Revised Statutes prohibits debtors in commercial transactions from bringing an action or defense related to a credit agreement "unless the credit agreement is in writing, provides for the payment of interest or for other consideration, sets forth the relevant terms and conditions, and the credit agreement is executed by the debtor and the lender." Section 432.047 "eliminate[s] all claims and defenses" based on alleged oral agreements or promises to modify commercial credit agreements. *BancorpSouth Bank v. Paramont Properties, LLC*, 349 S.W.3d 363, 367 (Mo. App. E.D. 2011).

Point II is denied. To properly plead a civil conspiracy case, plaintiffs must plead two things: the underlying unlawful act causing damages and the civil conspiracy. *Envirotech, Inc. v. Thomas,* 259 S.W.3d 577, 586 (Mo. App. E.D. 2008). If the underlying wrongful act alleged fails to state

a cause of action, the civil conspiracy claim fails. *Id*. Appellants failed to plead an underlying unlawful act, so Point II fails.

Point III is denied. Appellants may plead a cause of action based on the covenant of good faith and fair dealing only if Appellants also alleged Respondents breached their contract. *Kroger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 413 (Mo. App. W.D. 2000). The covenant of good faith and fair dealing does not give rise to new obligations not otherwise contained in the contract's express terms. *Meridian Creative Alliance, LLC v. O'Reilly Automotive Stores, Inc.*, 519 S.W.3d 839, 845 (Mo. App. S.D. 2017). Appellants did not plead Respondents breached any term of the contract, so Point III fails.

Point IV is denied. To prove unjust enrichment, plaintiffs must prove "(1) defendant was enriched by the receipt of a benefit; (2) that the enrichment was at the expense of the plaintiff; and (3) that it would be unjust to allow the defendant to retain the benefit. *Central Parking System of Missouri v. Tucker Parking Holdings*, 519 S.W3d 485, 498 (Mo. App. E.D. 2017). "[P]laintiff[s] cannot recover under an equitable theory when [they have] entered into an express contract for the very subject matter for which [they seek] to recover." *Grisham v. Mission Bank*, 531 S.W.3d 522, 538-39 (Mo. App. W.D. 2017). The contract did not prohibit Respondents from acting as they did, so Point IV fails.

Accordingly, we affirm the trial court's judgment.

Opinion by: Philip M. Hess, J.

Gary M. Gaertner, Jr., P.J. and Michael E. Gardner, J. concur.

Attorney for Appellant: Michael A. Gross

Attorney for Respondent: Ryan C. Hardy, Arthur D. Gregg, Robert D. Blitz, and Aaron W. Sanders

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