

2007

McKay Dee Credit Union v. Federal Home Loan Mortgage Corporation : Brief of Appellant

Utah Court of Appeals

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M. Darin Hammond, R. Blake Hamilton; Smith Knowles, P.C.; attorneys for appellant.

Scott Lundberg; Lundberg & Associates; attorneys for appellees.

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MCKAY DEE CREDIT UNION)	
)	
Appellant)	
)	Appellate Case No. 20070399-CA
v.)	
)	
FEDERAL HOME LOAN MORTGAGE))	
CORP., et al.,)	
)	
)	
Appellees)	
)	

<p>Scott Lundberg Lundberg & Associates 3269 S. Main Street, Suite 100 Salt Lake City, UT 84115 <i>Attorneys for Appellees</i></p>	<p>Smith Knowles, P.C. M. Darin Hammond R. Blake Hamilton 4723 Harrison, Suite 200 Ogden, Utah 84403 <i>Attorneys for Appellant</i></p>
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FILED
UTAH APPELLATE COURTS
NOV - 5 2007

IN THE UTAH COURT OF APPEALS

MCKAY DEE CREDIT UNION)	
)	
Appellant)	
)	
v.)	Appellate Case No. 20070399-CA
)	
FEDERAL HOME LOAN MORTGAGE))	
CORP., et al.,)	
)	
)	
Appellees)	
)	

OPENING BRIEF OF APPELLANT
MCKAY DEE CREDIT UNION

APPEAL FROM THE DECISION AND ORDER
OF THE SECOND JUDICIAL DISTRICT

Scott Lundberg Lundberg & Associates 3269 S. Main Street, Suite 100 Salt Lake City, UT 84115 <i>Attorneys for Appellees</i>	Smith Knowles, P.C. M. Darin Hammond R. Blake Hamilton 4723 Harrison, Suite 200 Ogden, Utah 84403 <i>Attorneys for Appellant</i>
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ORAL ARGUMENT REQUESTED

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the following is a complete list of all parties to the proceedings below that are involved in this Appeal.

McKay Dee Credit Union, Plaintiff below, Appellant
Federal Home Loan Mortgage Corp., Defendant below, Appellee
GMAC Mortgage, Defendant below, Appellee

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None

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None

JURISDICTIONAL STATEMENT

As provided by statute, the Court of Appeals has jurisdiction to review this matter resulting in this appeal pursuant to UTAH CODE ANN. §78-2a-3(3)(j). These issues were addressed in the trial court.

STATEMENT OF ISSUES ON APPEAL

ISSUE NUMBER 1. : Did the district court err in determining that Defendant Federal Home Loan Mortgage Company (“Freddie Mac”) is not liable in equity to Plaintiff McKay Dee Credit Union (“McKay Dee”) for unjust enrichment?

STANDARD OF REVIEW

The standard for review for this matter is that the appellate court should give no deference to the trial court’s conclusions of law and review the legal conclusion reached by the trial court for correctness. The factual findings of the trial court are reviewed on a clearly erroneous standard. See, Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998).

CONSTITUTIONAL PROVISIONS WHOSE INTERPRETATION ARE DETERMINATIVE

None.

STATUTES WHOSE INTERPRETATION ARE DETERMINATIVE

None.

STATEMENT OF THE CASE

McKay Dee was the holder of a deed of trust for certain real property (the "Property") to secure a loan in the amount of \$30,000.00. Said obligation was junior to a deed of trust in the amount of \$175,000.00 which was eventually assigned to Freddie Mac. At all times the Property was worth more than the value of the said debts. In April of 2001, McKay Dee received a notice of trustee's sale from the first lienholder that the Property would be sold at trustee's sale on May 15, 2001. McKay Dee contacted a phone representative which was identified in the notice of trustee's sale, to ascertain the status of the May 15, 2001 sale. McKay Dee was advised that the sale had been postponed until May 18, 2001 to be held at the same time and same location.

McKay Dee prepared itself to defend its position by issuing a check in preparation to attend the trustee's sale and bid on the Property. McKay Dee attended the postponed sale on May 18, 2001, and when nobody else attended McKay Dee believed that the debtors had reinstated their mortgage with the first lienholder as they had on several other occasions prior to this time. This was further confirmed by the fact that the debtors continued to make their payments to McKay Dee, continued living in the Property, and informed McKay Dee that they had re-instated at that time. The debtors discontinued making monthly payments to McKay Dee in June 2003 and McKay Dee subsequently found out that the trustee's sale had apparently occurred May 17, 2001, one day earlier than the time that the sales line had informed McKay Dee that the sale was going to take place.

McKay Dee brought an action against Freddie Mac for unjust enrichment. R. 1-6. The trial court was unwilling to impose liability on Freddie Mac. R. 271. Furthermore, the trial court found that McKay Dee had not conferred a benefit upon Freddie Mac and therefore could not prevail on its unjust enrichment claim. R. 271-72. McKay Dee believes that the Second District Court was in error.

STATEMENT OF FACTS

1. On March 22, 1996, McKay Dee extended a home equity line of credit to David R. and Julie S. Call (the "Calls") not to exceed \$30,000.00. R. 203.
2. McKay Dee received from the Calls a deed of trust in return for the above loan. R. 203.
3. Said obligation was junior to a deed of trust in favor of the Bank of Utah issued in February of 1996 in the amount of \$175,000.00. R. 203.
4. McKay Dee accepted the deed of trust because they were informed that the Property had sufficient equity to protect its interest. R. 203.
5. At the time that McKay Dee extended its loan, the Property was worth approximately \$287,000.00 according to the information and appraisals provided to McKay Dee Credit Union. R. 203.
6. At the same time that McKay Dee extended the loan it also recorded a Request for Notice which entitled it to any notice of any action on senior encumbrances. R. 203.
7. The Bank of Utah loan was assigned to Wells Fargo Bank in April of 1998. R. 204.

8. Wells Fargo Bank later assigned said obligations to GMAC in July of 1998.

R. 204.

9. The Calls struggled in making their payments to the first lien holder and a notice of default was recorded on June 17, 1999 but was later canceled on September 7, 1999. Again, a new notice of default was recorded against the Calls with regard to the first mortgage as of January 12, 2000, which was once again canceled on April 26, 2000. R. 204.

10. A third notice of default on the Property was recorded on August 8, 2000 by the Defendant or its representative. R. 204.

11. A sale was scheduled for December of 2000 and McKay Dee intended to bid at that sale to protect its position. However, the Calls apparently made reinstatement arrangements prior to that sale being accomplished. R. 204.

12. In April of 2001, McKay Dee received again a notice of trustee's sale from the first lienholder that the Property would be sold at trustee's sale on May 15, 2001. R. 204.

13. McKay Dee prepared itself to defend its position by issuing a check in preparation to attend that trustee's sale and bid on the Property. R. 205.

14. When McKay Dee called the sales line, provided for in the notice of trustee's sale, to ascertain the status of the May 15, 2001 sale McKay Dee was advised that the sale had been postponed until May 18, 2001 to be held at the same time and same location. R. 205.

15. On or about May 17, 2001, GMAC assigned the first deed to Freddie Mac.

16. McKay Dee attended the postponed sale on May 18, 2001, and when nobody else attended McKay Dee believed that the debtors had once again reinstated their mortgage with the first lienholder as they had each prior time. This was further confirmed by the fact that the Calls continued to make their payments to McKay Dee, continued living in the Property, and informed McKay Dee that they had re-instated at that time. R. 205.

17. The Calls discontinued making monthly payments to McKay Dee in June 2003 and McKay Dee subsequently found out that the trustee's sale had apparently occurred May 17, 2001, one day earlier than the time that the sales line had informed McKay Dee that the sale was going to take place. R. 205.

SUMMARY OF ARGUMENT

In reaching its conclusion that it was unwilling to impose liability on Freddie Mac the trial court made the following finding of fact, "[i]t is not clear to this Court if Mr. Shirra (Vice-President of McKay Dee) wrote the wrong sale date down, or if GMAC provided the wrong date." R. 271. However, upon a closer examination of Mr. Shirra's recorded testimony and the other evidence before the trial court this finding of fact by the trial court is erroneous. Therefore, the trial court should have imposed liability upon Defendants.

Furthermore, in reasonably relying upon the information provided to them about the postponement of the trustee's sale McKay Dee was unable to defend its trust deed position and Freddie Mac was able to purchase the Property as the only bidder for the amount of \$183,344.61. R. 303, Bench Trial Transcript p. 7. By its

own admission Freddie Mac was able to then sell the Property for the approximate amount of \$269,900.00. R. 128. Therefore, the benefit conferred upon Freddie Mac was at least the profit of \$86,555.39 that they received in selling the Property. Freddie Mac had an appreciation or knowledge of the benefit received from McKay Dee and Freddie Mac's retention of the benefit under the circumstances surrounding the apparent trustee's sale would be inequitable without payment to McKay Dee for the amount due to it. Therefore, the trial court erred in not granting McKay Dee's unjust enrichment claim.

ARGUMENT

I. THE TRIAL COURT ERRED BECAUSE IT WAS CLEARLY ERRONEOUS TO CONCLUDE THAT MCKAY DEE HAD NOT BEEN GIVEN THE WRONG DATE OF THE TRUSTEE'S SALE.

Utah law is clear that a trustee's foreclosure sale is void when a defect or irregularity, "would have the effect of chilling the bidding and causing an inadequacy of the price". Concepts, Inc. v. First Sec. Realty Services, Inc., 743 P.2d 1158, 1159 (Utah 1987). Concepts and its progeny, *i.e.* Timm v. Dewsnup, 86 P.3d 699 (Utah 2003), and Occidental/Nebraska Fed. Savings Bank v. Mehr, 791 P.2d 217 (Utah App. 1990), arise from circumstances where trustee's sales were conducted with a valid notice of default, but an alleged irregularity in either: 1) a defect in the notice of sale itself (Concepts), 2) the timing of the notice of sale (Occidental), or the service of the notice of sale (Timm). Therefore, in this case the trial court should have imposed liability upon Freddie Mac if it concluded that

McKay Dee had received the wrong date for the trustee's sale because such an irregularity "would have the effect of chilling the bidding and causing an inadequacy of the price." Concepts, 743 P.2d at 1159.

In reaching its conclusion that it was unwilling to impose liability on Freddie Mac the trial court made the following finding of fact, "[i]t is not clear to this Court if Mr. Shirra (Vice-President of McKay Dee) wrote the wrong sale date down, or if GMAC provided the wrong date." R. 271. A close examination of Mr. Shirra's recorded testimony and the other evidence before the trial court demonstrates that this finding of fact was clearly erroneous.

Mr. Shirra testified that he called the sales line provided for in the notice of trustee's sale, to ascertain the status of the May 15, 2001 sale. R. 303, Bench Trial Transcript p. 41. "I was given the date that the sale was rescheduled for 5/18, May the 18th, which is three days later." R. 303, Bench Trial Transcript p. 41. This testimony is consistent with the testimony Mr. Shirra gave in his affidavit. R. 141. It is also consistent with the testimony he gave during his deposition. R. 244. Furthermore, Mr. Shirra's testimony is supported by the Notice of Sale. R. 192. Mr. Shirra testified that while listening to the message on the sales line he circled the date 5/15/2001 and then drew a line out to the side where he wrote the new date 5/18/2001. R. 303, Bench Trial Transcript p. 41. Also, Mr. Shirra's testimony is strengthened by the fact that he had a check prepared, R. 198, and attended the postponed sale on May 18, 2001. R. 205.

Freddie Mac has never presented any evidence to contradict Mr. Shirra's

testimony. In fact it should be noted that Freddie Mac's only defense to this pivotal fact is the disclaimer notice given at the beginning of the sales line recording, a defense that the trial court concluded to be wholly insupportable. R. 303, Bench Trial Transcript p. 114. Thus, in reaching its finding that it was not convinced that McKay Dee had been given the wrong date for the trustee's sale the only evidence that the trial court relied on was the evidence presented above along with Mr. Shirra's cross examination testimony. R. 271.

During cross examination Mr. Shirra was asked about the Notice of Sale with the handwriting indicating the sale date of May 18th, 2001. R. 303, Bench Trial Transcript p. 54. He again testified that this was his handwriting. R. 303, Bench Trial Transcript p. 54. He was then asked, "[i]s it possible that you could have written down the incorrect date for the sale?" R. 303, Bench Trial Transcript p. 54. He responded by again saying, "I wrote that down and so I got it from the sale line." R. 303, Bench Trial Transcript p. 54. It was only after being pressed on the issue by Freddie Mac's counsel several times that Mr. Shirra indicated, "[t]here is that possibility." "The same as the possibility of them having the wrong date." R. 303, Bench Trial Transcript p. 54. The fact that Mr. Shirra stated a possibility does not go to the weight or to the credibility of his testimony.

Taking this testimony together with all of Mr. Shirra's other testimony and all the evidence before the trial court it was clearly erroneous for the trial court to conclude that McKay Dee was not given the wrong date for the trustee's sale. Therefore, the trial court should have imposed liability upon Freddie Mac because

McKay Dee had been given the wrong date for the trustee's sale and that is the type of irregularity that, "would have the effect of chilling the bidding and causing an inadequacy of the price." Id.

II. MCKAY DEE'S UNJUST ENRICHMENT CLAIM SHOULD NOT HAVE BEEN DISMISSED BECAUSE MCKAY DEE CONFERRED A KNOWN BENEFIT UPON THE DEFENDANTS WHICH IF THEY RETAIN WHOULD BE WHOLLY INEQUITABLE.

The facts underlying an unjust enrichment claim are often complex and vary greatly from case to case. Allen v. Hall, 565 Utah Adv. Rep. 9 (Utah 2006), Desert Miriah, Inc. v. B & L Auto, Inc., 12 P.3d 580 (Utah 2000), Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998). Indeed, by its very nature, the unjust enrichment doctrine developed to handle fact situations, like the one present in this case, that do not fit within a particular legal standard but which nonetheless merit judicial intervention. Id., see also Restatement of Restitution, intro. n. (1937) (noting that narrow early common law causes of actions posed difficulties and required creation of chancery courts because "there were many situations in which one justly entitled to recover was not able to do so"). While the unjust enrichment doctrine has ancient roots, and courts have had a great deal of opportunity to apply it, the court's ability to state clearly the outcome-determinative factors remains elusive. Id. However, the rationale for granting equitable relief is that as a matter of reason and justice from the acts and conduct of the parties and circumstances surrounding a transaction, restitution need be provided for the purpose of bringing about justice. Id.

For example in the Jeffers case the Utah Supreme Court upheld the trial courts ruling that individuals who built improvements on land located in Hildale, Utah which they did not even own because the property was held in trust by the United Effort Plan Trust (“the UEP”) were able to recover for unjust enrichment. Jeffers, 970 P.2d at 1248. The trial court held that even though the individuals intended to benefit and would benefit from the improvements by occupying the property during their lifetimes, the individuals' services still conferred a direct, not incidental, benefit on the UEP and thus they were able to recover for them. Id. The Jeffers case is instructive that the cause of action of unjust enrichment is equitable in nature and should be broadly construed. The trial court rigidly applied the elements of unjust enrichment without looking at the broad picture. McKay Dee’s nonattendance at the trustee’s sale was unfairly induced by Defendants with inaccurate information. The non-attendance at the sale benefited Freddie Mac abundantly. Had McKay Dee been provided with accurate information, it would have attended the sale, and McKay Dee would have at least received the amount owed on the underlying note, if not more because the property was worth so much more. Instead, Freddie Mac received a huge unjust enrichment from McKay Dee Credit Union.

In Utah a party may prevail on an unjust enrichment theory by proving three elements: “(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it

inequitable for the conferee to retain the benefit without payment of its value.”

American Towers Owners Assoc., Inc. v. CCI Mechanical, 930 P.2d 1182, 1192-93 (1996). Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. Id.

The trial court found that McKay Dee had not conferred a benefit upon Freddie Mac and therefore could not prevail on its unjust enrichment claim. R. 271-72. However, when looking at all the facts presented to the trial court its conclusion is not correct.

A. MCKAY DEE CONFERRED A BENEFIT UPON FREDDIE MAC.

In this case McKay Dee conferred a benefit upon Freddie Mac by not attending the trustee’s sale which apparently occurred May 17, 2001. R. 205. In April of 2001, McKay Dee received a notice of trustee’s sale from the first lienholder that the Property would be sold at trustee’s sale on May 15, 2001. R. 204. McKay Dee prepared itself to defend its position by issuing a check in preparation to attend the trustee’s sale and bid on the Property. R. 204. When McKay Dee called the sales line, provided for in the notice of trustee’s sale, to ascertain the status of the May 15, 2001 sale McKay Dee was advised that the sale had been postponed until May 18, 2001 to be held at the same time and same location. R. 205. Again, McKay Dee prepared itself to defend its position by issuing a check and attending the postponed sale on May 18, 2001. R. 205.

In reasonably relying upon the information provided to them about the postponement of the trustee's sale McKay Dee was unable to defend its position and Freddie Mac was able to purchase the Property as the only bidder for the amount of \$183,344.61. R. 303 Bench Trial Transcript p. 7. By its own admission Freddie Mac was able to then sell the Property for the approximate amount of \$269,900.00. R. 128. Therefore, the benefit conferred upon Freddie Mac was the profit of \$86,555.39 that Freddie Mac received in selling the Property.

B. FREDDIE MAC HAD APPRECIATION OR KNOWLEDGE OF THE BENEFIT RECEIVED FROM MCKAY DEE.

At the same time that McKay Dee extended the loan to the Calls it also recorded a Request for Notice which entitled it to any notice of any action on senior encumbrances. R. 203. McKay Dee received the previous notice of defaults recorded on June 17, 1999, January 12, 2000, and August 8, 2000 as well as the notice of trustee's sale in April of 2001. R. 204. By its own admissions Freddie Mac knew that the Property would most likely be sold to a third party because there was significant equity in it. R. 241. Therefore, Freddie Mac had an appreciation or knowledge of the benefit received from McKay Dee's not attending the apparent trustee's sale. Moreover, McKay Dee's failure to attend the sale was induced by Freddie Mac.

C. THE RETENTION BY FREDDIE MAC OF THE BENEFIT UNDER THE CIRCUMSTANCES SURROUNDING THE APPARENT TRUSTEE'S SALE WOULD BE INEQUITABLE WITHOUT PAYMENT TO MCKAY DEE.

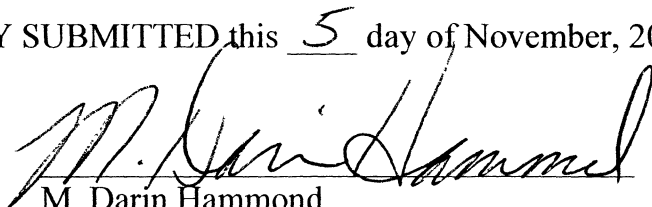
McKay Dee extended the loan in good faith, attempted to defend its second lien position in good faith, received payments from the customers for two years beyond the date that the property was sold and has now been left with a deficiency plus after accruing interest and has accrued attorney's fees and costs incurred in bringing its action. On the other hand Freddie Mac was able to purchase the Property as the only bidder for the amount of \$183,344.61 and then by their own admission were able to sell it for the approximate amount of \$269,900.00 leaving them with a profit of \$86,555.39. To permit Freddie Mac to retain the benefit and value received from McKay Dee in regard to the windfall from the sale of the Property without compensating McKay Dee would result in an unjust enrichment of Freddie Mac, at the expense of McKay Dee, which unjust enrichment should not be allowed.

CONCLUSION

In summary, while the circumstances of this case are somewhat unique the remedy of unjust enrichment is not confined to any particular circumstance or set of facts. It is, rather, a flexible, equitable remedy to be applied when the court finds that “the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity” to make compensation for benefits received. Therefore, the trial court erred in finding that Freddie Mac is not liable in equity to

Plaintiff McKay Dee for unjust enrichment because McKay Dee conferred a known benefit upon Freddie Mac which if they are allowed to retain would be wholly inequitable.

RESPECTFULLY SUBMITTED this 5 day of November, 2007.

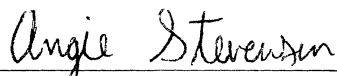


M. Darin Hammond
Attorneys for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing
OPENING BRIEF OF APPELLANT were mailed by first-class mail with
postage fully prepaid this 5th day of November, 2007, to each of the following:

Scott Lundberg
Lundberg & Associates
3269 S. Main Street, Suite 100
Salt Lake City, UT 84115



Legal Assistant

ADDENDUM

MEMORANDUM DECISION.....A

BENCH TRIAL TRANSCRIPT EXCERPTS.....B

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

MCKAY DEE CREDIT UNION,

Plaintiff,

vs.

GMAC MORTGAGE CORPORATION and
FEDERAL HOME LOAN MORTGAGE
CORP., et al,

Defendants.

MEMORANDUM DECISION

Case No. 040901626

Ernie W. Jones
District Judge

FEB 13 2007

This matter came on for trial on January 18, 2007 before the Honorable Ernie Jones. The Plaintiff was represented by Attorney Darin Hammond. The Defendant was represented by Attorney Brad DeHaan.

The Court, having heard the testimony and arguments of counsel, and having reviewed the exhibits, rules as follows:

I. The Wrong Date for Foreclosure:

1. The mortgage foreclosure was originally set for May 15, 2001. McKay Dee Credit Union personnel believed the sale was moved to May 18, 2001. Mr. Shirra, Vice President of McKay Dee Credit Union, called the sale telephone line and wrote down May 18, 2001 on the notice. (See exhibit P12).



2. Mr. Shirra testified that he thought the date of the sale was May 18, 2001, but admitted on cross-examination that it was possible he wrote the wrong date down.

3. The foreclosure sale was actually held on May 17, 2001.

4. The Plaintiff has the burden of proof in this case.

5. Based on the testimony, the Court is not convinced that Plaintiff has met the burden of proof. The issue is whether G.M.A.C. gave the Plaintiff the wrong date, or whether Mr. Shirra wrote down the wrong sale date.

6. It is not clear to the Court if Mr. Shirra wrote the wrong date for the sale down, or if G.M.A.C. provided the wrong date.

7. Since the Plaintiff has failed to meet the burden of proof, the Court is unwilling to impose liability on the Defendant for the error.

II. Unjust Enrichment Claim:

8. Plaintiff seeks relief on grounds of unjust enrichment to Plaintiff's detriment.

9. Three elements must be present for unjust enrichment:

a) there must be a benefit conferred on one person by another;

b) the second and third elements are not relevant to this issue.

10. In this case, Plaintiff claims Defendant received a windfall in excess of \$25,000 and that Plaintiff conferred this benefit on Defendants.

11. The Court finds the Plaintiff conferred no benefit on Defendant. Plaintiff did not pay money or provide any benefit directly to Defendant.

12. Any benefit received by Defendant was conferred by Defendant's own effort in completing the foreclosure sale.

exists to support its claim for unjust enrichment.

14. Plaintiff cannot recover under a theory of unjust enrichment against the Defendant.

III Damages:

15. Plaintiff claims it is entitled to the excess sale proceeds from the sale of the property.

16. The Court finds it is speculation on the part of the Plaintiff that Plaintiff would have received any excess proceeds.

17. There is no way to determine if Plaintiff would have prevailed at the sale in any event.

18. While it is unfortunate that the Credit Union lost the opportunity to bid on the property, there is no way to determine if they would have been the successful bidder.


19. It is speculation to say the Credit Union would have prevailed at the sale.

20. There is no doubt the Credit Union was prepared to bid, but this only amounts to a lost opportunity. There is no unjust enrichment, only a lost opportunity to bid on the property.

21. The Court finds that the Plaintiff has failed to prove its case. The Court enters judgment in favor of the Defendant, for no cause of action.

22. Defendant will prepare an order consistent with this decision for signature and entry.

Dated this 9 of Feb 2007.

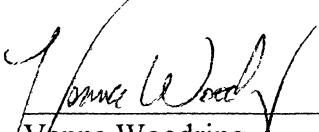

ERNIE JONES
DISTRICT COURT JUDGE

Certificate of Mailing:

I hereby certify that on the 12 of ^{February} January 2007, I mailed a copy of the foregoing order to counsel, as follows:

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Venna Woodring
Lead Deputy Court Clerk

SECOND JUDICIAL DISTRICT COURT - OGDEN COURT

WEBER COUNTY, STATE OF UTAH 34

MCKAY DEE CREDIT UNION, : Case No. 040901626 MI **AUG 15 2007**

Plaintiff,

: Appellate Case No. 20070399-SC

v

FEDERAL HOME LOAN

MORTGAGE CORPORATION,

et al.,

Defendant.

: With Keyword Index

BENCH TRIAL HELD JANUARY 18, 2007

BEFORE

THE HONORABLE ERNIE W. JONES

Transcript by Carolyn Erickson of 1/18/07 bench trial



VD19772637

pages: 1

040901626 FEDERAL HOME LOAN MORTG/

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER

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ORIGINAL

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For the Defendant: BRAD G. DAHAAN
Attorney at Law

* * *

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1 date or was he given the wrong date and that's, again, I'm
2 trying to figure out how I, you know, because I mean I felt
3 like he was extremely honest in his testimony. But to me
4 that is a big, big issue in this case is was he given the
5 wrong date or did he just write down the wrong date and so
6 your assessment of his testimony is what? That he was given
7 the wrong date?

8 MR. HAMMOND: That he was given the wrong date.
9 That, that's what he said that the phone line provided to him
10 that date and the second element, the second prong of his
11 testimony that he [inaudible] wrote that down and that was
12 what his best recollection was and I agree that he was trying
13 to forthright with the Court.

14 MR. DEHAAN: Can I address that, Your Honor?

15 THE COURT: Yes.

16 MR. DEHAAN: I've got some issues a little bit with
17 Mr. Shirra's testimony. He initially gets on the stand and
18 says I attended the trustee sale. But in his deposition
19 there are numerous instances where he asserts that he has no
20 recollection of attending the sale. So I believe that raises
21 an issue of reliability.

22 And secondly, he testified that he could have
23 written down the incorrect date; that it's possible that he
24 wrote down the incorrect date. That date was not provided
25 by, by the defendants or by the trustee. That's a date that

1 he wrote down on a trustee's deed. Even if he was given that
2 date by the sale line, the sale line has a major disclaimer
3 that says this information -

4 THE COURT: Yeah, I know that.

5 MR. DEHAAN: - is inaccurate.

6 THE COURT: That, that whole concept just hits me
7 wrong. That, that you can call the number and they can give
8 you information and oh, by the way, we may give you the wrong
9 information. So don't rely upon this. I mean that, that's,
10 to me that's crap. To be able to make some kind of
11 disclaimer when you're calling to find out, you know, when's
12 this sale going to take place. I mean to me if he called and
13 somebody on the other end told him it was the 18th, then I
14 think they're going to be responsible for that. But what I'm
15 struggling with, and I know that you make this disclaimer and
16 I think that why bother even having a, having a recording or
17 having anybody on the other end. It's like saying, well,
18 here's the date. But by the way, it may not be reliable. It
19 may not mean anything and you can't hold us to it. I mean
20 the whole concept of the disclaimer is troubling to me. But
21 putting that aside, what I'm trying to figure out is did
22 somebody on the other end tell him the 18th. I think that's
23 critical to this case and I just can't figure out whether he
24 wrote the wrong date down or whether somebody gave him the
25 18th.

1 MR. DEHAAN: I understand your concern. I
2 understand the troubling aspect of the disclaimer. I suppose
3 that's an issue of whether disclaimers should be provided or
4 not in a general sense. In this case I do assert that Mr.
5 Shirra's testimony is unreliable. He did testify that he
6 could have written down the wrong date; that the date was
7 provided, or he came up with that date. It wasn't a date
8 provided by the defendants or by the trustee that [inaudible]
9 itself.

10 THE COURT: But where else would he have come up
11 with the date. It makes more sense that somebody gave him
12 the date than it does that he made a mistake. But I'm not
13 sure that's what happened here. I'm just trying to figure
14 out. I mean, you know, to me, he's sitting there. He's got
15 the notice. He makes the phone call, and then he circles the
16 date the 15th and then writes 5/18/01 out to the side. To me
17 that's pretty credible. But when he said it's possible that
18 I wrote down the wrong date. That, that caused me some
19 concern and so I, that's what I'm trying to figure out. Was
20 he given the 18th, or did he make a mistake and write down
21 the 18th?

22 MR. DEHAAN: I write down incorrect dates and
23 things all the time, Your Honor.

24 THE COURT: I know, so do I.

25 MR. DEHAAN: But even with that, I still would

1 assert that the code provides that everything was complied
2 with, that the trustee's -

3 THE COURT: Well, I know what all the documents say.

4 MR. DEHAAN: Okay.

5 THE COURT: And I know there was a mistake made here
6 by somebody, you know, and that's what I'm trying to figure
7 out. If McKay Dee just made a mistake and wrote down the
8 wrong date. But you know what's so frustrating about this
9 case is this property was up for sale and it was cancelled
10 and we went through the same process over and over and over
11 again and so I can see where they're coming from thinking,
12 oh, it's been cancelled again. But I think it makes a big
13 difference to know where that, the 18th came from. Is it his
14 mistake, or is the, was it the -

15 MR. HAMMOND: [inaudible] or not. Would the Court
16 like to ask any more questions of Mr. Shirra?

17 THE COURT: You know what to me it's critical enough
18 I, yeah, I wouldn't mind hearing from him again on this
19 because I, to me the case really to a large extent hinges on
20 that date. I, in my opinion, it's the number one issue for
21 me.

22 Do you have any objection if we put him back on.

23 MR. DEHAAN: I would object to that, Your Honor. I
24 think plaintiff rested it's case.

25 THE COURT: Okay. All right, well I'm not going to

1 put him back on. I know what his testimony is and I can, I
2 can read it back, or have it read back. I can get a copy of
3 the tape. But anyway, what I'm going to do is take this
4 under advisement. Because I really think that's the, such a
5 critical part of the case, I think.

6 The other question I had for Mr. Hammond is a
7 question of damages. Let's assume that I rule in favor of
8 McKay Dee and I'm trying to figure out how you assess
9 damages. Because what it boils down to is, hey, and you know
10 Mr. Palmer was right. He said we just wanted an opportunity
11 to bid on the property and they weren't given that
12 opportunity, for whatever reason. But I don't know how you
13 assess the damages because aren't we speculating to a certain
14 extent? In other words, had they both been there, had McKay
15 Dee been there at the same time that Freddie Mac was there,
16 we don't know who would have won the bid, do we? So how do
17 I, how do I calculate damages in a situation like that?

18 MR. HAMMOND: Well, the best way that I think that
19 the Court has to calculate that is to look at what McKay Dee
20 lost, and McKay Dee first [inaudible] lost the entire benefit
21 of that sale.

22 THE COURT: Well, I don't have any trouble with the
23 loan, the 30,000 or 25,000 that they, they put out, but what
24 I'm getting to is the profit. We know that there was a
25 profit made from the sale on this property. The 269 less the