

2007

# McKay Dee Credit Union v. Federal Home Loan Mortgage Corporation, GMAC Mortgage Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MCKAY DEE CREDIT UNION,

Appellant/Plaintiff,

vs.

FEDERAL HOME LOAN MORTGAGE  
CORP. and GMAC MORTGAGE  
CORPORATION,

Appellees/Defendants.

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Case No. 20070399-CA

BRIEF OF APPELLEES

Appeal from the Decision and Order of Judge Ernie W. Jones  
of the Second Judicial District

---

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## **STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction to review this matter pursuant to Utah Code Ann. §78-2a-3(2)(j).

## **STATEMENT OF ISSUES ON APPEAL**

1. Did the trial court err in determining that McKay Dee Credit Union (“McKay Dee”) had failed to meet its burden of proving that defendant GMAC Mortgage Corporation (“GMAC”) gave McKay Dee the wrong date for a postponed foreclosure sale?

2. Did the trial court err in determining that defendant Federal Home Loan Mortgage Corp. (“Freddie Mac”) is not liable in equity to McKay Dee for unjust enrichment?

## **STANDARD FOR REVIEW**

The standard for review of the trial court’s findings of fact is the clearly erroneous standard. See, Dep’t of Human Servs. Ex rel. Parker v. Irizarry, 945 P.2d 676, 678 (Utah 1997). The trial court’s conclusions of law are reviewed for correctness. See, Evans v. Board of County Commissioners of Utah County, 2004 UT App 256, 97 P.3d 697, 700.

**CONSTITUTIONAL PROVISIONS WHOSE INTERPRETATIONS ARE  
DETERMINATIVE**

None.

**STATUTES WHOSE INTERPRETATIONS ARE DETERMINATIVE**

None.



## STATEMENT OF THE CASE

Freddie Mac and GMAC adopt the statement provided by McKay Dee with three exceptions:

1. First, the facts determined by the trial court do not support McKay Dee's unqualified assertion in the last line of the first paragraph of McKay Dee's statement that McKay Dee was advised that the sale had been postponed until May 18, 2001.

2. Second, McKay Dee's statement is incomplete in that it indicates that McKay Dee brought an action against Freddie Mac for unjust enrichment. Actually, the case before the trial court consisted two cases, one where McKay Dee sued Freddie Mac and another where McKay Dee sued GMAC and First American Title Insurance Agency, Inc. ("First American"), consolidated by the trial court. Additionally, McKay Dee, although naming First American as a defendant and alleging that First American wrongfully foreclosed, apparently did not serve First America. No proof of service for First American was filed with the trial court.

3. Third, the statement fails to indicate that the trial court determined that McKay Dee had failed to meets its burden of proving that GMAC gave McKay Dee the wrong date for a postponed foreclosure sale.

## **STATEMENT OF FACTS**

Freddie Mac and GMAC adopt the statement provided by McKay Dee with the following exception:

1. With respect to statement 14 in the appellant's brief, when McKay Dee called the sales line, its representative, Mr. Cameron Clifford Shirra ("Shirra") wrote down that the sale as postponed until May 18, 2001. The evidence presented to the trial court was inconclusive on the question of whether Mr. Shirra was told that the sale was postponed until May 18, 2001 or he erroneously wrote down May 18, 2001. R. 271; R. 303, Bench Trial Transcript, p. 54.

## **SUMMARY OF ARGUMENT**

There are three reasons why this Court should not address whether the trial court clearly erred when it found that McKay Dee failed to meet its burden of proving that GMAC gave McKay Dee the wrong date for the postponed foreclosure sale. First, McKay Dee failed to marshal the evidence that supports the trial court's finding. Second, the real issue posed by the trial court's factual finding is whether McKay Dee met its burden of proof to establish the fact – a burden that it did not meet. Finally, this issue is irrelevant to McKay Dee's only cause of action against Freddie Mac and GMAC – unjust enrichment. Such a factual finding would only be relevant to a cause of action for invalid or wrongful foreclosure – a cause of action that was only brought (but not pursued) by McKay Dee against the foreclosure trustee, First American.

The trial court's conclusion that McKay Dee could not demonstrate that it was entitled to compensation for unjust enrichment was also correct. First, the equitable claim of unjust enrichment lies only when a party has no recourse at the law. Second, the facts of this case do not support a finding that McKay Dee has proven the elements of unjust enrichment.

## ARGUMENT

### I. MCKAY DEE FAILED TO MEET ITS BURDEN OF MARSHALLING THE EVIDENCE SUPPORTING THE TRIAL COURT'S FINDINGS OF FACT

In order to successfully challenge the trial court's finding of fact that "[i]t 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," McKay Dee must marshal the evidence in support of that finding and then demonstrate that, despite that evidence, the trial court's finding was against the clear weight of the evidence. In re Estate of Bartell, 776 P.2d 885 (Utah 1989). The appellant in Bartell, much like McKay Dee in this case, essentially reargued the facts submitted to the trial court, ignoring evidence supporting the trial court's finding.

"In order to properly discharge the [marshalling] duty . . ., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991). Where, as here, the appellant fails to properly discharge the marshalling duty, the appellate court must accept the trial court's findings as valid. Demetropoulos v. Vreeken, 754 P.2d 960, 963 (Utah App. 1988).

McKay Dee did not marshal the evidence supporting the trial court's findings in its opening brief. Specifically, it did not present evidence that Mr. Shirra was not a credible witness. Accordingly, the Court should accept the trial court's findings.

The testimony of McKay Dee's primary witness, Mr. Shirra, was inconsistent and contradictory. For example, under direct examination Mr. Shirra stated that he attended the foreclosure sale on May 15, 2001. R. 303, Bench Trial Transcript p. 40. However, in his deposition and under cross examination, Mr. Shirra admitted that he could not say whether he went to the sale on that date. R. 303, Bench Trial Transcript pp. 52-53. In fact, in view of his testimony that he called the foreclosure trustee's bid line on that date, it is unlikely that he attended the sale. If he had, he would have heard the Trustee postponing the sale and known that the sale was to be held on May 17, 2001. He would not have had to call the hotline if he had heard the postponement of the sale on May 15, 2001.

This inability to accurately remember dates is important because it bolsters the admission Mr. Shirra made on cross examination. His testimony at trial under direct examination was that, when he called the sale hotline on May 15, 2001, he was given the date of May 18, 2001 as the new date for the foreclosure sale. R. 303, Bench Trial Transcript p. 41. However, when cross examined, Mr. Shirra admitted that he may have written down the wrong date. R. 303, Bench Trial Transcript p. 54. McKay Dee failed to mention this inconsistency and explain its importance to Mr. Shirra's admission on cross examination. Since this was important evidence bearing on the question of whether the trial court's finding was in error, and it was not marshaled by McKay Dee, McKay Dee failed in its duty to comprehensively present every scrap of evidence introduced at trial that supported the trial court's findings.

II. MCKAY DEE FAILED TO MEET ITS BURDEN OF PROVING THAT FREDDIE MAC, GMAC OR FIRST AMERICAN PROVIDED THE INCORRECT DATE OF SALE.

The issue in this case is not whether the evidence supports the trial court's finding that it was not clear whether Mr. Shirra incorrectly wrote down the date of the sale or if it was incorrectly given to him. The issue is whether the evidence presented would support the trial court's implicit finding that McKay Dee failed to meet its burden of proof that Freddie Mac, GMAC or First American gave the incorrect date to McKay Dee.

To support its argument that the trial court clearly erred when it found that it was not clear that Mr. Shirra was given the wrong date or he incorrectly wrote it down, McKay Dee claims that Mr. Shirra's testimony is strengthened by the fact that he had a check prepared and attended the sale on May 18, 2006. Appellant's Opening Brief, p. 11. That fact supports a conclusion that McKay Dee believed the postponed sale was set for May 18, 2001 rather than May 17, 2001, but it does not, without more, support a conclusion that Freddie Mac, GMAC or the foreclosure trustee, First American, provided a wrong date.

III. MCKAY DEE DID NOT ALLEGE A WRONGFUL FORECLOSURE CLAIM AGAINST FREDDIE MAC AND GMAC.

The complaints filed against Freddie Mac and GMAC by McKay Dee sought relief only for unjust enrichment. R. 001-006, 010-015. The factual finding regarding whether Mr. Shirra was given the wrong date is irrelevant to the elements of unjust enrichment. That is evident from McKay Dee's brief which treats this factual finding as a separate

issue from the argument about whether the elements of unjust enrichment have been shown. Rather, this finding would be relevant to a cause of action for wrongful or invalid foreclosure.

Properly, McKay Dee did not allege a claim for wrongful foreclosure sale Freddie Mac nor GMAC because neither conducted the foreclosure sale. Relief based on wrongful foreclosure could only have been sought against the foreclosure trustee, First American. Although McKay Dee did complain of wrongful foreclosure against First American (R. 010-015), it failed to serve or pursue First American. Because of its failure to complain of this cause of action against Freddie Mac or GMAC, the issue of the trial court's factual finding need not be addressed because it is irrelevant to the sole cause of action actually brought against Freddie Mac and GMAC, viz., unjust enrichment.

#### IV. MCKAY DEE'S EQUITABLE UNJUST ENRICHMENT CLAIM WAS PROPERLY DISMISSED BECAUSE MCKAY DEE HAS A REMEDY AVAILABLE AT LAW.

The equitable remedy of unjust enrichment lies only where the aggrieved party has no remedy at law. Five F, L.L.C. v. Heritage Savings Bank, 2003 UT App 373, 81 P.3d 105,109; American Towers Owners v. CCI Mechanical, 930 P.2d 1182, 1193 (Utah 1996); SLW/Utah, Lysenko v. Sawaya, 973 P.2d 445, 449 (Utah App. 1999). In Lysenko, the Court upheld the trial court's denial of an unjust enrichment claim, observing that Lysenko had already obtained the remedy of a money judgment.

McKay Dee not only had an adequate remedy at law, but it chose to exercise it. After learning of the foreclosure sale, it sued its borrowers and obtained a deficiency judgment on which it has collected substantial sums. R. 81, 87.

McKay Dee's complaint against Freddie Mac and GMAC sought damages for unjust enrichment for the amount of \$25,413.68. R. 001-006, 010-015. McKay Dee's initial disclosures indicate that it seeks damages against Freddie Mac and GMAC in the approximate amount of \$25,000. R. 267. At trial, John Palmer ("Palmer") indicated that McKay Dee had collected \$25,643.62 from the borrowers since obtaining a deficiency judgment against them. R. 303, Bench Trial Transcript p. 81, 87.

McKay Dee's brief suggests that it is inequitable to allow Freddie Mac or GMAC to retain the "windfall" that resulted from taking the property back through foreclosure and subsequently selling it for a price in excess of what Freddie Mac or GMAC were owed. In other words, McKay Dee argues that it is unfair that Freddie Mac or GMAC profited by eventually receiving more than they were owed when McKay Dee did not. The doctrine of unjust enrichment is designed to provide a party a remedy when no other exists, not to ensure that one party does not profit more than another.

McKay Dee is not without a remedy. It has a judgment against its borrowers and is collecting on it. What would be inequitable would be to allow McKay Dee, the junior lienholder which failed to appear at the foreclosure sale to protect its interest, to obtain a "windfall" after having obtained judgment against its borrowers and after having



collected on that judgment an amount in excess of the amount it was owed at the time of the foreclosure sale.

V. MCKAY DEE DID NOT SATISFY THE ELEMENTS OF UNJUST ENRICHMENT.

The three elements of unjust enrichment are:(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.

Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1984).

A. McKay Dee did not confer a benefit on Freddie Mac or GMAC.

In Baugh v. Darley, 184 P.2d 335 (Utah 1947) (distinguished on other grounds), a landowner orally contracted to sell land to a buyer who, in turn, entered into a contract to sell the property to a third party at a profit. The landowner refused to honor the oral contract with the buyer and, instead, sold it to the third party at a better price. The Supreme Court ruled that the buyer did not confer a benefit on the landowner. Rather, the landowner received the profit as a result of his own negotiations, with only the incidental benefit of the buyer notifying the third party that the property was for sale.

Freddie Mac and GMAC were entitled to foreclose on the property in the event of default and to bid on the property at the foreclosure sale. After purchasing the property at the foreclosure sale and, eventually obtaining possession of the property from the borrowers, they sold it. The profits from that sale were the result of their efforts in lending to the borrowers, exercising the remedy of foreclosure after the borrowers

defaulted, purchasing the property at the foreclosure sale, evicting the borrowers and selling the property. The profit was the result of their efforts, not McKay Dee's failure to attend the foreclosure sale.

The SLW/Utah, Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998) case relied upon by the appellant for the proposition that unjust enrichment is equitable in nature and should be applied broadly, also stands for the proposition that the trial court in an unjust enrichment case should be afforded a broad degree of discretion in its decision. SLW/Utah, Jeffs, 970 P.2d at 1245. The trial court found that McKay Dee had not conferred any benefit on Freddie Mac nor GMAC. R. 271. That finding should be afforded broad discretion. The facts and arguments presented by McKay Dee on this point in its brief are the same ones made to the trial court. Appellant's Opening Brief, pp. 15 and 16 and the accompanying cites to the record. The trial court heard that evidence and those arguments and decided differently. Its decision should be upheld absent a showing of abuse of discretion. McKay Dee has made no such showing.

**B.**     Since McKay Dee did not confer a benefit on Freddie Mac or GMAC, neither of them could have known of or appreciated the benefit.

At the time of the foreclosure sale, Freddie Mac and GMAC did not know (a) why McKay Dee was not bidding or (b) that the property would sell for a profit following the foreclosure sale. Therefore, they did not know of or appreciate a benefit.

**C.**     It is just for Freddie Mac and GMAC to retain the profits from the sale of the property.

First, McKay Dee has not proven that it was harmed, because it has not proven that it would have bid higher than any other bidder at the sale. If another bidder had bid more than McKay Dee was willing to pay, McKay Dee not have profited from purchasing and re-selling the property.

Second, McKay Dee, not Freddie Mac or GMAC, is responsible for the predicament in which it finds itself. McKay Dee admits that it assumed that the borrowers had reinstated the loan, because (1) no one showed up at the foreclosure sale on May 18, 2001, (2) the borrowers had a history of reinstating the loan, (3) the borrowers continued to make payment on the home, (4) the borrowers continued to remain in the home and (5) the borrowers informed McKay Dee that they had reinstated. R. 303, Bench Trial Transcript pp. 38, 39, 42 and 44. Clearly, McKay Dee did not make its assumption based on anything Freddie Mac or GMAC did or said. It would be unjust to require Freddie Mac or GMAC to bear the burden of McKay Dee's mistaken assumption. McKay Dee could have called the foreclosure trustee hotline to confirm that the loan had been reinstated, just as it called to learn that the sale had been postponed in the first place.

Third, as previously discussed, McKay Dee has successfully pursued a deficiency claim against the borrowers. It could also have pursued a wrongful foreclosure claim against First American. Since it has adequate remedies at law, the invocation of an equitable remedy is not just.

Fourth, McKay Dee is also at fault for its own predicament because of its failure to confirm whether a sale had occurred. That failure removed any opportunity for the

foreclosure trustee to correct any error. Had McKay Dee contacted the trustee, Freddie Mac or GMAC when no one appeared for the foreclosure sale, there would have been an opportunity to remedy the situation by voiding and re-noticing the sale to provide McKay Dee with an opportunity to bid. Once the property was subsequently sold to a third party, however, that opportunity was lost.

### CONCLUSION

The trial court did not clearly err in determining that McKay Dee failed to meet its burden of proof relative to the wrong foreclosure date on which McKay Dee relied to its detriment. The equitable remedy of unjust enrichment is inappropriate in this case because McKay Dee did not confer a benefit on Freddie Mac or GMAC which would warrant equitable intervention. Even if, however, McKay Dee had conferred such a benefit, its demonstrated ability at the law to recover its damages from its borrowers bars the imposition of the equitable remedy of unjust enrichment.

Respectfully submitted this 5<sup>th</sup> day of December 2007.

LUNDBERG & ASSOCIATES

By: Scott Lundberg  
Scott Lundberg  
Attorneys for Appellees

### **CERTIFICATE OF SERVICE**

I certify that two copies of the foregoing brief were mailed on December 5,  
2007, to the following:

M. Darin Hammond  
R. Blake Hamilton  
Smith Knowles, P.C.  
4723 Harrison, Suite 200  
Ogden, UT 84403

A handwritten signature in cursive script, reading "Scott Lundberg", is written over a horizontal line.

## **ADDENDUM**

### **BENCH TRIAL TRANSCRIPT EXCERPTS**

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

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\* \* \*

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1           Q     Did you receive this as the credit manager for  
2 McKay Dee Credit Union?

3           A     Yes, I did.

4           Q     And what did you understand by this Notice?

5           A     I did, I understood that it was a notice of  
6 foreclosure and the property would be sold.

7           Q     Did you understand which date it would be sold?

8           A     It was scheduled for May 11<sup>th</sup>, 2000 at 10 a.m.

9           Q     And do you recall whether or not you attended the  
10 sale on May 11<sup>th</sup>, 2000?

11          A     On May the 3<sup>rd</sup> I followed up with Lundberg &  
12 Associates. They, being the trustees in this case, and I -  
13 told by them that the loan was paid current.

14          Q     So you did not attend the sale?

15          A     I did not attend the sale on that scheduled date.

16          Q     Okay. Would you now take a look at Exhibit 11?  
17 Did you receive this document at McKay Dee Credit Union?

18          A     We received this document, again, as the Notice of  
19 Trustee Sale. I received it on November the 14<sup>th</sup>.

20          Q     And did you, what did you understand when you  
21 received this Notice of Sale?

22          A     It's indicating the date of the sale at this  
23 location on 12/14 of 2000 at 12:30 p.m.

24          Q     And do you recall whether or not you attended that  
25 sale?

1           A     Both John and I were present at the sale, at the  
2 time so stated. Nobody showed up.

3           Q     So what did you do when nobody showed up?

4           A     We later found out it had been cancelled and would  
5 be performed, that we'll be notified when it was rescheduled.

6           Q     Do you recall how you were notified it was  
7 cancelled?

8           A     With Executive Trustee Services the only way I  
9 could have found that out is on their hotline or their sale  
10 line indicated in the letter.

11          Q     So this notice identifies a sale line, a telephone  
12 number; is that right?

13          A     Yes.

14          Q     Can you identify where in the Notice that sale line  
15 is identified?

16          A     It's at the end of the last paragraph, indicated as  
17 sale line.

18          Q     Did you contact that telephone number?

19          A     Yes, that's what I would have contacted to find  
20 out.

21          Q     Was there any other information on this Notice of  
22 Sale for you to contact anybody else?

23          A     No, there's no other information on there.

24          Q     And did you continue to receive payments on the  
25 second mortgage from the Call's after this sale that you

1 attended?

2 A Yes.

3 Q Did you do anything else to identify whether or not  
4 the sale had been conducted, other than contact the  
5 telephone, that telephone number?

6 A Well, as I indicated, I think I was informed that  
7 we would be notified when it was rescheduled so we just  
8 received payments and continued on with the loan.

9 Q Okay, would you now take a look at Exhibit 12? Can  
10 you identify that document for the record?

11 A It is another Notice of Trustee Sale. It's dated  
12 April 12th, of 2001.

13 Q And what did you do when you received that Notice  
14 of Sale?

15 A The sale date ended on this Notice is May 15th of  
16 2001, 11:30 a.m. On that date both John and I attended the  
17 sale prepared to bid on the sale and as instructed we had a  
18 \$5,000 check, certified check, to proceed with bidding on the  
19 sale.

20 Q And what happened when you arrived at the sale?

21 A There was nobody there.

22 Q When nobody was there, were you concerned?

23 A Can't say I was overly concerned. It had happened  
24 several times before.

25 Q What did you do after returning back to the office?

1           **A**     Came back to the office, contacted the sale  
2     hotline, which again is advertised in this document. I was  
3     given the date that the sale was rescheduled for 5/18, May  
4     the 18th, which is three days later.

5           **Q**     And did you write that information on the Notice of  
6     Trustee's Sale?

7           **A**     I did. I have it noted here in my handwriting.

8           **Q**     So the date 5/15 of '01 has been circled?

9           **A**     5/15/01 has been circled. I'd drawn a line out to  
10    the side and written the date 5/18/01.

11          **Q**     Did you write the - any new time down?

12          **A**     No, I didn't write a time down on it.

13          **Q**     Why not?

14          **A**     I just, at the time assumed I would be prepared and  
15    go to the sale on 5/18 at the same time.

16          **Q**     Did the hotline tell you that it would be held at  
17    the same time of day?

18          **A**     It must have.

19          **Q**     Therefore, did you receive any written notice of a  
20    sale to be held on May 18th, 2001?

21          **A**     No, I didn't.

22          **Q**     Did you attend the sale that -

23          **A**     I attended that sale on May the 18th at 11:30 a.m.

24          **Q**     And was anybody there?

25          **A**     No.

1           Q     What did you do when nobody was there at that sale?

2           A     I returned to the credit union. I don't have the  
3 notes that I contacted the sale line or anything, however,  
4 the Call's had been making payments to the loan. I had  
5 received two payments to the loan that date. I assumed that  
6 it had been worked out with the Call's again and the loan was  
7 proceeding forth as before.

8           Q     Did the Call's tell you that the loan had been  
9 worked out?

10          A     I remember a conversation with David in which he  
11 said that he had worked out an agreement with them.

12          Q     Would you take a look at Exhibit 13, please?

13          A     Yes.

14          Q     Can you identify that document for the Court?

15          A     It is a check issued by the credit union and  
16 stamped as a certified check. It is dated 5/15/01. It is  
17 the check that I prepared to go to the sale on that date of  
18 5/15/01.

19          Q     And -

20          A     It's in the amount of \$5,000.

21          Q     Did you use that check?

22          A     When the sale did not take place I did not use the  
23 check. On the endorsement of the check I have written a  
24 notation "not used for purposes intended" and I would just  
25 re-process the check through our system to show that it was

1           A     That document is the receipt portion of the check  
2     that I just talked about, dated 5/18/01.

3           Q     Thank you very much. Did you continue receiving  
4     payments from the Call's on the second mortgage after May  
5     18th of 2001?

6           A     Yes, we did.

7           Q     Have you ever received payments from a debtor in  
8     that situation after the home's been foreclosed on?

9           A     Never.

10          Q     So how long had you received payments from the  
11     Call's after May 18th, 2001?

12          A     For a period of time. I believe for about a couple  
13     of years.

14          Q     And did you know whether or not the Call's were  
15     still in the home during that period of time?

16          A     I understood that they were in the home. I can't  
17     remember dates. But I know that periodically I had a  
18     conversation with Dave and there was one or two times he  
19     would get behind on the loan. I probably called him to find  
20     out when he was going to make the payments and my  
21     understanding was he still lived in the home.

22          Q     When did you find out that the property had  
23     actually been sold on May 17th, 2001?

24          A     June 2nd of '03 one of our employees lived just  
25     down the street from his home. She came to work and reported

1 attending the sale besides looking back at your notes or a  
2 check that may have been drawn?" Your answer: "I don't have  
3 perfect recollection of what happened at that time."

4 I also read on Page 34, lines 7 through 16, the  
5 question is "I'm trying to get beyond just your general  
6 procedure about attending the sale." You answer "I can't  
7 remember that I took steps and went down there and all that."  
8 Question again put to you, "So you can't say whether you went  
9 to the sale?" You answer, "I can't say that I went, or is it  
10 possible I called the sale line at the last minute to find  
11 out it had been cancelled then, or if I did that after I came  
12 back because the sale did not take place. I can't attest to  
13 that." Do you recall that testimony?

14 A I do.

15 Q Is that accurate testimony from your deposition?

16 A I would have to say that's the case. I'm, like you  
17 said, I'm going on my procedure.

18 Q Well, it's hard to remember, is it not? It's -

19 A [inaudible]

20 Q - five years ago, right?

21 A Not many of us can remember what we did five years  
22 ago.

23 Q Exactly. I'm looking also on Page 35, lines 13  
24 through 17 in your deposition about whether you attended that  
25 sale on May 15th, 2001. Your answer: "I cannot say that I

1     went to the sale. I cannot say I ran into a person  
2     conducting the sale, later find out the status. All I can  
3     say is I voided the check because the sale did not take  
4     place. Whether I went or found out I have no recollection of  
5     that." So isn't it true Mr. Shirra, that you have no  
6     recollection of actually attending the sale?

7           A     That is probably true. As I indicated, I was  
8     probably going on my procedure. I had the check prepared to  
9     go to the sale. I may have called the trustee line before  
10    the sale or after the sale.

11          Q     But it's true that you really can't remember  
12    whether you attended that sale or not?

13          A     - I can't remember [inaudible] I'll say that I  
14    can't remember that I actually got in the car and drove down  
15    there to that sale. If I had called the trustee line and got  
16    this information before the sale I would not have gone to the  
17    sale.

18          Q     Excuse me, [inaudible] answer my question. If you  
19    called the sale line, you would have received the disclaimer  
20    language, correct?

21          A     If that was on that message that time.

22          Q     So as I understand that you called the sale line.  
23    Your testimony is you called the sale line, which has the  
24    disclaimer language about the sale dates and times and  
25    information, correct?



1           A     On those dates and times, yes.

2           Q     And then you testified earlier that you attended  
3     the sale, when in fact you have no recollection of actually  
4     attending the sale on May 15th, 2001; is that your testimony?

5           A     That is, that is what I said.

6           Q     Looking at Plaintiff's Exhibit 12 as well, there's  
7     handwriting on that exhibit that indicates the sale date, or  
8     indicates the date of May 18<sup>th</sup>, 2001, correct?

9           A     Correct.

10          Q     And that's your handwriting, correct?

11          A     It is.

12          Q     Is it possible that you could have written down the  
13     incorrect date for the sale?

14          A     I wrote that down and so I got it from the sale  
15     line.

16          Q     I understand where you got it. Is it possible you  
17     wrote down an incorrect date?

18          A     I would say that there, any possibility. The same  
19     as the possibility of them having the wrong date.

20          Q     That's right, it's possible that that's the correct  
21     date. But it's also possible that you wrote down the  
22     incorrect date, correct?

23          A     There is that possibility.

24          Q     And that date is handwritten by you, correct?

25          A     That is right, uh-huh (affirmative).

1           A     Yes, we have.

2           Q     What have you done?

3           A     We filed suit and received judgment and continue to  
4 garnish their account.

5           Q     And do you know about how much is left owing on  
6 that account?

7           A     Approximately \$21,000.

8           Q     And just generally how do you arrive at that  
9 figure?

10          A     Well in, and this is from, I have to, may I refer  
11 to my notes?

12          Q     Sure.

13          A     In researching their, their payment history, we've  
14 actually recovered the total of \$25,643.62 of which \$5,900  
15 has gone to principal, \$11,000 to interest. Just under \$700  
16 in late fees and another \$7,800 in legal fees.

17          Q     So the total cost that have been added to that  
18 account since Mr. Call moved out have been approximately,  
19 well, have been over \$25,000, correct?

20          A     Well, no, not added. The added cost are probably  
21 more around \$8,500 in legal fees and late fees. The other  
22 funds are in normal accrued and paid interest and principal.  
23 So the principal has been paid down from the balance owing at  
24 the time of the foreclosure sale from, it looks like it's  
25 just over \$27,000 now to \$21,000.

1           Q     Okay, you don't contact the first lienholder before  
2 the sale -

3           A     No.

4           Q     - and say we're in a second position. We want to  
5 purchase you guys out?

6           A     I have never done that myself. Whether Cameron has  
7 or not, I would doubt it. I have never done that myself, no.

8           Q     Do you know if it's done in any other  
9 circumstances?

10          A     I wouldn't know. Certainly not in our  
11 organization.

12          Q     Okay. You testified that you recovered, as I  
13 understand this correctly, from the Call's \$25,643.62?

14          A     Correct, in the last five years, correct.

15          Q     The last five years?

16          A     Five years.

17          Q     And some of that money is principal. Can you give  
18 me a principal amount?

19          A     59-12-37.

20          Q     And the interest amount?

21          A     11,233.77.

22          Q     And then what are the other amounts for?

23          A     Late fees and legal fees.

24          Q     And what are those amounts?

25          A     684.90 in late fees; \$7,812.58 in legal fees.