Case No. 11-11019

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICKEY FOSTER and wife MICHELLE FOSTER,

Plaintiffs – Appellants

v.

OCWEN LOAN SERVICING, L.L.C. and U.S. BANK NATIONAL ASSOCIATION, as Indenture Trustee for the Registered Holders of Aegis Asset Backed Securities Trust 2005-1, Mortgage Backed Notes,

Defendants – Appellees

Appeal from the U.S. District Court
Northern District of Texas, Dallas Division
USDC No. 3:10-CV-1058

REPLY BRIEF OF APPELLANTS

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Reply to Appellees' Issue 1: U.S. Bank accelerated the Note before it obtained a written assignment of the Note.

The assignment from MERS to U.S. Bank was executed on January 27, 2010. U.S. Bank accelerated the note and posted the property for foreclosure sale 5 days prior to January 27, 2010. (ROA 549). An assignment of a Deed of Trust and Note is not effective until made in writing. TEX. BUS. & COM. CODE § 26.01 & 26.02.

Section 26.01 of the Texas Business and Commerce Code specifically states:

> (a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
>
> (1) in writing; and
>
> (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
>
> (b) Subsection (a) of this section applies to:
>
> (1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;
>
> (2) a promise by one person to answer for the debt, default, or miscarriage of another person;
>
> (3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;
>
> (4) a contract for the sale of real estate;
>
> (5) a lease of real estate for a term longer than one year;
>
> (6) an agreement which is not to be performed within one year from the date of making the agreement;

> (7) a promise or agreement to pay a commission for the sale or purchase of …

Section 26.02 of the Texas Business and Commerce Code states:

> (b) A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative.
>
> (c) The rights and obligations of the parties to an agreement subject to Subsection (b) of this section shall be determined solely from the written loan agreement, and any prior oral agreements between the parties are superseded by and merged into the loan agreement.

Appellees acknowledge that a Transfer of Lien was filed on February 22, 2010, in the real property records of Hunt County which states that the transfer date was August 25, 2007. However, Appellees argue that this in incorrect and that a new transfer of lien "will be filed" with the correct date. Additionally, Appellees argue that a representative testified that a corrected Transfer of Lien would be filed with the correct date. (Appellee's Brief p. 13). The representative's testimony is from May 27, 2011. There has not been a new Transfer of Lien with a corrected date filed to Appellants' knowledge.

Therefore, since there is nothing in writing giving U.S. Bank the authority to accelerate the note and post Appellants' property for foreclosure sale on January

22, 2010, since the assignment was made on January 27, 2010, U.S. Bank did not have the authority to take the actions it took.

Appellees further argue that Appellants do not have standing to challenge the assignment. Appellants have standing to complain because US Bank foreclosed on their property based on contracts to which Appellants are a party, and on relationships in which they are an active participant. (ROA 602-606, 623-626). *Wells Fargo Bank, NA, as Trustee v. Laureno A. Ballestas et al*, No. 01-10-00020-CV (Tex. App.—Houston [1st Dist.] May 12, 2011).

Reply to Appellees' Issue 2: Appellees failed to move for dismissal of Appellants claim of Waiver and the District Court did not address it *Sua Sponte*.

Appellees argue that Appellants contend that they sued "under a theory of waiver". (Appellee Brief at p. 15). However, Appellants do not just contend that they made a claim for waiver of the right to accelerate and foreclose; rather they did make a claim as evidenced in their First Amended Complaint. (ROA 142-145).

Waiver is not a defense, as argued by Appellees. Texas law allows a party to waive contractual breaches, which Appellees did through its actions and failures to act starting in December 2009 and lasting until the foreclosure sale on the Property on March 2, 2010. (ROA 647-648, 654-659). Appellees also try to argue that Appellants waiver claim was addressed and cites to several different sections of its Motion. However, Appellants made a separate and distinct claim that Appellees

waived their right to accelerate and foreclose. Appellants should have been given the opportunity to respond to their waiver claim.

Since Appellees did not address Appellants claim that Appellees waived their right to accelerate and foreclose, Appellants were not given the opportunity to respond to this claim. The Fifth Circuit has strictly applied the procedural safeguards of Rule 56 and "has therefore held that a district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party." *John Deere Co*., 809 F.2d at 1192 (citing *Capital Films Corp. v. Charles Fries Productions,* 628 F.2d 387, 390-91 (5th Cir.1980); *Sharlitt v. Gorinstein,* 535 F.2d 282, 283 (5th Cir.1976)).

Reply to Appellees' Issue 3: The District Court erred in overruling Appellants' objection to Appellees' summary judgment evidence.

It is well-settled that a summary judgment is reviewed *de novo,* applying the same standard as the district court was required to apply. *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005); see e.*g., Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir.2001); *Tex. Med. Ass'n v. Aetna Life Ins. Co.,* 80 F.3d 153, 156 (5th Cir.1996). On appeal, a District Court's decision to grant summary judgment is considered by reviewing the record under the same standards which guided the district court. *Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co.,* 832 F.2d 1358, 1364 (5th Cir.1987); *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir.1986).

When reviewing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir.1988); *Brimer v. Chase Bank, USA, N.A.*, 2011 WL 4715173, *2 (N.D. Tex. September 22, 2011). The Court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As long as there appears to be some support in the record, for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Id.* at 250; *Brimer,* 2011 WL 4715173, *2.

Here, the District Court erred in not sustaining Appellants' objections to the summary judgment declaration of Nichelle Jones because the declaration lacked any proof that Ms. Jones had any personal knowledge, which makes the statements in the declaration conclusory. All of the objections to Ms. Jones's statements arising from purported "personal knowledge" should have been sustained and the evidence presented therefrom discarded by the District Court. Appellees argue that since Ms. Jones has worked at Ocwen for 12 years and has held the position as "Loan Analyst" since January 2006, she therefore has personal knowledge. (Appellees' Brief p. 17-18). That is another way of saying that "inferences" should be masde in favor of the movant, and not the non-movant, which is not the law,

and never has been. Simply stating that the matters are within the affiant's personal knowledge is not sufficient; rather, the witness must introduce sufficient evidence supporting a finding that the witness possesses actual personal knowledge of a matter. See FED. R EVID. 602; *Amie v. El Paso Indep. Sch. Dist.,* 253 Fed.App'x 447, 451 (5th Cir. 2007)). Conclusory, unsupported assertions are insufficient to support a summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Even if all the documents attached to the declaration of Ms. Jones is admissible solely as business records, it does not change the fact that all of the testimony offered by Ms. Jones concerning those documents is inadmissible for lack of personal knowledge.

For these reasons and the reasons addressed in Appellants' Brief, Ms. Jones' declaration submitted as an exhibit to the Motion was incompetent summary judgment evidence because it did not positively show the basis for her purported personal knowledge of any of the facts about which she attempted to testify, rendering all of the statements therein conclusory and hearsay, and rendering the declaration incompetent summary judgment evidence.

Reply to Appellees' Issue No. 4: The District Court Erred in Dismissing Appellants' Claims for Breach of Contract.

Sub-Issue 4a: The District Court erred in finding that Appellants do not have standing to contest the assignment from MERS to U.S. Bank.

Appellants rely on the arguments presented in their primary Brief on appeal for the issues pertaining to their claim that Appellants had standing to contest the assignment between MERS and US Bank.

Sub-Issue 4b: The District Court erred in finding that Success transferred the Note to US Bank.

As numerous federal and state courts across the country are, in recent opinions, recognizing, that an assignment of interests under a deed of trust does not carry with it a simultaneous transfer of the note, because MERS never holds an interest in the note. Further, other courts are increasingly finding, upon a more thorough analysis of MERS, its formation, and its purpose, similarly: MERS (and its assignees) cannot foreclose if it doesn't also hold the underlying note. *Bank of N.Y. v. Silverberg*, 926 N.Y.S. 2d 532 (App. Div. 2011). The ubiquitous MERS, nominal holder of millions of deeds of trust, does not have the right to foreclose on a mortgage in default, or assign that right to anyone else, if it does not also hold the underlying promissory note. *Id.*

The summary judgment evidence is uncontested that MERS never held the Note or had any rights under the Note, accordingly, it could not transfer the Note, regardless of what it did with the Deed of Trust. An assignment of a deed of trust, even if validly accomplished, does not accomplish a simultaneous transfer of the note.

The only assignment in the record is for instrument number 20215. (ROA 316). Instrument number 20215 is the Deed of Trust for the First Note. (ROA 607-622). Appellees bore the burden of proving, as a matter of law, that the Note under which they were attempting to foreclose was legally transferred by Success to US Bank, which they have failed to prove through any competent summary judgment evidence.

Sub-Issue 4c: The District Court erred in its application of the law concerning the Statute of Frauds.

Appellants rely on the arguments presented in their primary Brief on appeal for the issues pertaining to the statute of frauds. Defendants are barred by both promissory estoppel and partial performance from relying on the statute of frauds to escape responsibility for their actions and inactions in breaching the contracts at issue in this matter.

Sub-Issue 4d: The District Court erred in finding that the mortgage servicer was allowed to appoint a substitute trustee.

Appellees argue that since the Deed of Trust and allegedly the Note, were assigned to US Bank on February 1, 2005, US Bank therefore had the right to appoint a substitute trustee. However, as explained in Appellants' Brief, and above, the only assignment in the record is for instrument number 20215. (ROA 316). Instrument number 20215 is the Deed of Trust for the First Note. (ROA 607-622). Appellees in their Brief cite to a Transfer of Lien in the record to support their

contention that the assignment occurred on February 1, 2005. (ROA 316). However, the Transfer of Lien states it was entered into on August 25, 2007 but was not executed until January 27, 2010. Nowhere in this instrument does it show that the Deed of Trust and Note were assigned to US Bank on February 1, 2005. As explained in Appellants' Brief and above, even though Appellees claim this Transfer of Lien contains the incorrect date and that it would be fixed, there is nothing before the Court showing the assignment of the Deed of Trust and Note to US Bank on February 1, 2005.

Therefore, the evidence shows that neither US Bank nor Ocwen were entitled to appoint a substitute trustee.

Reply to Appellees' Issue No. 5: The District Court erred in granting summary judgment for Appellees on Appellants anticipatory breach of contract claim.

Appellees argue that Appellants' anticipatory breach of contract claim was based upon Appellees failure to provide the Appellants with proper notices and that since Appellants are no longer making that claim on appeal they cannot now make the claim Appellees repudiated on the loan agreement. However, Appellants have all along claimed that Appellees breached the contracts. Appellants' claims are not new and have been pled since the start of the lawsuit. Specifically:

(1) Absolute repudiation by Appellees:

- Appellees have no rights under the Note because the Note was never validly assigned to them. The evidence shows that Success

is still the holder and owner of the Notes. (ROA 602-606, 623-626). Therefore, Appellees' foreclosure upon the Property was a repudiation of their obligations under the Deeds of Trust.

- Appellees and Appellants entered into a unilateral contract in January 2010, when Ocwen informed Appellants that no foreclosure sale would occur while they were in the loan modification process. (ROA 683). Appellants therefore, submitted all the requested documentation for the loan modification. (ROA 789-790). The foreclosure sale was an absolute repudiation of the agreement between the parties.

(2) Lack of a just excuse for the repudiation:

Appellees have offered no explanation as to the reason why they foreclosed upon Appellants' property after telling Appellants they would not while they were in the loan modification process and while not having any rights under the Note to do so.

(3) Appellants were damaged:

The above repudiations by Appellees resulted in damage to the Appellants. Appellants have suffered from direct and indirect economic damages, including but not limited to damages for loss of credit and damages to credit reputation, attorney's fees, court costs, and mental anguish and emotional distress, damages resulting from payment in excess or additional interest due to inability to refinance. (ROA 151-152). But most importantly, Appellants lost title to their home. (ROA 141, 151).

Therefore, the District Court erred in granting summary judgment on Appellants' anticipatory breach of contract claim.

Reply to Appellees' Issue No. 6: The District Court erred in granting summary judgment in favor of Appellees on Appellants' claim for unreasonable collection efforts.

Appellees argue that the tort of unreasonable collection efforts requires a finding of a "course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm". (Appellees Brief p. 41). However, as explained by Appellants, the standard for the tort of unreasonable collection efforts varies from cases to case. *Employee Finance Co. v. Lathram*, 363 S.W.2d 899 (Tex.App.-Fort Worth 1962), aff'd in part, rev'd in part on other grounds, 369 S.W.2d 927 (Tex. 1963).

In *Lathram*, the Court thoroughly discussed the history of the tort when it issued its opinion, and adopted the "ordinary care" standard." *Lathram* at 900-01. The Appellants in *Lathram* contended that to be actionable the unreasonable collection effort must be intentional or one that wantonly inflicted mental distress that is likely to cause physical harm. *Id.* at 901. However, the Court rejected Appellants definition explaining that "wilful and malicious conduct are prerequisites to plaintiff's recovery of exemplary damages, but not to actual damages. The negligent conduct of defendant which results in physical illness and mental or emotional pain, supports an award of actual damages". *Id.* Therefore the

Court held that it was unnecessary in an unreasonable collection efforts claim to plead or prove "wilfulness or maliciousness". *Id.*

Further, according to Webster's dictionary, unreasonable is defined as "exceeding the bounds of reason or moderation."

Appellants offered sufficient summary judgment evidence that Appellees exceeded the bounds of reason. (Appellants Brief p. 36-37).

Misrepresentations should not be reasonable regarding the tort of unreasonable debt collection efforts, when they are not reasonable with regard to the Texas Debt Collection Act, Tex. Fin. Code § 392.304(a).

Reply to Appellees' Issue No. 7: The District Court erred in granting summary judgment for Appellees and dismissing Appellants' claim for violations of the Texas Finance Code.

TEX. FIN. CODE §392.304(a)(19) prohibits a debt collector, in debt collection or obtaining information concerning a consumer, from using a fraudulent, deceptive, or misleading representation or deceptive means to collect a debt or obtain information concerning a consumer. Appellees argue that Appellants did not offer any evidence to show Appellees violated this section of the Texas Finance Code.

Appellants offered evidence that Appellees represented that they would not foreclose while Appellants were in the loan modification process and represented that they would postpone, put on hold, or otherwise cancel any foreclosure sale

until after the modification review process was completed. (ROA 680, 683). Appellees' own corporate representative testified that Appellents entered into the loan modification process in December 2009. (ROA 680-681). Appellees' own records show that Appellants provided their financial information to Appellee's again on January 28, 2010 and that they were re-sending the application packet since Appellees records show it was not received, even though it was sent 10 days prior. (ROA 683-684).

So even though Appellants were in the loan modification process as of January 2010, Appellees foreclosed in March 2010. Appellees' representations that the foreclosure sale would be postponed while Appellants were in the loan modification process were false and misleading representations in the collection of a debt.

Sub-Issue No. 7a: Bond requirement under Tex. Fin. Code § 392.101

Appellants acknowledge that they included this argument in their Summary of the Argument section of their Brief. It was not raised in their First Amended Complaint or in the Argument section of their Brief. Even though it was argued and discussed in Appellants Response to Appellees' Motion, Appellants do not intend this argument to be before the Court for consideration.

Reply to Appellees' Issue No. 8: The District Court erred in granting summary judgment in favor Appellees on Appellants claim for suit to quiet title and trespass to try title.

Appellees argue that Appellants did not present any evidence showing they are entitled to possession of the property. However, Appellants presented evidence of the following:

- U.S. Bank accelerated the note and posted the property for foreclosure sale 5 days prior to the execution of the assignment on January 27, 2010. (ROA 316, 549).

- Appellees were not the owners or holders of the Note and therefore not authorized to foreclose upon the Property. (ROA 316).

- Appellees right to foreclose never matured because they had told Appellants not to worry about the foreclosure and that no foreclosure will occur "during the time period provided that your application has been submitted and complete". (ROA 556-557, 683).

- According to Appellees' records, Appellants were in the loan modification process as of January 2010. (ROA 683-684).

Due to the actions described in Appellants Brief and above, the foreclosure sale is void and therefore, Appellants have superior title.

Reply to Appellees' Issue No. 9: The District Court erred in granting summary judgment and dismissing Appellants claim for negligent misrepresentation.

Appellees argue that Appellants have failed to provide any evidence "whatsoever" showing Appellees supplied false information to Appellants. (Appellees' Brief p. 47). Appellees fail to acknowledge the numerous false representations made to Appellants. (See Appellants Brief p. 41-42 for the

misrepresentations). The representations of postponement of the foreclosure sale were false and misleading, as there was no postponement, cancellation, or other rescheduling of the foreclosure sale, despite Appellees' failure to ever notify Appellants that any sort of conclusion had been reached on the modification application. Appellants relied on these representations to their detriment.

Economic Loss Doctrine: The economic loss rule does not bar a claim for negligent misrepresentation. Under the economic loss rule, a plaintiff may bring a claim if the plaintiff can establish she suffered an injury distinct, separate, and independent from the economic losses recoverable for breach of contract. *See Sterling Chems., Inc. v. Texaco, Inc.,* 259 S.W.3d 793, 797 (Tex. App.-Houston [1st Dist.] 2007, pet. denied)(citing *D.S.A., Inc.*, 973 S.W.2d at 664). When Plaintiffs seek to recover for something in addition to the loss or damage to the subject matter of a contract, a plaintiff is not prevented by the economic loss rule from maintaining a tort action against the defendant. *Id.* at 796–98(citing *DeLanney*, 809 S.W.2d at 494).

Appellants pled facts and presented evidence indicating the existence of both personal injuries and property damage, not just "economic harm recoverable under breach of contract." Specifically, Appellants pled entitlement to damages for economic damages as well as reasonable and necessary attorney's fees and costs, loss of creditworthiness and the stigma of foreclosure, mental anguish and

depression, and the value of the time lost in attempting to correct Appellees' errors. (ROA 146, 148, 150-152, 808-809). Appellants alleged viable causes of action based upon more than just contractually based damages or economic damages arising out of the foreclosure sale. Accordingly, the District Court erred in granting summary judgment in favor of Appellees on this issue.

Reply to Appellees' Issue No. 10: The District Court erred in granting summary judgment for Appellees on Appellants equitable request for an accounting.

An action for accounting may be a suit in equity, or it may be a particular remedy sought in conjunction with another cause of action, as is the case here. *Michael v. Dyke*, 41 S.W.3d 746, 754 (Tex.App.-Corpus Christi 2001, no pet.); compare *T.F.W. Mgmt. v. Westwood Shores Prop. Owners Ass'n*, 79 S.W.3d 712, 717 (Tex.App.-Houston [14th Dist.] 2002, pet. denied) (treating an accounting as a cause of action based on alleged contractual obligations and principles of equity); *Hutchings v. Chevron U.S.A., Inc*., 862 S.W.2d 752, 762 (Tex.App.-El Paso 1993, writ denied) (treating accounting as an equitable remedy for determining amount of damages).

The decision to grant an accounting is within the discretion of the trial court. *Michael*, 41 S.W.3d at 754. In matters of equity, a trial court abuses its discretion if it rules: (1) arbitrarily, unreasonably, or without regard to guiding legal principles; or (2) without supporting evidence. *Welder v. Green*, 985 S.W.2d 170, 180 (Tex.App.-

Corpus Christi 1998, pet. denied). An equitable accounting is proper when the facts and accounts presented are so complex that adequate relief may not be provided for at law. *Hutchings*, 862 S.W.2d at 762 (citing *Richardson v. First Nat'l Life Ins. Co.,* 419 S.W.2d 836, 838 (Tex.1967))**;** *Michael,* 41 S.W.3d at 754.

Appellants' causes of action for breach of contract, anticipatory breach of contract, unreasonable collection efforts, violations of the Texas Finance Code, negligent misrepresentation, suit to quiet title and trespass to try title were improperly dismissed as discussed in Appellants' Brief and above. Those causes of action entitle Appellants to seek the equitable remedy of an accounting. This Court should reverse the rulings on the Appellants' equitable request for an accounting as one category of damages sought and remand to the district court for further proceedings.

Reply to Appellees' Issue No. 11: The District Court erred in granting summary judgment for Appellees on Appellants request for declaratory judgment.

As argued previously, the District Court erred in dismissing Appellants' request for declaratory judgment because not all of Appellants' causes of action were properly dismissed, Because reversal and remand are proper, there still exists underlying causes of action for the District Court to adjudicate and that are appropriately considered under the Declaratory Judgments Act.

CONCLUSION

For all of the reasons raised in this Reply Brief and in Appellants' Brief, the District Court erred in granting Appellees' Motion for Summary Judgment and dismissing all of Appellants' claims against Appellees. Appellants request that this court reverse and remand this matter for further hearings and trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellants Rickey Foster and Michelle Foster request that the Appellate Court reverse the Order Granting Summary Judgments and Final Judgment and remand this matter for further proceedings, and for such other and further relief to which they may be justly entitled.

Respectfully submitted,

/s/ *J.B. Peacock, Jr.*

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CERTIFICATE OF SERVICE

I certify that on the 30th day of May, 2012, a true and correct copy of the foregoing document was served by certified mail, return receipt requested on the following parties:

a. the attorney for Appellees-Defendants Ocwen Loan Servicing, LLC and U.S. Bank National Association, Mark D. Cronenwett and Lindsay Stansberry, at 5057 Keller Springs Road, Suite 600, Addison, Texas 75001.

/s/ *J.B. Peacock, Jr.*

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 4,052 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14-point) using Microsoft Word 2003.

Dated: May 30, 2012

/s/ *J.B. Peacock, Jr.*
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