93972-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEUTSCHE BANK TRUST COMPANY AMERICAS
AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF
SAXON ASSET SECURITIES TRUST 2005-1
MORTGAGE LOAN ASSET BACKED NOTES, SERIES 2005-1

Respondent,

v.

ALBERT E. AVALO and VICTORIA L. AVALO

Petitioner.

PETITIONER'S REPLY ADDRESSING NEW ISSUES RAISED IN RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR REVIEW

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REPLY TO NEW ISSUES RAISED

Pursuant to RAP 10.3(c), Petitioner [the Avalos] respond to the issues in the brief to which the Respondent [Deutsch's] reply brief is directed as follows:

1. At Page 3 of Deutsch's Answer (under #1), Deutsch asserts that, "Accordingly, the Note was later indorsed to Deutsche Bank Trust Company Americas" .... "(the "Trust"). (CP 252.)"

   Reply: Petitioner has argued that this remains an open question and is not a settled fact. In the interest of promoting justice and facilitating a decision of the case on the merits, Petitioner has simply asked for parody in the ability of the litigants to complete their own discovery to establish the veracity of allegations such as this. The issue of whether the subject note was properly and timely indorsed is consequential.

2. At the top of Page 4 of Deutsch's Answer, Deutsch asserts, "Defendants became delinquent on the Loan and entered into a Loan Modification Agreement with the Trust on June 2, 2009."

   Reply: Deutsch has made this false allegation more than once. Petitioner never became delinquent on their loan prior to seeking a modification. Petitioner was never late on a payment to Saxon prior to Petitioners seeking a modification that was finally granted in 2009 after what took an outlandish 18 months for Saxon to complete.

Further, the Petitioner has repeatedly explained that the Petitioners stopped making payments to Ocwen after Ocwen failed to keep its promise to address the issue of the $70,067.85 "stated balloon amount"; a figure that Ocwen never documented how it became a legitimate part of the transaction; a figure that Saxon had orally admitted was a mistake and that Ocwen later orally promised to address, which they never did. These breaches are what led to the Petitioners' decision to stop making payments. These are allegations that Deutsch's has failed to deny, the latest time in its recent Answer to Petition for Review.

As stated in its Petition, the Avalos base argument is that the parties are at this point for one reason: the Respondent's servicer made an error in its first modification and has, ever since then, failed to rectify their error. See Gonzaga Law Review Vol. 49:2, Page 382:

> "Most lenders lose considerable money in the foreclosure process and would benefit from a performing loan, fully secured by real property. Large amounts of money are wasted on judicial actions to stop foreclosures and in bankruptcy court. Lenders should take advantage of the various government programs, such as HAMP, that provide incentives to lenders for a reduction of the interest rate, reduction of principle, and easing of the foreclosure crisis, which was largely created by these same large lenders, servicers, and the regulators who failed to protect the American economy from corporate greed."

And Id, Page 382:

> "A reasonable accommodation on a loan modification for the qualified homeowner saves money for the lender, for the

> homeowner, for the community, and for the justice system. Foreclosures, on the other hand, displace homeowners (often onto the public welfare system), reduce tax revenues, increase crime, and only rarely facilitate repayment in full to the lenders."

Moreover, it is in the interests of the Respondent to address their error, once and for all here and now, because the Avalos have several causes of action and will be forced to pursue them until the Respondent simply fixes the problem they created.

Washington's adopted version of the Uniform Bank Protection Act codifies the common law statute of frauds. See WASH. REV. CODE § 19.36 (2013). The act exempts oral contracts and oral promises performed in under one year, which Saxon's and then Ocwen's oral promises to resolve the unexplained $70,067.85 they erroneous claimed the Avalos owed had a presumed "as-soon-as-possible" expectation attached to it. Still, in equity, courts may enforce these promises. See WASH. REV. CODE§ 19.36.010(1); see also, e.g., Lyons v. Bank of Am., No. C11-1232 CW., 22011 WL 6303390 (N.D. Cal. Dec. 16, 2011); Ansanelli v. .JP Morgan Chase Bank, No. C10-03892 WHA., 2011 WL 1134451 (N.D. Cal. Mar. 28, 2013).

Currently, litigation to enforce promised loan modifications, and modification-related mistakes, is happening all across the country. Moreover, the prevailing trend is that enforcement of the modifications,

including oral promises, is being allowed under several theories, including...

* Breach of contract. See e.g. Corvello, 728 F.3d at 882; Sutcliffe v. Wells Fargo Bank, 283 F.R.D. 533, 549, 553 (N.D. Cal. 2012); Gaudin v. Saxon Mortg. Servs., 820 F. Supp. 2d 1051, 1053-54 (N.D. Cal. 2011); Mendez v. Bank of Am. Home Loans Serv., 840 F. Supp. 2d 639, 651 (E.D.N.Y. 2012); Picini v. Chase Home Fin., 854 F. Supp. 2d 266, 273 (E.D.N.Y. 2012);

* Breach of covenant of good faith and fair dealing. See, e.g. Bosque v. Wells Fargo Bank, 762 F. Supp. 2d 342, 353 (D. Mass. 2011); Plastina v. Wells Fargo Bank, 873 F. Supp. 2d 1179, 1192 (N.D. Cal. 2012);

* Consumer protection. See, e.g., Okoye v. Bank of N.Y. Mellon, No. 10-11563-DPW, 2011 WL 3269686, at *3 (Mass. Dist. Ct. 2011); In re Ulberg, No. 10-53637-E-13, 2011 WL 6016131, at *3 (Bankr. E.D. Cal. Nov. 29, 2011); Parker v. Bank of Am., 29 Mass. L. Rptr. 194 (Mass. Sup. Ct. 2011);

* Specific performance. See, e.g., Crafts v. Pitts, 162 P.3d 382 (Wash. 2007);

* Promissory estoppel as to offers of forbearance and temporary modification. See, e.g., Lucia v. Wells Fargo Bank, 798 F. Supp. 2d 1059, 1069 (Cal. Dist. Ct. 2011); Nicdao v. Chase Home Fin., 839 F. Supp. 2d 1051, 1076 (D. Alaska 2012); Harvey v. Bank of Am., 906 F. Supp. 2d. 982, 993 (N.D. Cal. 2012); and

* Fraud. See, e.g., Singh v. Wells Fargo Bank, No. 1: 10-CV-1659 AWI SMS, 2011 WL 66167, at *5 (Cal. Dist. Ct. App. 2011); Slowey v. Flagstar Mortg. Corp., No. 10-11891- RGS, 2011 WL 1118470, at *2

(Mass. Dist. Ct. 2011); Parker, 29 Mass. L. Rptr. at *4; Picini v. Chase Home Fin., 854 F. Supp. 2d 266,275-76 (E.D.N.Y. 2012).

In the instant matter, the Respondent is in clear violation of the 2013 multi-state Consent Order that Ocwen agreed to. The Order, well-known to this Court, describes Ocwen of having engaged in "systemic misconduct at every stage of the mortgage servicing process." See the full article at CFPB website at https://www.consumerfinance.gov/about-us/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/

Further, an article recently posted in the Los Angeles Times, February 17, 2017 ("Ocwen will pay $225 million to settle allegations it violated mortgage servicing rules"), located at http://www.latimes.com/business/la-fi-ocwen-mortgage-settlement-20170217-story.html, describes exactly what the Avalos experienced:

> "Ocwen mailed time-sensitive letters to borrowers after the date on the letter, often many days later. In some cases, the delays endangered borrowers' ability to obtain loan modifications, the department said."

The Avalos would be making payments on their re-modified loan, instead of fighting off an unjust foreclosure attempt, if the due date on the modification offer Ocwen made to the Avalos in the summer of 2015 had not already expired when they sent it to the Avalos. The Avalos

responded favorably but insisted that Ocwen provide an offer with a date that was not already passed. Instead of correcting the date of their modification offer, Ocwen had their attorneys proceed with a summary judgment when they knew the Avalos were out of state caring for a parent who died shortly thereafter.

3. At the top of Page 5 of Respondent's Answer, Deutsch asserts, "As part of the agreement, Defendants signed a notice verifying that the written agreement was the final agreement and there were no other oral agreements. (CP 284.)"

   Reply: Respondent ignores facts the Petitioner asserted in its Petition for Review. Deutsch, through its new servicers Ocwen, made oral promises to investigate and properly address the matter of its prior servicer erroneously creating an additional $70,000+ in new principal to the transaction that was ostensibly due and payable by the Avalos, rendering its modification a demonstrably worse financial proposition than the prior loan terms under which the Avalos NEVER made a late payment. Given this, the Avalos would never have knowingly agreed to such a nonsensical arrangement.

   Further, the oral agreements that the Avalos allege that Deutsch bound itself to had to do with remedying mistakes its servicer made and

admitted to AFTER the 2009 modification was presented to the Avalos. The Avalos were expected to begin making separate payments on this mysterious and gigantic "stated balloon" figure that they were receiving separate statement for, even after the people who erroneously generated that false additional obligation admitted the entire figure was a mistake.

The Respondent therefore conflates the signing of a modification agreement which what the Avalos discovered after said modification was entered into, including post-modification promises both servicers made to fix their error.

4. Page 6 of Respondent's Answer asserts, "(3) the Trust was the holder of the Note entitled to foreclose, and (4) the Trust satisfied all of the preconditions to enforcement of the Note and Deed of Trust through foreclosure. (CP 309, ¶1.) The Trust offered evidence supporting all of these points. (CP 246-306.)"

   Reply: All the above allegations should be the subject of discovery. They remain to be open questions and are not settled facts. The Avalos have simply asked for parody in the ability of the litigants to complete their own discovery to establish the veracity of allegations such as this these as they are consequential to the controversy. Further, they are material facts very much in dispute as the Avalos denied them as far

back as their Answer to the Complaint and Deutsch has not provided sufficient evidence to support them.

5. At the bottom of Page 6 of Deutsch's Answer, Deutsch asserts, "Defendants failed to provide any briefing or explanation regarding the forensic audit or the conclusions Defendants expected the Court to draw from the audit."

   Reply: The finder of fact can easily ascertain from reviewing the exhaustive mortgage audit the Avalos had conducted on the transaction, and by the detailed multi-page affidavit provided by the licensed investigator who performed the audit on what Deutsch has filed on the public record. In the interest of promoting justice and facilitating a decision of the case on the merits, Deutsch should not be able to prevail on the rationale that the Avalos failed to provide a briefing or explanation of its audit as said audit needs no further explanation as to what it reveals about Deutsch's servicers' mistakes that they subsequently failed to address, apparently at all levels.

6. At the top of Page 7 of Deutsch's Answer, Deutsche asserts, "Defendants also failed to serve any discovery requests on the Trust. (CP 316.)"

   Reply: This is false. On the day of the hearing for summary judgment,

Deutsch's counsel said that she had not seen any discovery as of that morning. However, discovery had arrived at their offices some days prior to the hearing. It is an unrebutted fact that the Avalos were given very little time to produce discovery request material. Given the time that it took for the Avalos to produce discovery request material and to get it to the Respondents' law offices, Respondent had virtually no time to review it, let alone respond to it. But this problem was not caused by the Avalos. The trial court had it within its authority to provide enough time for the Respondent to answer the Avalos discovery requests.

7. On of Page 8 of Deutsch's Answer, Deutsche asserts that the Avalos' Petition for Review was, "untimely and no adequate reason for an extension has been offered."

Deutsch then extended its argument in the accompanying footnote and continued it on the next page, saying the Avalos "have not provided evidence of extraordinary circumstances justifying this Court's allowance of the Petition."

Reply: This, too, is false. By the time the Avalos learned that the Appellate Court had filed its opinion, it was a full two weeks after the fact. This was because someone at the Appellate Court level entered the wrong address for the Avalos, resulting in the Avalos not receiving

timely notice of the opinion. The Avalos discovered that the opinion had been filed from an email the Avalos received from Deutsche counsel in which the Avalos were asked whether the Avalos would be acting any further in the matter.

The Avalos confirmed that someone at Division One did, in fact, have the wrong address. Division Two (where the appeal began) had the correct address in its records. Given that the Avalos filed their Petition on a timely basis thereafter (within 30 days after they discovered the underlying opinion had been filed) and given that they followed the instructions given to them by the clerk of Division One (in filing a request for an extension of two weeks' time), the Avalos' filing was, in fact, made with reasonable diligence and untimely only due to circumstances very much out of the Avalos control. The excusable error was on the part of Division One personnel, not the Avalos.

The cover letter Deutsch provides as "proof" the Avalos received proper notice, was never received by the Avalos. As can be clearly seen on the face of that letter, the address is wrong. The Avalos reside at *2215 29th Ave Ct. SW*, not 2215 Ave St. SW. The Avalos never received the notice because it was sent to the wrong address.

CONCLUSION

For reasons outlined in their Petition pursuant to RAP 13.4(b), and pursuant to RAP 1.2 stating "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits" and RAP 10.3(c) stating "the respondent may file a brief in reply to the response the appellant or petitioner has made to the issues presented by respondent's review"; the Avalos restate that the matter should be sent back to the Trial Court where the Avalos should be allowed to proceed with discovery.

Respectfully submitted this 24th day of April, 2017

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Alberto E. Avalo, Appellant

Victoria L. Avalo, Appellant

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALBERTO E. AVALO, Pro se, and VICTORIA L. AVALO, Pro se, Appellants, vs. DEUTSCHE BANK TRUST COMPANY AMERICAS, Respondent	)) No. 939721)) CERTIFICATE OF SERVICE)))))))

WE, the Appellants, Alberto E. Avalo and Victoria L. Avalo, Pro Se, HEREBY CERTIFY that a true and correct copy of PETITIONER'S REPLY ADDRESSING NEW ISSUES RAISED IN RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR REVIEW was filed with the Clerk of the Court and served by email/US Mail upon the following party: Emilie Edling at Houser & Allison, APC 9600 Oak St., Ste 570, Portland, OR 97223, on this 24th day of April, 2017.

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