

NO. 306798

FILED

AUG 21 2012

**COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON
BY _____

**RICHARD L. HARWOOD, and THE HARWOOD
GROUP, LLC;**

Appellants

v.

WELLS FARGO BANK N.A.,

Respondent.

BRIEF OF APPELLANTS

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ASSIGNMENT OF ERROR

1. The trial court erred by dismissing the Appellants' Complaint pursuant to CR 12(b)(6).

STATEMENT OF THE CASE

This matter came before the trial court upon Respondent's Motion to Dismiss under CR 12(b)(6). Pursuant to that rule, all facts alleged in the complaint are taken as true. The following facts were alleged by the Appellant.

Wells Fargo Bank, N.A. is a national banking association. It is the owner of Wells Fargo Mortgage. Wells Fargo Bank and Norwest Mortgage Inc. merged in 1998, before the transaction which created the note and deed of trust discussed herein. CP 3-4.

The Plaintiffs reside and conduct business in Spokane County Washington. The transactions alleged herein occurred in the most part in Spokane County. The Defendant does business in Spokane County. CP 4.

Plaintiffs acquired an ownership interest in property

located at 10006 North Andrew Street in Spokane, Washington. The property is legally described as: "Lot 12, Block 6, Morning Side Park Addition, according to Plat recorded in Volume "W" of Plats, Page 25, in Spokane County Washington." The real property was subject to a deed of trust naming "Norwest Mortgage Inc. DBA Directors Acceptance" as the trustee. This deed of trust was later assigned to U.S. Bank National Association as Trustee for Structured Asset Securities Corporation Trust 2005-SC1. CP 4.

Ann E. Short was the fee owner of the subject property. She signed the above referenced note and deed of trust in December of 1999. She is a disabled person who struggled with her finances. In June of 2007 the Plaintiffs acquired a second position deed of trust on the subject property. The Plaintiffs lent money to Ms. Short to help her avoid foreclosure. CP 4.

In March of 2009, Ms. Short defaulted on her obligation to the Defendant and it initiated steps to begin foreclosure. The

Successor Trustee scheduled a trustee sale for August 7, 2009. Shortly before this date, Ms. Short suffered a stroke and was hospitalized in a coma. CP 4.

In an effort to protect their investment, the Plaintiffs stayed in contact with Defendant Wells Fargo. Wells Fargo publishes and promotes a telephone number which consumers may call to seek assistance with defaulted obligations and foreclosure. Mr. Harwood contacted Wells Fargo on many occasions. CP 4-5.

As a result of Mr. Harwood's contacts with Wells Fargo, they agreed to postpone the trustee sale on several occasions. The sale was postponed to September 11, 2009; then again to October 30, 2009; then again to November 30, 2009. The Wells Fargo representatives continually acknowledge that the property had equity, that Mr. Harwood and his company had a substantial interest in the property, and that they would allow him to cure the defaulted obligation. CP 5.

Shortly before the November 30, 2009 sale date, Mr.

Harwood contacted Wells Fargo to cure the defaulted obligation, and prevent the trustee sale. On November 24, 2009 Mr. Harwood spoke with Aleisha in the loss mitigation department and told her that he had funds to cure the default. She transferred the call to Adam. Mr. Harwood told Adam that he had certified funds available and was going to deliver them to the Trustee who is 300 miles away. Adam placed the call on hold and came back on the line after a few minutes. Mr. Harwood offered immediate tender of the funds to any location. Adam stated that he would call Mr. Harwood on November 30, 2009 with the exact payoff and that he would simply postpone the sale again. Adam did not call back on November 30, 2009. CP 5.

On December 3, 2009, Mr. Harwood contacted the Trustee who informed him that the property was sold on November 30, 2009. Mr. Harwood immediately called Wells Fargo and Raina explained that "they had dropped the ball." She gave Mr. Harwood some instructions to send funds to the

trustee, Northwest Trustee Services and send a copy of the check to Wells Fargo's Trustee Liaison. Mr. Harwood complied and sent funds in the amount of \$17,000 to Northwest Trustee Services. CP 5-6.

After several more calls and attempts to rescind the sale, it became apparent that Wells Fargo would not or could not rescind the trustee sale. CP 6.

The Plaintiffs reasonably relied upon the promises and representations made by Wells Fargo to preserve its rights to protect its investment. Wells Fargo had acted appropriately in the past and had postponed the sale on other occasions. The Defendant's representations were false. The Defendant did not do what it promised to do for the Plaintiff. The Plaintiffs' reliance on the representations caused economic damage to the Plaintiffs. CP 6.

Based on these facts the Court granted the Respondents' Motion to Dismiss the Appellants' claim for reliance under CR 12(b)(6). The Court did not dismiss the Appellants' CPA

claim. That claim was later dismissed pursuant to a summary judgment motion.

SUMMARY OF THE ARGUMENT

The Plaintiffs' complaint adequately plead an action for equitable reliance. To meet the elements of a promissory estoppel claim, a plaintiff must plead the following elements: (1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

In this matter, the Respondent, a beneficiary under the deed of trust promised to delay a trustee sale, by contacting the trustee and requesting that the trustee set a new sale date. The Respondent had done this in the past. Respondent should have reasonably expected that the Appellants' would rely on this promise and they in fact did rely on the promise, changing their position. Respondents were justified to rely on that promise

and the only way to avoid injury is to compensate the Appellants for their losses. That will require a trial.

The matter is not prohibited by the statute of frauds. The promise was to inform a trustee under a deed of trust to continue a sale. It was not for the exercise of an interest in real property.

ARGUMENT

The decision of the trial court is reviewed *de novo*.

Under CR 12(b)(6), a complaint can be dismissed if it fails to state a claim upon which relief can be granted. Because a trial court's dismissal under this rule is a holding on a question of law, appellate review is *de novo*. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir.1984).

Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988).

In ruling on a motion to dismiss the Court is required to view the complaint in the light most favorable to the plaintiff.

Scheuer v. Rhodes, 416 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed.2d 90 (1974). The Court must accept all allegations in the plaintiff's complaint as true for purposes of adjudicating the

motion to dismiss. A plaintiff need only allege a claim for which relief can be granted because the allegations in the complaint are presumed to be true for the purpose of deciding the motion to dismiss. *Sun Savings & Loan Assoc. v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987). Motions to Dismiss are viewed with disfavor. *Intake Water Co. v. Yellowstone River Compact Comm.*, 590 F. Supp. 293 (D.C. Mont. 1983) *aff'd*, 769 F.2d 568 (9th Cir.), *cert. denied*, 476 U.S. 1163, 106 S. Ct. 2288, 90 L. Ed.2d 729 (1985). A plaintiff need not “prove” the allegations in the complaint in order to defeat a Motion to Dismiss pursuant to FRCP 12(b)(6). *Gilligan v. JAMCO Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009).

In this matter, the complaint describes facts which fulfill the elements of a claim of equitable estoppel based on reliance.

I. THE COMPLAINT SATISFIES ALL OF THE ELEMENTS OF A PROMISSORY ESTOPPEL.

There are five elements of a promissory estoppel claim:

We have previously cited the Restatement's formulation as being a useful guideline: *Spooner v. Reserve Life Ins. Co.*, 47 Wash.2d 454, 287 P.2d 735 (1955); *Hill v. Corbett*, 33 Wash.2d 219, 204 P.2d 845 (1949); *State v. Northwest Magnesite Co.*, 28 Wash.2d 1, 182 P.2d 643 (1947); and cases cited therein. In effect, § 90, supra, sets out five prerequisites for a recovery in promissory estoppel: (1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

Corbit v. J. I. Case Co., 70 Wn.2d 522, 538-539, 424 P.2d 290 (Wash. 1967).

The Plaintiffs' complaint properly alleges facts to satisfy each of the elements of a promissory estoppel.

A. THE PLAINTIFFS ALLEGE THAT A PROMISE WAS MADE BY THE RESPONDENT.

The plaintiffs must allege that a promise was made.

Paragraphs 8 and 9 of the complaint present a framework in which the defendant had made promises in the past and made a specific promise that it would inform the trustee to postpone the sale. Paragraph 9 states the following: “Mr. Harwood offered immediate tender of the funds to any location. Adam stated that he would call Mr. Harwood on November 30, 2009 with the exact payoff and **that he would simply postpone** the sale again. Adam did not call back on November 30, 2009.”

CP 5 (emphasis added.)

The specific promise alleged herein is that Adam, a representative of the defendants, would call Mr. Harwood on November 30, 2009 with the payoff figure, and that he would postpone the trustee sale. A promise has been alleged.

B. THE PLAINTIFFS ALLEGED A FACTUAL HISTORY WHICH DEMONSTRATES THAT THE PROMISOR WOULD REASONABLY EXPECT THE PROMISEE TO CHANGE HIS POSITION BASED ON THAT PROMISE.

Paragraph 8 of the complaint demonstrates a pattern of conduct in which the defendants had made the exact same

promise on prior occasions and had kept that promise.

Paragraph 8 reads as follows: “The sale was postponed to September 11, 2009; then again to October 30, 2009; then again to November 30, 2009. CP 5. The Wells Fargo representatives continually acknowledge that the property had equity, that Mr. Harwood and his company had a substantial interest in the property, and that they would allow him to cure the defaulted obligation.” CP 5.

This factual allegation demonstrates that the sale was continued three previous times and that the Wells Fargo representatives understood that Mr. Harwood was attempting to protect his equity in the property. For purposes of a motion to dismiss under CR 12(b)(6), this allegation is sufficient to establish the second element of a promissory estoppel.

C. THE PLAINTIFFS DID IN FACT CHANGE THEIR POSITION BASED ON THE PROMISE.

Paragraph 9 of the complaint demonstrates that the plaintiffs had the ability to comply with the demands of the respondent to

cure and avoided trustee sale. “Mr. Harwood told Adam that he had certified funds available and was going to deliver them to the Trustee who is 300 miles away. Mr. Harwood offered immediate tender of the funds to any location.” CP 5. Instead of tendering the funds, Mr. Harwood relied on the representations of Adam, and changed his position with respect to the postponement of the sale. For purposes of a motion to dismiss under CR 12(b)(6) this allegation is sufficient to establish the third element of a promissory estoppel.

D. THE PLAINTIFFS WERE JUSTIFIED IN RELYING UPON THE PROMISES OF THE WELLS FARGO REPRESENTATIVE.

Paragraphs 7, 8 and 9, establish the plaintiffs justification in relying on the promises of Wells Fargo. CP 4-5. These paragraphs show a factual history in which Wells Fargo had previously promised to postpone the trustee sales and had followed through by contacting the trustee and instructing the trustee to continue the sale. The prior history of three contacts with the trustee confirming three continuances created a

relationship in which the plaintiffs were justified in relying upon the promises made by Adam, the Wells Fargo representative. For purposes of a motion to dismiss under CR 12(b)(6), these allegations are sufficient to establish the fourth element of a promissory estoppel.

E. INJUSTICE CAN ONLY BE AVOIDED BY HOLDING WELLS FARGO ACCOUNTABLE FOR THE BROKEN PROMISE.

Paragraph 10 of the complaint demonstrates the damage that was done by the broken promise. It also demonstrates the respondent's attempt to mitigate the damages that were caused by the broken promise. The damage that was caused was the sale of the house to an independent third-party. It is impossible for the plaintiffs to undo that transaction. The only way to avoid injustice is to hold Wells Fargo accountable for this broken promise. The pleadings and paragraphs 10 and 11 are sufficient to establish the fifth element of a promissory estoppel. CP 5-6.

Paragraphs 12 -14 also establish the bare-bones elements

of the promissory estoppel. CP 6. In addition to the specific factual allegations in the prior paragraphs, the complaint as a whole pleads all of the appropriate elements. The complaint taken in the light most favorable to the plaintiffs establish all of the elements of a promissory estoppel.

II. THE STATUTE OF FRAUDS DOES NOT BAR THE APPELLANTS' COMPLAINT.

The Respondent successfully argued that the statute of frauds prevented the Appellant from bringing this cause of action. The statute of frauds does not require a writing to continue a trustee sale. The statute of frauds regarding conveyances of real property is found at RCW 64.04.010 and reads:

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or

evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

RCW 64.04.010.

This section does not prevent the enforcement of a promise to instruct the Trustee under a Deed of Trust to continue a Trustee Sale. In this matter, the Beneficiary under the Deed of Trust promised to instruct the Trustee to continue the Trustee sale. Because of the failure of the Beneficiary to fulfil its promise, the Appellant was damaged. There is no requirement under RCW 64.04.010 that this promise be in writing.

CONCLUSION

The Appellant alleged facts which support a cause of action for reliance. The Court erred in dismissing this cause of action.

Respectfully Submitted, on
August 21, 2012

A handwritten signature in black ink, appearing to read 'Tim', written over a horizontal line.

Timothy W. Durkop, WSB #22985
Attorney for Appellant