

FILED

JAN 27 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 320111.

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CHRISTIANA TRUST et al.

Plaintiff

v.

STEVEN M. AND LETICIA M. MILLER et. al.

Appellant/Defendant,

v.

SUN TRUST MORTGAGE et. al.

Third Party Defendant/Respondent.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error No. 1

A. The superior court erred as a matter of law when it found there was no issue of fact regarding whether a contract was established by the August 7, 2009 TPP agreement signed by the Millers.

Issues pertaining to Assignment of Error No.1

1. Could a reasonable person find the August 7, 2013 TPP agreement, signed by the Millers, created a binding contract between Suntrust and the Millers?
2. Does promissory estoppel create an issue of fact prohibiting summary judgment in this case?
3. Did Suntrust breach its implied duty of good faith and therefore create an issue of fact for hearing?

INTRODUCTION

Defendants Steven and Leticia Miller (“Millers”) built a home on acreage the own located at 13210 S Campbell Road, Rockford, WA 99030. After some difficulties with their original contractor they got a loan from the Bank of Whitman to refinance the property and finish the building. However, the loan ended up being difficult to manage on Mr. Miller’s income. Leticia Miller is a stay at home mother who takes care of their three children. The Bank of Whitman went under in the financial crisis and Suntrust took over control of the loan. Mr. Miller sought out financial relief in April of 2009 from Suntrust. Suntrust was not originally ready for the new HAMP modification process and did not request documents to start the process until a later date. Mr. Miller continued making on time payments to the mortgage company.

Eventually, in July of 2009 Suntrust sent the Millers a Trial Plan Payment Agreement (TPP). The TPP requested the Miller’s pay \$2,113.31 a month, including escrow. The Millers signed the agreement, but Mr. Miller called and said this was still too high based on his current income and needs for his family. Suntrust responded by sending a second TPP on August 7, 2009 for \$1,311.87 a month. This became the new offer.

The August 7, 2009 TPP required three payments to be effective. One in September, October and November 2009. The Millers signed the agreement and made the payment. Suntrust never provided a modification offer under the August 7, 2009 TTP. Thus, they breached the contract and caused considerable harm. There is a question of fact as to whether Suntrust breached the contract.

PROCEDURAL STATEMENT OF THE CASE

Suntrust moved to foreclose on the Millers in 2012. The Millers brought an action in Spokane Superior Court opposing the foreclosure on the basis that Suntrust had breached its contract to modify the payments. Before the case went to hearing Suntrust sold the loan to Christian Trust. Judge Sypolt heard Suntrust's Summary Judgment Motion on August 27, 2013. Judge Sypolt ruled in favor of Suntrust. The Court found that the Miller's were sent a Trial Payment Plan (TPP) on August 7, 2009. That SunTrust sent the Miller's a modification agreement consistent with the August 2009 TPP in October 2009. That the Miller's refusal to accept the October modification agreement was a rejection of the offer to modify the contract and the original trust deed was to remain in force. The Millers filed a Motion to Reconsider on August 29, 2013 and that was denied. They then appealed to the Washington Court of Appeals on October 18,

2013.

STANDARD OF REVIEW

This Court reviews orders of summary judgment de novo, and engages in the same inquiry as the Trial Court:

After the moving party submits adequate affidavits, the nonmoving party must set out specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.

Heath v. Uruga, 106 Wn. App. 506, 512-513, 24 P.3d 413 (2001)

(internal citation omitted)

STATEMENT OF THE CASE

SunTrust sent a TPP in July 2009 to the Millers for \$2,113.31. CP 25 Ex. E & F. The Millers called SunTrust and asked for a lower payment arrangement. CP 29 Ex. A. SunTrust sent a second TPP in August 2009 for \$1,311.87. CP 25 Ex. G & H. Each TPP required the Miller's make three payments before a modification could be issued. Specifically they stated that if the Millers made payments different than the amount specified they may not receive a modification. CP 25 Ex. E & G.

For the July 2009 TPP the payments had to be made on August 1,

2009, September 1, 2009 and October 1, 2009. CP 25 Ex F. Only the August 1, 2009 payment was made before the Miller's asked for a second modification. CP 29 Ex. A. The August 2009 TPP payments were to be made on September 1, 2009, October 1, 2009 and November 1, 2009. CP 25 Ex. H. The Millers made the September 1, 2009 and October 1, 2009 payment before SunTrust sent a modification on October 20, 2009 consistent with the July 2009 TPP. CP 29 Ex. A.

The Miller's called SunTrust immediately and told them the October 20, 2009 modification was not consistent with the August 2009 TPP. CP 29 Ex. A. After several discussions SunTrust told them to keep making payments on the trial agreement and they would let them know what to do. *Id.* SunTrust did not send another writing regarding the modification or instruct the Miller's on how they would act. *Id.* The Miller's continued to pay under the August 2009 TPP and SunTrust continued to accept the payments. *Id.*

ARGUMENT

Judge Sypolt granted Suntrust's Motion to Dismiss on the grounds that Suntrust complied with the terms of the August 7, 2009 TPP. The court's decision was not supported by the current case law in the 9th district nor the evidence before the court. Spokane County Court's ruling

should be reversed for the following reasons: (A) SunTrust failed to send a modification as required by *Corvello* under the August 2009 TPP; (B) SunTrust was estopped from moving to foreclose as it had promised to send another modification, and; (C) SunTrust's October 20, 2009 modification was not sent in good faith as required by the case law (*Corvello*).

A. Breach of Contract

Multiple courts have found that a TPP agreement has the appearance of a contract. These include Bosque v. Wells Fargo Bank N.A., 762 F.Supp.2d 342, 348 (D.Mass. 2011) and more recently, the 9th Circuit Court of Appeals recently published Corvello v. Wells Fargo Bank, NA, DBA, D.C. No. 3:10-cv-04749-JSW. *Corvello* deals directly with the obligations of a bank when dealing with a TPP. Relevant to the case at hand *Corvello* states the following:

Where as here, borrowers allege, and we must assume, that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement. *Corvello* at Pg. 13.

The Miller's alleged that SunTrust failed to hold its end of the bargain under the August 7, 2009 TPP. The Millers made the September, October and November payments. SunTrust sent no modification

agreements after the November 2009 payment was made. The only modification agreement sent was on October 20, 2009 before the final payment on the August 2009 TPP. Therefore, the October 20, 2009 payment cannot be consistent with the August 2009 TPP as it had not been fulfilled. It could only be consistent with the July 2009 TPP which the Miller's had already rejected and been sent a subsequent offer.

Factually, the October 20, 2009 modification cannot be consistent with the August 2009 TPP as the TPP was not fulfilled until November 1, 2009 12 days later. *Corvello* makes it clear that on November 1, 2009 SunTrust had an obligation, at a minimum to send a modification agreement or send a letter in writing stating the Millers did not qualify for a modification.

Id. The bank does not contest this point. At no point did they send a permanent modification after November 1, 2009 nor did they send a letter in writing telling the Miller's they did not qualify. All the bank did was tell the Millers on November 25, 2009 that they would review the information, delay all action until December 3, 2009 and get back to them. SunTrust continued to accept the payments under the August 2009 TPP and did not get back to the Millers. SunTrust failed its duty under the August 2009 TPP to notify the Millers they did not qualify and/or send and appropriate modification agreement.

Corvello states:

Under the terms of the TPP Agreement, then, that moment [when Wells Fargo received the borrower's TPP] was Wells Fargo's opportunity to determine whether [the borrower] qualified. If the [borrower] did not, it could have and should have denied [the borrower] a modification on that basis." Quoting Wigod, 673 F.3d at 562. If after receiving the TPP the bank determines that a borrower is not eligible for a modification, the bank should "promptly communicate that determination to the borrower **in writing** and consider the borrower for another foreclosure prevention alternative. SD 09-01. Wells Fargo's own failure to fulfill the notification obligation does not deprive plaintiffs of the benefits of their agreement. Emp. Added. *Corvello* at page 14.

In *Corvello*, the court found Wells Fargo was required to issue a modification after completion of the TPP payments. In this case, SunTrust did not issue the required modification. Contrary to the August 16, 2013 ruling the October 20, 2009 modification was not consistent with the August 2009 TPP, as the August 2009 TPP had not yet been completed. When this was brought to SunTrust's attention by Mr. Miller on or around October 22, 2009, SunTrust informed Mr. Miller the August 2009 TPP was a mistake but they would see what they could do.

An oral statement that the August 2009 TPP was a mistake did not revoke the August 2009 TPP. *Corvello* specifically states a revocation must be in writing. *Id.* Based on the facts there is still an issue as to whether SunTrust breached its agreement under the TPP. According to *Corvello*, they have. SunTrust has not issued a modification agreement in accordance with the terms of the TPP.

The essential terms in the TPPP Agreement are clearly specific enough to defeat a motion to dismiss. The Bosque court concluded that whether the TPP Agreement obligates the servicer to provide a modification or merely a decision on the loan modification, “is an issue better resolved at a later stage of the proceeding.” Id. as 352 n.7

All of this information must be viewed in a light most favorable to the non-moving party. In this case, the Millers were the non-moving party. The court needs to ask itself is there an issue of fact upon which reasonable people could disagree. In this case could a reasonable person look at the facts and believe that there was a contract between the Millers and Suntrust upon which Suntrust had not fulfilled its duty? The answer is yes.

A reasonable person would expect the TPP to provide the terms between the party. The two TPPS created separate contracts that required separate payment dates and amounts. The TPP specifically stated that payment of any different amount could result in no modification. In each case the Millers would have to make three exact payments before a modification would be offered. The August 7, 2009 TPP required three payments one each in September, October, and November of \$1,311.87. A reasonable person could conclude the October 20, 2009 modification offer was not consistent with the August 2009 TPP because the terms had

not yet been completed and the modification was not consistent with the TPP terms. A reasonable person could conclude the October 20, 2009 TPP was a mistake by Suntrust and the real modification had not yet been offered.

A reasonable person could also conclude Suntrust was required to provide a formal, written modification after the third payment was made in November 2009 or at a minimum a written letter denying modification. Suntrust's failure to do so would be a breach of contract. Based on the reasonable person standard there is an issue of fact before the court. The question of fact is did Suntrust do all that it was required under the TPP agreement, and if not did its subsequent actions create a new contract. Applying the findings in Corvel, a reasonable person could conclude they did not do what was required.

A. Promissory Estoppel

Promissory estoppel has four elements: a promise, foreseeability of reliance on that promise, actual reliance, and a finding that the reliance was justified. *Comment, Promissory Estoppel in Washington*, 55 Wash.L.Rev. 795 (1980). In this case, the promise was made to look at the file and see what could be done. This was done in October and November 2009. See declaration of Steve Miller. It was foreseeable that

The Millers would rely on this promise. They did rely by continuing to pay the \$1,311.87 a month. The reliance was justified as any party would expect a return call or written letter telling them how the company would react.

SunTrust did not send a further modification after these conversations in November 2009. As such SunTrust would be stopped from foreclosing as they never acted on that oral promissory. SunTrust would have been required to send a written document, either another modification or a document stating they would not modify the claim. SunTrust did not.

B. Good Faith Offer

If there is a contract, there is an implied covenant of good faith and fair dealing. Badgett v. Sec. State Bank, 116 Wash.2d 563, 569 (1991). This duty "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Badgett, 116 Wash.2d at 569. The duty of good faith and fair dealing requires only that the parties perform in good faith the obligations imposed by their agreement. *See* Barrett v. Weyerhaeuser Co. Severance Pay Plan, 40 Wash.App. 630, 635-36 n.6, (1985). The duty of good faith and fair

dealing does not inject substantive terms into the parties' contract or create a free-floating duty of good faith unattached to the underlying legal document. *Badgett*, 116 Wash.2d at 569-70.

Corvello states a bank has “some limited discretion to set the precise terms of an offered permanent modification” however; the terms offered must be done in good faith. *Id.* at 13. SunTrust did not act in “good faith” in this modification process. SunTrust provided the \$1,311.87 modification raising the Miller’s hopes of an affordable modification. They sent the October 20, 2009 modification that was not consistent with the August 7, 2009 TPP. It was not consistent as the August TPP had not been completed and it made no effort to explain the difference in the monthly payments. However, it was consistent with the July 2009 TPP. Thus, creating confusion on the Millers part. When asked they told the Millers that the August 2009 TPP was either a mistake or that it was not supported by the financial documentation they submitted. Both of these statements are blatant lies.

Corvello states that a modification request can only be denied by a written letter from the bank. SunTrust never sent that letter. The Miller’s provided all the financial documentation required to get a modification. This is why the July 2009 TPP and the August 2009 TPP were sent. The August 2009 TPP was based on an oral request by Mr. Miller to have

lower payments. SunTrust obliged based on the financial documents they had. SunTrust then after getting the Miller's hopes up refused to offer a modification consistent with the August 2009 TPP. That is why the October 20, 2009 modification was sent. It was sent to try and enforce the July 2009 TPP and avoid having to issue a modification consistent with the August 2009 TPP.

Good faith requires a sincere or honest intention to deal well with others. See Tyler v. Grange Ins. Ass'n, 3 Wash.App. 167, 173, (1970). The two TPPs sent by SunTrust combined with the October 20, 2009 modification, the subsequent phone calls with the Millers promising to review the documentation and the cashing of checks for months until denying the modification process show SunTrust had no intent to deal honestly with the Millers. SunTrust's October 20, 2009 modification was not in good faith. Its dealings after October 20, 2009 were not in good faith and it breached its duty to the Millers and the summary judgment dismissal should be overturned.

Not only did SunTrust fail to send the Millers written notification on their refusal to honor the August 2009 TPP, they reassured the Millers in the middle of the trial period that everything looked good. Further, SunTrust accepted the Millers' payments the following year (2010) and filed a 2010 IRS 1098 showing paid interest and principal. SunTrust did

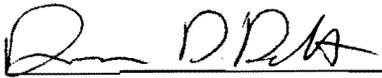
not deal fairly and honestly with the Millers and so it should not have been granted the motion for dismissal.

CONCLUSION

For the above stated reasons we request the court issue and order reversing the August 19, 2013 order to dismiss and/or grant the Defendant leave to amend its complaint to include the above theories of promissory estoppels and good faith in its counterclaims against SunTrust. We also request all reasonable attorney fees and costs as provided by under the law.

Dated this 27 day of January, 2014

FORD LAW OFFICES, PS


Drew D. Dalton,
Attorney for Defendant

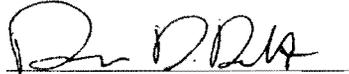
1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify that on the 27th day of January, 2014, I caused a true and correct copy of the
3 foregoing **APPELLANT'S BRIEF** to be forwarded, with all required charges prepaid, by US mail indicated below,
4 to the following:

4 ORIGINAL TO: Clerk of the Court
5 Spokane County Courthouse
6 Room 300
7 1116 West Broadway Avenue
8 Spokane, WA 99260

9 AND TO:
10 Superior Court Judge
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