70628-4

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No. 70628-4-1

COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

HERBERT HEINTZ AND BARBARA HEINTZ, HUSBAND AND WIFE

PETITIONERS,

v.

J. P. MORGAN CHASE BANK NATIONAL ASSOCIATION AND QUALITY LOAN SERVICE CORP. OF WASHINGTON, TRUSTEE

RESPONDENTS.

PETITIONERS' REPLY TO J. P. MORGAN CHASE BANK NATIONAL ASSOCIATION'S ANSWERING BRIEF

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Table of Authorities

Cases

Rules

REPLY

Petitioners make the following replies to the Answering brief of Chase Bank:

(1) Petitioners have not made a single mortgage payment since early 2010 because they disagreed with Chase's reading of the note.

Reply

Default is a fundamental condition to foreclosure. Petitioners were never in default until Chase wrongfully raised the monthly payment. Petitioners were fully paid on their mortgage when, without warning, Chase raised monthly payments and refused to discuss the raises and reasons. If Petitioners are permitted to rescind this loan because of breach by Chase of the terms of the note, Chase would not be entitled to enforcement. King v Long Beach Mortgage, 672 F. Supp. 238 (2009) (a security interest becomes void and unenforceable if the borrower has a right to rescind).

(2) The trial court reviewed the terms of the note and dismissed the action because it did not state a claim under CR12(b)(6).

Reply

The trial court improperly dismissed this action under CR12(b)(6). This rule is sparingly used and there must be no set of facts that could be proved which would entitle relief. All inferences are in favor of petitioners. The 5-year moratorium claimed by the Petitioners is to be treated as true under this rule. Given these standards, dismissal was reversible error since the case calls for trial on the facts and law. Pearson v Vandermay, 67 Wn2d 222, 407 P 2d 143 (1965). Bravo v Dolsey Companies, 125 Wn2d 745 (1995), Halvorson v Dahl, 89 Wn2d 673, 675, 574 P2d 190 (1978).

(3) The note contains 3 "triggers" for possible monthly increases:

(A) the occurrence of a payment change date
(B) where the principal exceeds a certain sum
(C) the fifth anniversary of the first payment

This argument assumes, without good reason, that the 5-year moratorium does not have priority over the occurrence of a payment change or the principal exceeding $1,150,000.00. The contention is specious.

The trial court failed to permit a trial which would have recalled the basic surrounding circumstances under which this loan was made. Those circumstances are vital to the intentions of Washington Mutual and Petitioners as to the reason for the 5-year moratorium, i.e., to lower the monthly payments for a fixed period in order to allow Petitioners to pay taxes and insurance in addition to the interest and principal on the debt. This loan was "adjustable" after 5 years. The payment of interest only for a fixed period was a common type of loan in 2007. The $3451 paid by Petitioners represents interest only. The balance of the interest, was $4014 and added to the principal. At no time during the 22 months the monthly payments were made, did the principal balance exceed $1,150,000. Contrary to the contention of Chase, the excess of principal change never took place.

Example

Debt $1,000,000.00
x 8.759% interest

$ 89,590.00 per annum interest
÷ 12 months
$ 7465.00 per month interest

Paid by Petitioners per month - $3451
Difference between total amount of interest per month of $7465 and $345 = $4014 per month
Payment by Petitioners of $345 for 22 months (prior to raise by Chase) = $88,308. Total principal at end of 22 months $1,000,000 plus $88,308 = $1,088,308.00.

The principal never exceeded $1,150,000 at the time of raises by Chase on October 17, 2008 and was no "trigger" for raises argued by Chase.

The occurrence of a payment change date argued by Chase raises questions as to whether the note provisions are understandable. When an agreement is not understandable, it is unenforceable. The so-called change dates and their language simply lack clarity. Only Chase could dictate what and in what manner changes were to be made. The change provisions in 4(e) and 3(b) are in conflict and unintelligible. Paragraph 4(B) is vague and incomprehensible. When dealing with an "index" to be used as a standard to raise interest rates, the standard is illusory and unenforceable because Chase promises nothing in these mixed and confusing provisions.

(4) The language of the note may not be interpreted by the expressed subjective intent of extrinsic evidence.

Reply

Chase's attempt to block the background of the note's execution is ill-aimed. The background of the note's intent is always the premier question. While extrinsic evidence may not be used to modify, negate or contradict the note terms, the context rule of Hearst permits the showing of not only the circumstances surrounding the execution of the note, but extrinsic evidence. Chase wrongly seeks to cite Hearst, 154 Wn.2d 493 as a case blocking the extrinsic Declaration of Herbert Heintz. Chase was not privy to the background and never challenged the declaration.

In light of the Heintz Declaration, the trial judge should not have granted summary judgment, but allowed a trial on the interactions of the parties and surrounding facts on the note's execution. Berg; Plese Graham, LLC v Lashbaugh, 104 Wn. App. 530, 541, 269, P3rd 1038 (2011).

(5) Petitioners illusory argument as to the language of the note is "nonsensical."

Reply

An illusory promise lacks consideration. The Index in the Chase note promises nothing. The provisions lack any reasonable standard whereby anyone can ascertain how and when Chase can raise interest rates in the note. The Index is a good example of a contract provision that is illusory and solely under the complete control of Chase. Under the Index, there is no real enforceable promise by Chase. It permits Chase to change the interest rate at its own whim and is unenforceable.

An illusory promise is an evidential contention which can be made at any stage of an action. The question of vagueness and clarity was before the trial court. This failure was one of law and properly before the trial court. Merritt v Graves, 52 Wash. 57, 100 P. 164 (erroneous rulings on pleadings are examples of errors of law).

Petitioner has previously addressed the unenforceability of the Chase note in detail in its Opening Brief, p.9. It serves no purpose here to repeat the argument.

Conclusions

A. Chase has no direct knowledge of the intention of the original parties to the note, nor its surrounding circumstances.

B. The language of the 5-year moratorium is plain and unambiguous.

C. Chase has never denied the Declaration of Heintz and it is verity on appeal.

D. A CR12(b)(6) motion admits the truth of Petitioners' assertions and summary judgment was inappropriate.

E. Extrinsic evidence is advisable so long as it does not deny the plain language of the note or cancel or modify its terms.

F. The note payment raises by Chase are void because the provisions are unenforceable.

G. Attorneys' fees should await the outcome of a trial on the merits.

Dated this date of November 5th, 2013.

Robert H. Stevenson
Attorney for Petitioners

On this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorney of record for plaintiff-defendant, containing a true copy of the document to which this affidavit is affixed.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

11-5-13