

FILED
COURT OF APPEALS
DIVISION II

2015 AUG -5 PM 1: 50

STATE OF WASHINGTON

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NO. 46906-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEY K. KIM, Appellant,

vs.

FAY SERVICING, Respondent

REPLY BRIEF of APPELLANT

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BACKGROUND

We often observe differing facts or accounts at different times. Such facts or figures are not necessarily contradictory as circumstance can and often do change. This was the situation with Mr. Kim. In 2006, at the time when he applied for the mortgage, he was married and had a business that produced positive income for the family. Things changed in 2011 when the couple petitioned for dissolution of their marriage. Mr. Kim left the business to his estranged spouse and was on a limited income until he received his settlement from the dissolution.

In early 2013, Mr. Kim requested a modification of his mortgage which the bank denied due to supposed non-response to request for additional documents despite having submitted all the required and requested documents. In August 2013, Mr. Kim received the \$300,000.00 settlement from his dissolution. Mr. Kim was forthcoming about his finances, including his desired plan to utilize the settlement to invest in a business to generate income during the entire period. Mr. Kim advised Fay Servicing of this plan in a "hardship letter" submitted to them per their instructions to his attorney who was known to Fay Servicing as someone who spoke Korean, Mr. Kim's native language. Fay Servicing acknowledges this in their response but simply chose not to contact Mr. Kim's attorney and chose to speak directly with Mr. Kim. Fay Servicing

ignored that fact that they could very easily have contacted the attorney instead of telling Mr. Kim that they will call again with an interpreter. This is what prompted Mr. Kim to wait for the phone call that never came.

ARGUMENT

Fay Servicing, in stating that Mr. Kim cannot meet elements 1, 3, or 5 of the elements for a Consumer Protection Act, does not claim that elements 2 and 4 are met. We will therefore address only elements 1, 3, and 5:

1. Unfair act or deceptive practice.

Fay Servicing agrees that they did in fact advise Mr. Kim some two weeks before the trustee sale that they will call him again with a Korean interpreter. They go on to claim that they were unable to find such an interpreter. This would not be deceptive but for the fact that Fay Servicing already knew that they could contact Mr. Kim's attorney but chose not to and that they did not make any attempt to find an interpreter. They simply chose to keep Mr. Kim holding his breath for the call that never came. This calls to question the intent of such a statement that served to keep Mr. Kim from acting to avoid the trustee sale. Fay Servicing knew that Mr. Kim had the necessary finances to avoid such a sale had he known for a fact that there was no modification in the works and that the trustee sale was going forward as scheduled. A statement that

they would call again with an interpreter with no intent to do so is very deceptive especially when it served to keep Mr. Kim from acting to avoid the trustee sale, to keep his home. Such action can easily be said to be deception.

2. Affecting the public interest.

Fay Servicing refer to *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986) in asserting that their actions do not meet this element because Mr. Kim cannot show “that additional plaintiffs have been or will be injured in exactly same fashion.” Even if this were a private transaction, Fay Servicing ignores the fact that the Court in *Hangman Ridge* goes on to say:

“Factors indicating public interest in this context include: (1)

Were the alleged acts committed in the course of defendant's

business? (2) Did defendant advertise to the public in general? (3)

Did defendant actively solicit this particular plaintiff, indicating

potential solicitation of others? (4) Did plaintiff and defendant

occupy unequal bargaining positions? As with the factors applied

to essentially consumer transactions, not one of these factors is

dispositive, nor is it necessary that all be present. The factors in

both the "consumer" and "private dispute" contexts represent

indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.” *Id. At 790-91*

It is undisputed that the acts alleged were committed in the course of Fay Servicing’s business; that they advertised to the public in general; and Mr. Kim and Fay Servicing occupied unequal bargaining positions. Mr. Kim was at the mercy of Fay Servicing to have his loan modified. He did not have the any known avenue of obtaining another loan from another lender who would be willing to refinance his mortgage within the time constraints that he faced. He had no choice. But, Fay Servicing had the option of modifying the loan or recovering the funds through foreclosure. Loan modifications and loan servicing in general occur with great frequency. It is not an isolated event that rarely happens in the public realm.

One need not have the language barrier to have the potential of being misled into having a false sense of security based on the representations from the business. It is undisputed that Fay Servicing said that they would call again and that Mr. Kim was waiting for that call to come. The language barrier itself is not the crux of this portion of the claim. Waiting is waiting regardless of the reason. One could be waiting for further calculations as well as for an interpreter. The misrepresentation inducing the consumer to believe that another call would be coming soon.

This is something that can happen again and again for a myriad of reasons. This satisfies the public interest element of the claim.

3. A causal link between the act and resulting injury.

Once again, Fay Servicing is confusing the facts. Mr. Kim did previously argue that he had the funds (CP 71-72). Fay Servicing relies on *Smith v. Shannon*, 100 Wash.2d 26, 666 P.2d 351 (1983); and RAP 2.5(a) in their attempt to classify the information that Mr. Kim had \$300,000.00 to “protect his home” as if it were a new issue that was not previously raised. This was evidence disclosed to all, not an “issue” that is being raised here. But for the misrepresentation by Fay Servicing leading Mr. Kim to believe that another call would be made shortly, Mr. Kim would have and could have acted to avoid the trustee sale that took away his home. This is a direct causal link that had been identified from the onset of Mr. Kim’s claim.

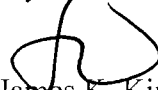
Speaking of raising new issues, unlike Mr. Kim, Fay Servicing is attempting to proffer new evidence and issue in the form of an assertion that they would not benefit in a foreclosure sale. This assertion is easily viewed as an attempt to raise an issue; that Fay Servicing lacked motive to mislead. Such an issue should not be examined here as it is based on an assertion that is not only a mere assertion but because it flies in the face of common conception regarding loan servicing companies.

I. CONCLUSION

The facts, especially when viewed in a light favorable to the nonmoving party, show that Fay Servicing was unfair and deceptive, caused injury to Mr. Kim, and such acts do affect the public interest. Mr. Kim therefore respectfully asks the Court to vacate the Summary Judgment and remand the matter for trial.

DATED this 5th day of August, 2015.

Respectfully Submitted,



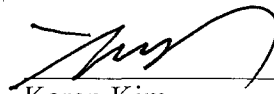
James K. Kim, WSBA #28331
Attorney for Appellant Kim

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on the 5th day of August 2015, I caused a copy of the Reply Brief of Appellant to be served upon Adam Hughes via electronic mail at the following electronic mail address and via first class mail at the following physical address:

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Dated this 5th day of August, 2015



Karen Kim

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