

Court of Appeals No. 66019-5-I
King County Superior Court No. 08-2-40263-1 KNT

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION
SUCCESSOR BY MERGER TO FIRST MUTUAL BANK,

RESPONDENT,

v.

DALE E. ALSAGER and BETTY J.L. ALSAGER,
husband and wife;

APPELLANTS,

PUGET SOUND LEASING CO., INC., a corporation; JOHN
and JANE DOE, unknown occupants of the subject
real property; and ALL OTHER PERSONS OR PARTIES
UNKNOWN CLAIMING ANY RIGHT, TITLE, INTEREST, LIEN,
OR ESTATE IN THE PROPERTY HEREIN DESCRIBED,

DEFENDANTS.

BRIEF OF APPELLANTS

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ORIGINAL

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I. INTRODUCTION

The Alsagers refinanced a loan on their real property in Hobart for what they in good faith and justifiably believed to be a 30-year conventional fixed rate mortgage. This is the type and kind of loan they applied for in July 2006; this is the type and kind of loan they believed and understood they were approved for and obtained by the documents they were told to sign at closing in January 2007; but this is not the type and kind of loan they received as the bank secretly changed their application in December 2006 to an adjustable rate loan for a higher percentage, a lesser amount, and a longer term. There was thus no meeting of the minds between the Alsagers and the bank so basic to the formation of a valid and enforceable contract, and the loan sought to be enforced and the deed of trust sought to be foreclosed by Washington Federal are void and unenforceable. The trial court erred by granting Washington Federal summary judgment where genuine issues of material fact exist that can only be resolved at trial.

II. ASSIGNMENTS OF ERROR

Appellants Dale and Betty Alsager filed their appeal raising issue with errors made by the trial court in its grant of summary judgment and decree of foreclosure to Respondent Washington Federal.

A. TRIAL COURT ERRORS

1. The trial court erred by issuing its Order granting Washington Federal Summary Judgment And Decree Of Foreclosure entered by the trial court dated August 10, 2010.

2. The trial court erred by issuing its Order On Civil Motion denying Alsagers' Motion For Reconsideration entered by the trial court dated August 27, 2010.

B. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether there exist genuine issues of material fact as supported by the undisputed evidence in the record to render summary judgment inappropriate under the circumstances and necessitate reversal and remand for trial? (Assignments of Error #1 and #2.)
2. Whether the undisputed evidence in the record, and all inferences therefrom, viewed in the light most favorable to the Alsagers support their defense that there was no meeting of the minds and thus no valid and enforceable loan contract and deed of trust were ever formed? (Assignments of Error #1 and #2.)

3. Whether the statute of frauds raised *sua sponte* by the trial court applies to preclude consideration of the notary's oral representations made to the Alsagers at closing as competent evidence supporting a genuine issue of material fact as to whether there was a meeting of the minds and the formation of a valid and enforceable loan contract? (Assignments of Error #1 and #2.)

III. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Alsagers own roughly 20 acres of land east of Maple Valley and near Hobart in unincorporated King County. CP at 141, ¶ 6. This land is composed of two separate but adjoining legal lots, each roughly 10 acres in size. CP at 141, ¶ 6. Although each lot is agriculturally used for the raising of horses, hay and grain, on each lot is also located a single family residence. CP at 141, ¶ 6.¹ It is the lot on which is located the barn and living quarters in the loft that is the subject of this action in which Washington Federal seeks judicial foreclosure of a Deed of Trust and the loan it

¹ On one a stand-alone house and on the adjoining 10 acre parcel is a barn with full residential living quarters in the loft. Each lot is zoned RA-5 for single family residential use on 5-acre minimum lot area. CP at 141, ¶ 7.

purportedly secures. CP at 141-42, ¶ 8.²

According to documents obtained from Washington Federal in response to interrogatories and request for production, on July 7, 2006, the Alsagers applied for a 30 year, conventional, fixed-rate loan in the amount of \$352,000 at 7.375 percent interest. CP at 142, ¶ 9.³ Over a 30 year amortization, under this intended loan format the Alsagers would have paid a total of \$875,220.16. CP at 153 (TILA Disclosure Statement). These were the Alsagers' fundamental and essential terms and conditions required by them for obtaining a loan that they needed and were capable of fulfilling over its lifetime. CP at 142, ¶ 9.

Without prior notice to and approval from the Alsagers,⁴ on or about December 1, 2006, Washington

² The street address of the subject property is 20275 269th Ave SE, Maple Valley, WA 98038 (tax parcel ID # 0122069141).

³ A copy of the loan application is CP at 146-51.

⁴ CP at 142, ¶ 10. Effective June 2008 Washington statutory law was changed to require that "if any material terms of the residential mortgage loan change before closing, a new disclosure summary must be provided to the borrower within three (3) days of any such change or at least three days before closing, whichever is earlier." RCW 19.144.020.

Federal's pre-merger predecessor First Mutual Bank summarily and unilaterally changed the type of loan it approved for the Alsagers to a 10/1 ARM⁵ and the principal amount reduced to \$304,000. CP at 155. Alsagers did not receive notice as to any such changes made at that time from either First Mutual Bank or Charter Funding and at all times continued to in good faith rely on their original loan application for a conventional fixed rate loan and understanding that such was processed for approval by First Mutual Bank. CP at 142, ¶ 11.

On January 12, 2007, the Alsagers met with Notary Public David Schlieps who presented them for the first and only time with a stack of documents comprising the final loan, deed of trust, and supporting documents. CP at 142, ¶ 12. The Notary was rushed, had no extra copy to leave with the Alsagers, and simply flipped through the documents and had the Alsagers sign each one without reviewing them or giving the Alsagers time to review

⁵ A "10/1 ARM" is an Adjustable Rate Mortgage that has a fixed percentage rate for 10 years after which in the 11th year the loan becomes an adjustable rate mortgage.

them. CP at 143, ¶ 13. He did, however, affirmatively represent to the Alsagers that the underlying loan was in fact a fixed rate note over the entire duration of the loan. CP at 143, ¶ 13.⁶

Having no time afforded them to review these loan documents, and no copy left with them to review thereafter, the Alsagers still believed and understood they were signing the final papers for the 30 year conventional fixed rate loan they originally applied for as they were aware of no changes to such essential and material terms.⁷ The Alsagers never received a copy of the loan documents until such were finally provided during this lawsuit.⁸ With their review of the documents so tardily provided, the Alsagers discovered that the loan and documents they were induced into

⁶ These facts are undisputed in the record.

⁷ CP at 143, ¶ 14. For example, the new TILA Disclosure Statement was for a 40 year 7/1 ARM with a principal amount of \$304,000 at an initial interest rate of 8.375 percent, which would amortize to a total of \$1,066,473.81. CP at 65. This is not what the Alsagers applied for nor intended as their loan.

⁸ CP at 143, ¶ 15. All the Alsagers received from First Mutual Bank was a payment coupon book. A copy of the loan documents was never provided as promised by Schlieps.

signing at a hurried pace were in fact not at all what they intended as applied for and believed in good faith to have obtained.⁹

First Mutual Bank summarily and unilaterally changed the essential and material terms of Alsagers' loan application without their knowledge and consent,¹⁰ and now Washington Federal seeks to reap the benefits from First Mutual's closing agent's unequivocal affirmation of fixed interest rate, rushing the signatures, and then beating a hasty retreat without leaving any copy of the loan documents in this "bait and switch" scam.¹¹

⁹ CP at 143, ¶ 16; CP at 144, ¶ 18.

¹⁰ CP at 144, ¶ 17.

¹¹ CP at 144, ¶ 19. The document signing on January 12, 2007, was but a sham as the Alsagers were not given time to review them and the closing agent took all papers with him and left no copy. Although Washington Federal now appears to contend that TILA and RESPA do not apply to this loan, such assertion belies the facts as papers included in the loan documents state that such federal laws do indeed apply to this loan. See CP at 65 (Federal Truth-In-Lending Disclosure Statement) and CP at 67 (RESPA Servicing Disclosure). Washington Federal cannot have it both ways and any doubt should be resolved in favor of the Alsagers. Accordingly, Alsagers were legally entitled to have a copy of all documents left with them for their review after signature and had three days in which to rescind. 12 CFR § 226.23(3) (TILA, Regulation Z). None of this they were afforded, and such is a violation of federal law affording at a minimum a rescission remedy.

B. PROCEDURAL BACKGROUND

Washington Federal brought a motion for summary judgment on the note and deed of trust in the trial court. The court granted Washington Federal's motion, CP at 168, and denied Alsagers' motion for reconsideration. CP at 181. This appeal was then brought by the Alsagers. CP at 182.

IV. STANDARD OF REVIEW

The Court of Appeals finds itself in the exact position as was the trial court in considering Washington Federal's motion for summary judgment and the evidence supporting the Alsagers' affirmative defenses that (1) there was no meeting of the minds and as a result there was never formed a valid and enforceable loan contract subject to foreclosure, and (2) fraud/misrepresentation in the inducement. CP at 50, ¶ 26.

A motion for summary judgment is appropriate only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law."¹² A material fact is one upon which the outcome of the litigation depends, in whole or in part.¹³ In a summary judgment motion, the burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper.¹⁴ All facts and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party.¹⁵

"The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract." Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). A purported acceptance is ineffective if additional or changed terms constitute a material variance to the original offer. Sea-Van, 125 Wn.2d at 126. "What constitutes a

¹² CR 56(c).

¹³ Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

¹⁴ Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

¹⁵ Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

material variation is dependent upon the particular facts of each case." Sea-Van, 125 Wn.2d at 126. Silence and failure to disclose material variations where a special relationship exists and a duty to disclose arises constitutes fraudulent concealment. Giraud v. Quincy Farm & Chemical, 102 Wn. App. 443, 453, 6 P.3d 104 (2000), *rev den*, 143 Wn.2d 1005 (2001). See also RCW 19.144.080. "Normally, the existence of mutual assent or a meeting of the minds is a question of fact." Sea-Van, 125 Wn.2d at 126.¹⁶ Whether there was a meeting of the minds as to the essential terms of an agreement is unsuited for disposition by summary judgment. Grimes v. New Century Mortgage Corporation, 340 F.3d 1007 (9th Cir. 2003).

V. ARGUMENT

SUMMARY

Because the Alsagers were relying in good faith on their application for a conventional fixed

¹⁶ Mutual assent or mutual intention are the modern expressions for the concept of "meeting of the minds". Swanson v. Holmquist, 13 Wn. App. 939, 942, 539 P.2d 104 (1975).

interest rate loan that, to them, at all times remained unchanged since July 7, 2006 as they were not told of the unilateral and significant changes to the essential and material terms made by First Mutual Bank on or about December 1, 2006, there was absolutely no "meeting of the minds" between the Alsagers and First Mutual Bank so essential to the formation of a valid and enforceable contract under Washington law on January 12, 2007, regarding and relating to, *inter alia*, the decrease in loan principal, the adjustable interest rate, and the increase in total amount of payments over an extended loan period for a smaller principal. Accordingly, there is no enforceable loan contract and deed of trust subject to foreclosure.

Furthermore, the notary's oral representations made to the Alsagers at closing fall outside of and are not barred by the statute of frauds, thus constituting competent evidence supporting the lack of a meeting of the minds fundamental to the formation of a valid and enforceable loan contract and deed of trust.

LEGAL DISCUSSION AND ARGUMENT

- A. BECAUSE THE ALSAGERS INTENDED TO OBTAIN A LOAN REFLECTING THEIR ORIGINAL APPLICATION AND THE BANK IN SECRET MATERIALLY CHANGED THE LOAN DOCUMENTS TO REFLECT A TYPE AND KIND OF LOAN THE ALSAGERS IN NO WAY INTENDED OR WANTED, THERE WAS NO MEETING OF THE MINDS AND THUS NO VALID AND ENFORCEABLE LOAN CONTRACT WAS FORMED**

The objective manifestation of intent clearly expressed by the Alsagers as to the loan they continued to believe and understand they were obtaining is evidenced in writing by their Uniform Residential Loan Application signed by them on July 7, 2006 and submitted to First Mutual Bank by Charter Funding. These underlying fundamental and essential terms and conditions of the Alsagers' loan requirements were clearly known to First Mutual Bank as such were very definitely neither a hidden nor secret agenda of the Alsagers and were disclosed six months prior to the presentment of the Bank-prepared loan documents on January 12, 2007. Their loan application formed the basis for the expected meeting of the minds.

"Meeting of minds" [means the] mutual agreement and assent of parties to contract to substance and terms. The "meeting of the minds" required to make a contract is not

based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which from all the circumstances should be known.

Black's Law Dictionary, at p. 886 (5th ed. 1979). Moreover, such terms and conditions of the loan were not only on the collective mind of the Alsagers, but comprised their basic and unchanging mind set throughout the loan process and as to which they never knowingly assented to any variation therefrom. Nevertheless, the essential terms and conditions of the loan as set forth in the Alsagers' application were summarily, unilaterally and most significantly changed by First Mutual Bank without informing Alsagers at the time it made the changes on or about December 1, 2006. No disclosure was made to the Alsagers at such time and no assent to these most significant variations was given by the Alsagers. At the loan document signing that took place on January 12, 2007, silence as to the changed terms and conditions and a rush to obtain signatures without

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an extra copy available was the *modus operandi*. Under the hurry-up pressure from First Mutual Bank's escrow agent, the Alsagers in good faith honestly believed and understood, as affirmed by Schlieps, that the loan documents they were told to sign and where to sign were as they originally intended and reflected a conventional fixed rate loan over a 30 year period. The changes unilaterally made by First Mutual Bank were not specifically brought to Alsagers' attention, such material variations from the original offer were as a matter of law fraudulently concealed from them.¹⁷

Here, Washington Federal has the burden of proving the existence of a valid and enforceable loan contract, which includes proving the existence of the parties' mutual intentions. Johnson v. Nasi, 50 Wn.2d 87, 309 P.2d 380 (1957). In order to prevail on summary judgment, Washington Federal must prove by competent substantial evidence that the Alsagers in fact intended and knowingly

¹⁷ A practice that should be found to constitute an unfair or deceptive act or practice under the Washington Consumer Protection Act, Chapter 19.86 RCW.

assented to the significant variation in the essential terms and conditions from their loan application unilaterally imposed by First Mutual Bank. The fact that the Bank's escrow agent sent to collect the Alsagers' signatures failed to bring attention to such material variations but affirmatively indicated that the loan was fixed rate militates against finding the absence of any genuine issue of material fact.¹⁸ *These facts are undisputed in the record.* There is also no evidence found in the record that demonstrates First Mutual Bank itself brought such profound changes expressly and specifically to the Alsagers' attention for their consent/approval at any time prior to the January 12, 2007, event. It is most obvious that it was First Mutual Bank that had the hidden and secret agenda thereby destroying any meeting of the minds.

Furthermore, there is no vitiation of the

¹⁸ Such affirmation of fixed rate by the bank's closing agent is an assertion of fact, not of law nor is such advice on the merits of the transaction, and is not proscribed by the escrow agreement (also presented for hurried signature along with all other documents on January 12, 2007). CP at 83.

Alsagers' firm and good faith belief that the final loan documents reflected their steadfast intention of obtaining a conventional fixed rate loan resulting from or inferred by the heading on the loan that such is a "Fixed/Adjustable Rate Note", CP at 16, especially read in the light of (1) Schlieps' affirmation that the loan was fixed rate over its entire duration, CP at 143, ¶ 13, and (2) the Alsagers hurried through closing being told where and what to sign without being given an opportunity to read the documents and having no copy left with them for their review as required by law. CP at 50, ¶ 30. As a matter of long and well-established law, the "/" between Fixed and Adjustable is a "virgule" symbol which is defined as follows:

[The] "virgule" . . . symbol connotes disjunctive, or alternative, construction: "a short slanting stroke drawn between two words, usually and and or or (thus, and/or), and indicating that either may be used by the reader to interpret the sense."

Mumma v. Rainier National Bank, 60 Wn. App. 937, 940, 808 P.2d 767 (1991) (citing Ryland Group, Inc. v. Gwinnett County Bank, 259 S.E.2d 152 (Ga. App. 1979)). See also J.R. Simplot, Inc. v. Knight, 139

Wn.2d 534, 541 n.2, 988 P.2d 955 (1999) ("other jurisdictions-both state and federal-unanimously agree the plain meaning of the virgule unambiguously means 'or'"); Webster's College Dictionary, at p. 1488 (Random House 1995) (a "virgule [is] a short oblique stroke (/) between two words indicating that the appropriate one may be chosen to complete the sense of the text"). A virgule does not mean "and". Mumma, 60 Wn. App. at 940. It is therefore most reasonable that in light of Schlieps' affirmation that the loan was fixed rate for its entire duration the Alsagers understood and continued justifiably and in good faith to believe that what they were in fact told to sign were documents reflecting the conventional fixed rate loan they originally intended and applied for in July 2006 with First Mutual Bank.

Whether a valid and enforceable loan contract in fact exists under all the circumstances of our case is at the heart of this controversy and does, by any fair review of the evidence considered in the light most favorable to the Alsagers, present a

genuine issue of material fact for presentment to and determination by the trier of fact.

B. NOTWITHSTANDING THE APPLICABILITY OF THE STATUTE OF FRAUDS TO THE UNDERLYING DOCUMENTS FOR THIS REAL ESTATE TRANSACTION, THE ORAL REPRESENTATIONS MADE BY THE AGENT AT CLOSING AFFIRMING TO THE ALSAGERS THAT THE LOAN WAS FIXED RATE FALLS OUTSIDE THE STATUTE OF FRAUDS AND IS NOT REQUIRED TO BE IN WRITING TO CONSTITUTE COMPETENT AND ADMISSIBLE EVIDENCE THAT THERE WAS NO MEETING OF THE MINDS

At closing the notary orally confirmed to the Alsagers that the loan documents represented the type of loan they still held firm in their minds and that they continued to believe First Mutual Bank met in all respects. Obviously, however, First Mutual had vastly different objectives in its mind as the loan documents it had prepared and sent with the notary for signatures materially varied from the Alsagers' original loan application with respect to type of interest rate, the loan amount, and the term of the note. Given neither the time nor their own copy to review, the Alsagers in good faith believed and relied upon the notary's oral representations that there was in fact a meeting of the minds as to the papers they were told to sign.

The trial court, however, gave no consideration to what the notary told the Alsagers and that is undisputed in the record, because it opined sua sponte, without briefing or argument, that the statute of frauds prevented oral representations regarding a contract from being considered where the underlying agreement must be in writing. According to well-established, long-standing law, however, the trial court erred in declining to consider oral representations as competent evidence supporting a genuine issue of material fact as to the existence of a valid and enforceable contract between Alsagers and First Mutual Bank.

The fact that false representations are made in connection with a contract, which the general statute of frauds requires to be in writing does not render it necessary that such representations shall be in writing in order that they may sustain an action of deceit, or be relied upon as ground for rescinding the contract.

Zuckerman v. Cochran, 158 So. 324, 326 (Ala. 1934).
Accord 37 C.J.S. Frauds, Statute of, § 27 (1997);
Whitcomb v. Moody, 49 S.W.2d 513 (Tex.Civ.App. 1932). And in Blum v. Smith, 66 Wash. 192, 119 Pac. 183 (1911), the Washington Supreme Court held

that the false oral representations made by a lease vendor regarding its title to certain real estate and the class of tenants occupying such premises would be considered competent evidence in an action brought by the lease vendee/owner of real property exchanged for such lease for rescission and cancellation of the contract for exchange, bill of sale and deed for the property conveyance.

Clearly, under well-established legal precedent, oral representations regarding a contract that must otherwise be in writing to satisfy the statute of frauds do not themselves have to be in writing in order to be deemed competent evidence. See, e.g., Grimes, 340 F.3d 1007 (oral representations regarding loan contract could be considered as such relate to meeting of the minds).

VI. CONCLUSIONS

Based on the undisputed and uncontested evidence in the record taken in the light most favorable to the Alsagers as the non-moving party, there clearly was no meeting of the minds between the Alsagers and First Mutual Bank so basic and

essential under Washington law for the creation of a valid and enforceable contract. Washington Federal has the burden of proving by competent substantial evidence that all essential elements to their claim exist, and they have failed to do so by completely failing to show the requisite meeting of the minds. Johnson, 50 Wn.2d 87. See also Sea-Van Investments, 125 Wn.2d 120; Grimes, 340 F.3d 1007.

Furthermore, because as a matter of law the statute of frauds does not apply to oral representations regarding a contract otherwise required to be in writing, the oral representations made by the notary to the Alsagers at closing constitute competent admissible evidence that the trial court erred in failing to consider as supporting the existence of a genuine issue of material fact as to whether there was a meeting of the minds essential to the formation of a valid and enforceable contract.

Here, there was no meeting of the minds between Alsagers and First Mutual Bank as to the type and kind of loan presented at closing. Accordingly, no valid and enforceable loan contract

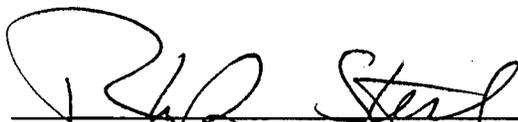
was created that may be held in default and no valid deed of trust exists that is subject to foreclosure.

As in Grimes, the Court should conclude that, stemming from the absence of a meeting of the minds, "material issues of fact as to the existence . . . of the contract remain [and] accordingly, summary judgment should not have been granted." 340 F.3d at 1010. The Alsagers respectfully ask this Court to vacate the trial court Orders and remand this matter to the superior court for trial.

Dated this 24th day of November, 2010.

Respectfully submitted,

RHYS A. STERLING, P.E., J.D.


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DECLARATION OF SERVICE

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Attorney for Respondent Washington Federal.

4. By postage prepaid first class mail on November 24, 2010 I filed in the Court of Appeals, Division I the original and one (1) copy of the BRIEF OF APPELLANTS and the original DECLARATION OF SERVICE in this matter, by placing in the United States mail the same addressed to:

Richard D. Johnson
Court Administrator/Clerk
Court of Appeals I
One Union Square, 600 University Street
Seattle, Washington 98101-1176

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

November 24, 2010
DATE


RHYS A. STERLING
(WRITTEN) WSBA # 13846

Hubert, WA
PLACE OF SIGNATURE


RHYS A. STERLING
(PRINTED)

DECLARATION OF SERVICE
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