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No. 676296-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION I

BRIAN A. HEBERLING,

Appellant,

v.

JPMORGAN CHASE BANK,

Respondent,

and

WASHINGTON MUTUAL BANK, FA; and BANK OF AMERICA,
NA,

Defendants.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Chase's motion below and its response to this appeal demonstrates the arrogance of the entire financial sector that has managed to make the current economic crisis everyone else's problem. In Chase's world, its employee's promises are no more than possibilities, and it effectively is immune from liability to its own customers. And to date, Chase and its brethren have consistently avoided answering for their conduct.

On March 7, 2012, however, the Seventh Circuit Federal Court of Appeals reversed dismissal of a claim by a borrower who alleged fraud and other misconduct in connection with a loan modification, including a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act. *Wigod v. Wells Fargo Bank, N.A.*, 2012 WL 727646, 2 (7th Cir. 2012).

This Court likewise should see through the cloud of obfuscation and excuses, and permit this claim to proceed to trial under the Consumer Protection Act. This is not a class action, but the claim of a single individual who lost a single property because of the lender's course of misrepresentations. If the Consumer Protection Act is to have any meaning at all, it should reach the claims asserted here based on the factual record before the Court.

II. FACTUAL BACKGROUND

Chase's recitation of the facts would make for good closing argument, but cannot be confused with viewing the evidence in a light most favorable to the party opposing summary judgment. The facts as set forth in Heberling's Brief are amply supported by the record and should be the facts on which this appeal is decided.

III. ARGUMENT

Since the only claim being appealed is the Consumer Protection Act, the only issues in this appeal are whether Heberling has presented a question of fact on that claim and whether the claim is barred by FIRREA.

A. Consumer Protection Act.

As Chase implicitly concedes on page 4 of its Brief, the arguments presented to this Court bear little resemblance to those argued below. Brief of Respondent at 4 (this Court may affirm the ruling below on any ground supported in the record, 'even if the trial court did not consider the argument.'"). No matter how Chase tries to recharacterize the facts, and no matter what new arguments it makes, Heberling has presented ample evidence and authority to take his Consumer Protection Act claim to trial.

1. Unfair or Deceptive Act or Practice.

"Whether an action constitutes an unfair or deceptive practice is a question of law." *Columbia Physical Therapy, Inc., P.S. v. Benton*

Franklin Orthopedic Associates, P.L.L.C., 168 Wn.2d 421, 442, 228 P.3d 1260, 1270 (2010).

An act is deceptive if it has “the *capacity* to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wash.2d at 785, 719 P.2d 531. Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead a reasonable consumer.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm’n*, 785 F.2d 1431, 1435 (9th Cir. 1986) (emphasis omitted))

Id. (emphasis as in original).

For purposes of this appeal, it is a fact that Heberling was told that his loan modifications were approved. CP 156-57 (Heberling Declaration); CP 158-61 (Heberling Declaration). Chase’s own internal documents contain an analysis of Heberling’s loan, and in “Step 5: Final Decision” states: “Offered Step Rate IO Balloon per manager approval.” CP 227.

It also is a fact in this appeal that Heberling was told not to worry about the foreclosure notices and that they were just part of the loan modification process, and that Chase then proceeded with the foreclosure. CP 434 (Heberling Deposition at page 163); 440 ((Heberling Deposition at page 189); 677-78 at ¶ 16; 680 at ¶ 25; 684 at ¶ 44; 685 at ¶ 45.

Finally, it is a fact in this appeal that despite these promises and representations, Chase called Heberling three days before the foreclosure date and demanded payment of \$100,000 to stop the sale. CP 162. When

Heberling failed to come up with the money, the property was sold at foreclosure on October 23, 2009. *Id.*

On summary judgment, these are facts. But Chase ignores them. Instead, it quotes the letters that Heberling was told not to worry about and then cites its own deposition testimony to contradict Heberling's declaration. Brief of Respondent at 16-17.

When a large national financial institution tells its customer that a loan modification has been approved and not to worry about foreclosure notices, only to demand a \$100,000 payment in two days, and then forecloses contrary to its long history of assurances, it cannot plausibly deny that it committed unfair or deceptive acts under the Consumer Protection Act. The Consumer Protection Act has been applied in the context of representations to a single plaintiff on many occasions. *E.g. Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 406, 759 P.2d 418, 423 (1988) ("The sellers assert the first element is unsatisfied because there was no evidence any buyer other than Travis purchased a defective horse from WHBA's sale. Although true, this does not mean the first element is unsatisfied."); *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984) (action against real estate broker from single sale); *Young v. Savidge*, 155 Wn.App. 806, 230 P.3d 222 (2010) (dentist's use of wrong materials); *Burbo v. Harley C. Douglass, Inc.*, 125

Wash.App. 684, 106 P.3d 258 (2005) (claim by buyer of new home); *Cotton v. Kronenberg*, 111 Wn.App. 258, 44 P.3d 878 (2002) (claim against attorney concerning fee agreement).

2. Public Interest Impact.

Chase inexplicably still ignores the fact that the public interest element of the Consumer Protection Act has been defined by statute. RCW 19.86.093. The public interest is affected if the unfair or deceptive act “had the capacity to injure other persons” or “has the capacity to injure other persons.” RCW 19.86.093(3). Chase’s reliance on pre-statute cases is quite beside the point.

Chase defends this case partly on the basis that it was simply following its own interpretation of the law and treated Heberling no differently than anyone else. *See* Brief of Respondent at 11 (“acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” (citation omitted). Nor does Chase ever argue that its conduct towards Heberling was contrary to its internal policies or the act of some rogue employee. The acts all occurred in the course of Chase’s ordinary business practices and plainly have the capacity to injure other persons.

3. Damage and Economic Loss Rule.

Heberling lost his property in a foreclosure sale. Only Chase could argue that does not mean he was injured. The loss of property because of the unfair or deceptive acts of another party constitutes damage for purposes of the Consumer Protection Act. The Supreme Court has held that even the temporary loss of the use of property is compensable under the Consumer Protection Act. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142, 148 (1990) (“A loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury to constitute the fourth element of a Consumer Protection Act violation.”). If a temporary loss of use constitutes “damage,” then a permanent loss should as well.

Chase also argues that the Economic Loss Rule somehow bars a statutory claim under the Consumer Protection Act. First of all, the Economic Loss Rule no longer exists. *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wash.2d 380, 241 P.3d 1256 (2010) (Justices Fairhurst, Owens and James Johnson with Justices Chambers, Charles Johnson, Sanders and Stephens concurring). That rule has been replaced with the Independent Duty Doctrine. *Id.* at 398, 406. The Consumer Protection Act imposes an independent legal duty, and no case has ever applied the old Economic Loss Rule to the Consumer Protection Act. In

this Court's cases where common law claims were dismissed under the Economic Loss Rule, the Consumer Protection Act claims were not dismissed.

At issue in this case is whether 10 sets of subsequent homeowners may sue the developer of residential property for breach of the implied warranty of habitability, misrepresentation, breach of contract, and Consumer Protect Act (CPA) violations. Notwithstanding the assignments of claims from the original purchasers to these homeowners, we hold they cannot sue the developer for breach of the implied warranty of habitability. **The economic loss rule bars both the negligent and the intentional misrepresentation claims asserted here.** The claims based on breach of the duty of good faith and fair dealing are not substantiated in this record. **But there are genuine issues of material fact whether the developer's acts were the cause of the claimed damages under the CPA.** We affirm in part, reverse in part, and remand.

Carlile v. Harbour Homes, Inc., 147 Wash.App. 193, 198 (2008)
(emphasis added).

4. Causation.

Chase seems to argue that Heberling cannot prove causation because he could have taken other actions, but failed to. However, Chase cites no authority on the causation element under the Consumer Protection Act, and merely pointing out ways that Heberling might have minimized or avoided the damages caused by a Consumer Protection Act violation does not alter the question whether the plaintiff was damaged as a result of the violation.

Causation under the Consumer Protection Act was defined in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wash.2d 59, 83, 170 P.3d 10, 22 (2007), where the Court adopted traditional proximate cause as set forth in Washington Civil Pattern Instruction 15.01. In *Indoor Billboard*, the Court reversed summary judgment on causation because “it is not clear whether Integra's actions caused Indoor Billboard's injuries or whether Indoor Billboard's injuries were the result of its reliance on information it obtained from Shulevitz's investigation.” *Id.* at 85. Similarly in this case, Chase cannot avoid summary judgment simply by sowing other possible causes of the harm.

B. FIRREA and the Assumption Agreement.

Chase's arguments under FIRREA and the assumption agreement demonstrate why it is so important for this Court to reinstate Heberling's Consumer Protection Act claim.

Chase first argues that the Purchase and Assumption Agreement with the FDIC relieved it of any liability to Heberling for Washington Mutual's conduct before the sale. Brief of Respondent at 7. On its face, this provision is hardly surprising considering that Chase purchased the assets of WaMu. *Payne v. Saberhagen Holdings, Inc.*, 147 Wn.App. 17, 25, 190 P.3d 102, 107 (2008).

According to Chase, however, this provision not only protects it from the acts of WaMu before the sale, but immunizes Chase in perpetuity for its own conduct with the assets it purchased. Brief of Respondent at 8. Without exception, the cases cited by Chase all pertain to claims concerning conduct by WaMu before the assumption, not to claims against Chase for its own actions with the former WaMu assets. Chase's position is not just frivolous, but also absurd.

Chase makes the same mistake with regard to FIRREA. As Chase itself admits, FIRREA sets requirements for "claims against a defunct bank that FDIC takes into receivership, unless the plaintiff first complies with an administrative process." Brief of Respondent at 8. That makes sense while the FDIC is acting as a receiver, but Chase now argues that FIRREA "extends to post-receivership claims related to the failed institution." In other words, Chase claims that all former WaMu customers are now forever subject to an administrative claims process before they can sue Chase for its own conduct.

Chase is simply wrong, and its error is apparent from the very cases it cites as authority.

Ralph E. McCarthy appeals the dismissal of his **action for damages for the way the Federal Deposit Insurance Corporation (FDIC) handled a loan** that he was negotiating with Superior Bank, F.S.B. after the bank failed and the FDIC was appointed as receiver. The district court

held that it lacked subject matter jurisdiction because McCarthy failed to exhaust his claims pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821(d)(13)(D). McCarthy argues that he was not required to exhaust because he was a debtor, not a creditor, of the bank, and because his claims arise out of post-receivership conduct of the FDIC. We agree with the district court that FIRREA's exhaustion requirement applies to bank debtors as well as creditors, and to claims that arise out of acts by the receiver as well as by the failed institution. Accordingly, we affirm.

McCarthy v. F.D.I.C., 348 F.3d 1075, 1076 (9th Cir. 2003) (emphasis added).

Here, as noted above, the allegations in Plaintiffs' Complaints relate to WaMu and Chase's alleged involvement in the Ponzi scheme. However, the only allegation of misconduct by Chase is the general allegation that the “practices continued after [Chase] acquired WaMu in September 2008.” (Benson Comp. ¶ 8; Lowell Comp. ¶ 7.) More specifically, Plaintiffs contend that “all of the key WaMu managers and employees who had knowledge of the Millennium Ponzi scheme and aided and abetted its commission ... remained [Chase] officers and managers for the next six months, until the SEC finally shut down the Millennium Ponzi scheme.” (Opp'n at 5.)

In its previous Order, the Court held that the assertion that these employees remained employed after Chase acquired WaMu's assets fell short of transforming Plaintiffs' claims into something other than claims “relating” to WaMu's alleged misconduct. (SMJ Order 7:3-6.) To the contrary, the Court held that this showed that the claims in the Complaints were predicated on alleged misconduct at the failed bank. *Id.* at 6-7. Plaintiffs' current request does not change this holding.

Benson v. JPMorgan Chase Bank, N.A., 2010 WL 4010116, 7-8 (N.D.Cal.,2010).

First, the Uninsured Depositors contend that their claims against State Bank were not “‘claim[s] against a depository institution for which the [FDIC was] receiver,’ under 12 U.S.C. § 1821(d)(6).” This naked assertion appears to be an argument that because the Uninsured Depositors have sued only State Bank, rather than the FDIC, their claims fall completely outside of the framework of FIRREA’s administrative process. The problem with this novel argument is that all of their claims against State Bank are directly related to acts or omissions of the FDIC as the receiver of Oakwood.

Village of Oakwood v. State Bank and Trust Co., 539 F.3d 373, 386 (6th Cir. 2008).

In *American Nat. Ins. Co. v. JPMorgan Chase & Co.*, 705 F.Supp.2d 17, 20-21 (D.D.C.2010), the court did not, as Chase suggests, hold that claims only against Chase for its conduct with former WaMu assets were subject to FIRREA. To the contrary, that court held that the FDIC was a necessary party under Article III of the Constitution, and that before the FDIC could be joined, the administrative requirements of FIRREA would have to be met.

In this case, Chase acquired the assets of WaMu on September 25, 2008. CP 374. Prior to Chase’s acquisition, Heberling was current on the loans, and had merely contacted the bank to see what his options were. CP 674-75. The Chase representative who made the representations at

issue was not even known to Heberling until a month after Chase acquired the loans. CP 676 at ¶ 13. Although Chase was still using the WaMu name, all of the operative facts took place after the assumption of the assets by Chase. No case anywhere in the country has required plaintiffs in such circumstances to go through an administrative process.

VI. CONCLUSION

The Consumer Protection Act “shall be liberally construed that its beneficial purposes may be served.” RCW 19.86.920 Unfair and deceptive acts by lenders towards their distressed customers are exactly the kind of thing that the Act was intended to remedy and prevent. This Court should reverse the dismissal of the Consumer Protection Act claim against Chase and remand for trial.

DATED this 14th day of March, 2012.

DEMCO LAW FIRM, P.S.


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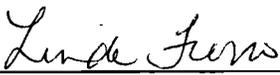
DECLARATION OF SERVICE

I, Linda Fierro, state: On this day I caused to be delivered by regular mail postage prepaid the Reply Brief of Appellant to the Court of Appeals Division I and to:

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

Dated this 14th day of March, 2012 at Seattle, Washington.



Linda Fierro