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STATE OF WASHINGTON
BY cm

No. 39763-3-II

IN THE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

DANIEL SZMANIA

Appellant,

Vs.

COUNTRYWIDE HOME LOANS INC.

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR CLARK COUNTY
The Honorable Barbara D. Johnson

REPLY BRIEF OF APPELLANT

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- 1) *Dannie R. Carter and Dorothy M. Carter v. Countrywide Home Loans Inc., et al., (Civil No. 3:07CV651). Page 5.*

Statutes

- 1) RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees. Pages: 12 & 13.
- 2) RCW 19.36.010 Contracts etc. void unless in writing. Pages 15 & 17.
- 3) RCW 61.16.010 Assignments, how made -- Satisfaction by assignee. Pages 14 & 18.
- 4) 12 U.S.C. 2605 (e) (3) Protection of credit rating. Pages 3, 4, 5, 6, 7, 10 & 12.
- 5) 12 U.S.C. Chapter 27, 2614 Jurisdiction of courts; limitations. Page 7.

I. Introduction

A. What is the legal relationship between the Appellant and the Respondent?

The material facts show the Respondent was only given “permission” from E-Loan Inc, the party that holds all **Legal Standing** in both the Note and Deed of Trust, to collect payments.

This is evidenced by Material Facts in the following:

1. **Note:** *See* Ex A Respondent has filed with their Motion to dismiss; December 23, 2008, CP 20.

2. **Deed of Trust:** *See* Ex A Respondent has filed with their Motion to dismiss; December 23, 2008, CP 20.

3. **RESPA** notice given to Appellant dated January 16, 2007. *See* EX 5, page 1 of CP 22.

Note: the RESPA notice clearly states under “NOTICE OF TRANSFER OF LOAN SERVICING”. It reads as follows: “We are writing to inform you that the servicing of your mortgage Loan **(that is, the right to collect payments from you)** has been transferred from E-Loan to Countrywide Home Loans, Inc. effective February 1, 2007.” *(Emphasis added)*.

Therefore by the **evidence filed in this case**, the Respondent is **only a servicer** of the loan and has **no legal standing in the Note or Deed of Trust!** Respondent even says “they became the servicer of the Loan on January 19, 2007.” *See* Page 24 Respondents Reply Brief. They don’t say the “owner of the Loan”!

This **temporary permission expired in full force and effect on April 27, 2009!** That’s when Bank of America, whom purchased Countrywide Home Loans Inc., forever retired the Countrywide name.

E-Loan Inc. gave **Countrywide** the permission to collect payments, **not** Countrywide and its successors. *See* RESPA notice; *See* Ex 5, page 1 of CP 22.

<http://www.usnews.com/money/blogs/the-home-front/2009/04/27/bank-of-america-retires-countrywide-brand>

II Counterstatement of Case by Assignments of Errors:

1. Damages:

12 U.S.C. 2605 (e) (3) Protection of credit rating: During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer MAY NOT provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of Title 15). (Emphasis added).

Proof of damaging of credit is found in the credit report found in Ex 8 & Ex 9 of CP 22, and as Ex B filed with Appellant's Brief.

Dates of the 5 qualified written requests are and their location in the record:

- 1) August 20, 2008: Email to Steve Bailey V.P Countrywide. Noted in Ex 3, Page 1, CP 22.
- 2) September 9, 2008: Ex 3, page 3, CP 22. Questions additional fees?
- 3) November 14, 2008: Monica Castillcjos. Page 6, CP 22, and Ex A of this Reply Brief
- 4) December 15, 2008: Email sent to John Devlin, attorney for Respondent, Lane & Powell. *See* Ex A, CP 48 and Ex A of this Reply Brief, with the read receipt!
- 5) February 17, 2009: Countrywide Home Loans; *See* Ex 3, CP 82 and Ex A of this Reply Brief, with their response!

Evidence of improper reporting was submitted to the court as Ex 8 & 9 of CP 22. This is a copy of the improper credit reporting by the Respondent, dated November 18, 2008. It clearly shows the Respondent reporting: 30 days late as of Aug 2008, 60 days late as of Sep 2008, 90 days late as of Oct 2008.

The first QWR's was dated August 20, 2008. The 60 day protection from negative reporting would than be to October 20, 2008.

The second QWR's was dated September 9, 2008. The 60 day protection from negative reporting would than be to November 9, 2008.

Creditors report on the 1st day of the month for the prior month.

Therefore, the August , the September, the October and November 2008 late notes on the Appellant's credit report dated November 18, 2008 **all clearly violate** the consumer protection granted the Appellant under 12 U.S.C. 2605(e)(3).

The primary purpose of RESPA is as a consumer protection law. **“RESPA is a consumer protection statute”**. (2) *Dannie R. Carter and Dorothy M. Carter v. Countrywide Home Loans Inc., et al., (Civil No. 3:07CV651)*. We further see that **“RESPA provides for relief in the form of any actual damages to the borrower** arising from a violation of said section.” *Id.* (*Emphasis added*).

The 12 U.S.C. 2605 (e) (1) (A) only gives the servicer 20 days to **respond** to a QWR’s, to acknowledge it, not 60 as the Respondent has mislead both courts. In 12 U.S.C. 2605 (e) (2), it says the (A) servicer **shall within 60 days correct and send borrower notification of such correction.**

(B) After conducting an investigation, provide the borrower with a written explanation.

It is obvious from the evidence in the record and by the 2 credit reports filed as evidence by the Appellant that the Respondent complied with (A) and replied to Appellants QWR’s, 2/5 times.

But the evidence speaks in volumes that the Respondent **never investigated or corrected the misreporting** as of March 21, 2010, **18 months after the fact!** Further more the statute does **prohibit the reporting to credit agencies for 60 days, period!** No matter what the outcome is. Here the record **does** indicate that the Respondent did in deed report to the credit agencies, **and still is!** *See* Ex 9, of CP 22, and Ex B of Appellant's Brief. The evidence of the record does **not** show any investigations or corrections of the miss credit reporting by the Respondent. Therefore Countrywide's actions are **in violation** of 12 U.S.C. 2605 (e) (1), (2) and (3).

Once again, the evidence in Ex 9, of CP 22, and Ex B of Appellant's Brief. Show that in August, September, October and November 2008, the Respondent reports late payments.

So **during and after the QWR's 60 day of protection**, the Respondent **did** miss report to the credit agencies. A response is not correction of an error. It does not only matter that the Respondent responded to 2/5 QWR's within the 20 days given under the statute.

What matters **most** is that the Respondent did not follow through with section (2) of 12 U.S.C. 2605 (e) (2) Action with respect to inquiry. Respondent did do step 1 out of 3 for 2/5 QWR's! Which would be responding in 20 days. However, **not reporting** to credit agencies and investigating and fixing the disputed problems is step 2 & 3, the Respondent did **not do those last 2 steps! And totally ignored 3/5 QWR's!** The Respondent is also misquoting the RESPA statues and implying the statue of limitations for all RESPA cases is a mere 1 year. That is **not** the case! No where in 12 U.S.C 2605 (e) through (f) is there a time limit.

Further more, Congress gave an additional protection to the consumer, since this is a consumer protection law, in **12 U.S.C. Chapter 27, 2614 Jurisdiction of courts; limitations:** clearly says that provision under **U.S.C. 2605, Jurisdiction of courts;** have **3 years for a time limit.** (RP, Volume II, page 107 lines 13-18, & page 118 line 18 to page 121 line 17). Furthermore, 12 U.S.C. 2605 does not address any issues of "stacking" QWR's.

The \$1,319,600.00 is the amount of total credit Appellant had borrowed at the time of the misreporting of the Respondent. **Thus the value of said “credit” of the Appellant is that amount of \$1,319,600.00.** Just as a house or car would be appraised for its value. The credit report and its credit extended are therefore the fair value of said report and credit rating. Evidenced by credit is found in the credit report found in Ex 8 & Ex 9 of CP 22, and as Ex B filed with Appellant’s Brief. Respondent **admits** to reporting within the 60 day window on page 23, paragraph 1, of their Reply Brief!

The fact is that the Respondent admits to sending a loan modification to the Appellant (Page 20, Respondents Reply Brief). Concurs with what the Appellant has stated all along. That Respondent agreed to a loan modification, **and** instructed the Appellant to make the reduced 3% payments. Through Mrs. Ashley Harrison, an employee of the Respondent. Thus making that an “agent –employer” relationship and all actions of an agent are legally binding upon said employer. *(See Ex B filed with this Brief).*

The Appellant made it clear in his Amend Compliant CP 22, pages 1, 2 and 5 that he was repeatedly trying to refinance his mortgages with the Respondent and others. Along with the statement about being self employed and needing credit lines for personal and business reasons, in the Plaintiff's Motion for Damages, CP 13, page 1

The "standard of proof" the Respondent refers to is much less in a civil case like this. In fact, it is the "Balance of probabilities", which is to say, "**The standard is met if the *likelihood* that the proposition is true is more likely than it not being true**". <http://www.spiritus-temporis.com/burden-of-proof/standard-of-proof.html>

Based on the real evidence filed by the Appellant, is the *likelihood* higher than 50% that the Respondent misreported on Appellants credit after receiving 5 QWR's? **YES!**

The **Respondent instructed the Appellant to make reduce payments**, which he did. The 3% rate was agreed upon; even the loan modification documents verify this. *See* Ex B filed with this brief. The **Respondent instructed the Appellant to make the reduce payments**; he did in fact make them. Then the Respondent purposely and maliciously falsely reported under payments on the Appellants credit.

The lower court **did not** rule properly on the RESPA motion of the Appellant. The reason is very simple. The court referenced the wrong section of the law! The correct section is: **RESPA, 12 U.S.C. Section 2605 (e) (3) Protection of credit rating.** The court in its February 3, 2009 ruling and letter. The court quotes “24 CFR 3500.21(e) (2) (ii), See CP 53.

2. **Lis Pendens:** Since the Respondent has **no legal standing** in said Note or Deed of Trust as evidenced above by the Material Facts of this case. Therefore the Respondent can **not** be harmed by its existence. The Respondent therefore has **no legal right** to motion to have it removed either, for it has **no legal standing** to do so.

3. **Discharging Debt:** The only **evidence of any debt in the record** is between the Appellant and E-Loan Inc., as noted above. Therefore as a matter of contract law, the Appellant owes **no** money to Respondent for the **same** said debt that he owns to E-Loan Inc.

Furthermore, since the “permission” to collect payments has **expired in full force and effect on April 27, 2009**. That’s when Bank of America, whom purchased Countrywide Home Loans Inc., **forever retired the Countrywide name**.

E-Loan Inc. gave Countrywide the permission to collect payments, **not** Countrywide and its successors. *See* RESPA notice; *See* Ex 5, page 1 of CP 22.

<http://www.usnews.com/money/blogs/the-home-front/2009/04/27/bank-of-america-retires-countrywide-brand>

IV. CONCLUSION

Assignments of Error

1. **Damages:** Appellant seeks \$1,319,600.00 in Damages from Respondent for damaging credit. Per: **12 U.S.C. Section 2605 (e) (3) Protection of credit rating.** *Id* is clear that during the 60 day window of protection of receiving a QWR's, they **may not** report to credit bureaus and **the Respondent did!** The evidence shows this.

2. **Lis Pendens:** Appellant seeks the vacating of the \$4,000.00 Judgment for Attorneys' Fees, dated: July 09, 2009 and the Lis Pendens remain in effect. Per: **RCW 4.28.328 Lis Pendens — Liability of claimants — Damages, costs, attorneys' fees.**

For the Respondent has **no legal standing** in the mortgage Note or the Deed of Trust. If this case was not about title, then why did Respondent use titles of the property in question as Ex A in their Defendant's Joint Opposition to Plaintiffs Motion for Summary Judgment Vacating Deed of Trust and Opposition to Motion for Summary Judgment Discharging Debt, CP 92? To say any different is just ludicrous.

Since the Respondent has **no legal standing** in the Note or Deed of Trust, they can not be harmed or “injured” by the Lis Pendens; there fore they **have no legal standing to motion** a court for its removal or any remedies of cost with said removal, of Lis Pendens. Aggrieved party; per RCW 4.28.328 (c) (ii)” **a person having an interest or a right to acquire an interest in the real property”**. The Respondent has only been given a permission to collect payments form the Note owner, E-Loan.

Therefore by reason of contract law and title law, the Respondent has **no legal standing** in said property, therefore by virtue of the RCW; they **are not** an aggrieved party!

Therefore the basis of there claims for any attorney fee damages are mute! Further more, even if Respondent argues they are an *Id* (c) (i) as a “party in an action”. Once again, the Respondent can not be “**injured**” or harmed by said Lis Pendens, for they have **no legal standing** in said Note or Deed. Therefore they can not be “injured” or harmed by said Lis Pendens at all. Their claim for damages has **no legal standing** and should have been dismissed as such. RCW 4.28.328 (2) Holds fruitless again for the Respondent as well.

Once again, the Respondent has **no legal standing** in the Note or Deed of Trust. Therefore, they can not be “injured” or harmed by said Lis Pendens. RCW 4.28.320, Courts have held that, to show a lack of substantial justification for filing a Lis Pendens, the **aggrieved party** must be able to prove that the claimant **did not** have a reasonable basis in fact or in law to file the Lis Pendens. Such is not the case here.

For the Respondent is **not an aggrieved party!**

Furthermore, the Appellant and the lender, E-Loan jointly holds all rights and remedies under the Note and Deed of Trust.

Therefore, the Appellant has a right to protect **his property** for he has “just possession”, and therefore can fight against the frivolous claims that the Respondent makes that they “own” the Note.

Therefore, by virtue of **RCW 61.16.010 Assignments, how made -- Satisfaction by assignee.**

If in fact the Respondent did purchase the Note, a proper assignment would be recorded in the county where the property exist. Therefore by the actions of the Respondent in this case, it did become about title. Despite what they say or the lower court says.

3. Discharging Debt: Appellant seeks a Discharging of the "supposed" Debt between the parties. Per: **RCW 19.36.010 Contracts etc. void unless in writing**, in the form of a ruling. For the Respondent has **no legal standing** in the mortgage Note or the Deed of Trust. That is the continued truth and argument for assignments of error's #2 and #3. The Respondent has **no legal standing!**

The Respondent continually tries to confuse the courts. Appellant seeks the discharging of the debt with the Respondent, **not** E-Loan Inc. Here are the material facts and the truth:

The mortgage Note is with E-Loan Inc. *See* Ex A Respondent has filed with their Motion to dismiss; December 23, 2008, CP 20.

The Deed of Trust is with E-Loan Inc. *See* Ex A Respondent has filed with their Motion to dismiss; December 23, 2008, CP 20.

Thus E-Loan Inc. has all the legal standings to said mortgage Note and Deed of Trust. Period!

E-Loan temporally gave permission to Countrywide Home Loans Inc. to collect the payments of said mortgage Note on February 1, 2007. *See* EX 5, page 1 of CP 22.

This **temporary permission expired in full force and effect on April 27, 2009**. That's when Bank of America, whom purchased Countrywide Home Loans Inc., forever retired the Countrywide name.

E-Loan Inc. gave Countrywide the permission to collect payments, **not** Countrywide and its successors. *See* RESPA notice; *See* Ex 5, page 1 of CP 22.

No new permission to collect payments has been given by E-Loan Inc. to any one, in the form of a RESPA notice!

No assignment of the mortgage Note from E-Loan Inc. has occurred!

No assignments of the deed of trust from E-Loan Inc. have occurred!

No mortgage contract or mortgage modification has been entered into by the Appellant with any other entity. (*See Ex B filed with this Brief*). The Respondent through their legal counsel Mr. Yates concurs with his statement on 23 January 2009: "There hasn't been any valid loan modification."(RP; Volume I, page 7 lines 14 & 15).

Respondent concurs that “no valid loan modification occurred” on page 22 of Respondents Reply Brief.

Thus, RCW 19.36.010 Contracts etc. **void** unless in writing!

Furthermore, the court ruled on January 23, 2009, “The parties never reached a legally enforcing contract”. (Referring to any loan modification). *See* January 23, 2009 court rulings filed with Notice of Appeal.

Therefore, the only parties to any legal standing in the mortgage Note and the Deed of Trust are the Appellant and E-Loan Inc!

The Respondent, Countrywide Home Loans Inc. and its successor Bank of America have **no legal standing** to this mortgage Note or Deed of Trust! The Respondent continually says that they purchased said Note, (page 3 of their Brief), but has **no** material evidence of possession to back up that statement. Therefore they have **no legal standing** to the Note! Without legal possession of the Note, the Respondent can not legally enforce the debt. Only the holder of the Note has evidence of the obligation.

Thus making the security interest, the Deed of Trust unenforceable without possession of the Note.

Also, as noted in my Brief, paragraph 16 of the Deed of Trust, *See* Ex A, CP 20, governing law is where the property is, Washington State! Not MERS or any where or any thing else!

Further more, RCW 61.16.010, requires **all** assignments of real property in the state of Washington to be recorded. Period! Also; **RCW 65.08.070 “Real property conveyances to be recorded declares, since it has not been recorded” It is VOID!**

4. Under: **RAP 18.1**; that no attorney fees or cost is awarded to the Respondent.

5. This court reverses the lower court on the above 3 issues.

6. Appellant is available for oral arguments.

Date: August 12, 2010

Respectfully submitted,

Appellant:


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has this date been served upon the parties by Depositing a copy of the same in the United State Mail, sufficient postage prepaid, and faxed, addressed to the parties as follows:

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Case No. 39763-3-II, COURT OF APPEALS, DIVISION II, OF THE STATE OF WASHINGTON

For: Case No. 08-2-07251-1, SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

Documents:

- 1) APPELLANT'S REPLY BRIEF.
- 2)
- 3)
- 4)



Daniel Szmania

August 12, 2010

Date

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