

FILED

MAR 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290352

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STEVEN F. SCHROEDER,
Appellant,

v.

PHILLIP J. HABERTHUR, as Trustee,
EXCELSIOR MANAGEMENT GROUP, LLC;
EXCELSIOR MORTGAGE EQUITY FUND II, LLC;
JAMES HANEY; and C.L.S. MORTGAGE, INC.,
Respondents.

RESPONDENT JAMES HANEY'S BRIEF

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I. INTRODUCTION

Respondent, JAMES HANEY, by and through his attorney of record, respectfully submits this brief in response to Appellant Steven Schroeder's (hereafter "Schroeder") appeal. Mr. Haney both joins with Co-Respondents' brief in response to Schroeder's appeal brief, and has provided additional independent briefing necessary to supplement areas specific to Mr. Haney, including attorney fees awarded by the trial court and on appeal.

Pursuant to RAP 10.1(g), Mr. Haney adopts by reference portions of Respondents Phillip J. Haberthur, Excelsior Management Group, LLC, and Excelsior Mortgage Equity Fund, II, LLC's Brief (hereafter "Excelsior") (*with modifications referenced parenthetically*) as follows:

Table of Authorities (*with the following additions:*

RCW 4.84.185, RAP 18.1, Biggs v. Vail, 119 Wn.2d

129, 830 P.2d 350 [as cited by the Appellant])

- I. Introduction.
 - II. Statement of Issues – (***Parts 1 through 4***)
 - III. Counterstatement of the Case.
 - IV. Arguments (***excluding sections G and I***);
- and
- V. Conclusion.

In addition to adoption of Excelsior's brief, the sections below provide additional facts and arguments as they pertain specifically to Mr. Haney.

Importantly, it is critical that the Court understand Mr. Haney's (and consequently, CLS Mortgage's ["CLS"]) extraordinarily limited involvement with the Appellant, Mr. Schroeder. That involvement was limited to Mr. Haney (an employee of CLS at the time) taking the initial loan inquiry call from Mr. Schroeder in 2007 and merely referring him to Excelsior to inquire there. Moreover, the most critical fact is that Mr. Haney and CLS were never parties to any transaction involving Mr. Schroeder, not the original loan transaction in 2007, which was resolved by Schroeder and Excelsior via stipulated dismissal, nor the 2009 transaction, which superseded the 2007 loan and is the only transaction that is the subject of this appeal.

II. ADDITIONAL ISSUE

In addition to the adoption of Excelsior's Statement of Issues numbered 1-4, Mr. Haney submits the following additional issue:

1. Since Mr. Haney and CLS are not proper parties to this action, was Mr. Schroeder's action against them frivolous and did the trial

court act within its sound discretion in awarding attorney fees to Mr. Haney? And, is Mr. Haney entitled to fees on appeal? ¹

III. ADDITIONAL COUNTERSTATEMENTS

In addition to adopting Excelsior's Counterstatement of The Case, Mr. Haney offers the following facts as they relate to him.

A. 2007 Transaction Between Schroeder and Excelsior.

Mr. Schroeder states in his brief that he executed a promissory note and deed of trust in favor of Excelsior on June 12, 2007 ("2007 Transaction").² Nowhere in his Appeal Brief or the underlying record does Mr. Schroeder allege that Mr. Haney or CLS were parties to this 2007 Transaction, and in fact, they were not. However, Mr. Schroeder does allege that Mr. Haney and CLS "assembled" this transaction.³ Though Mr. Haney and CLS did not assemble the transaction, even assuming for arguments sake that they did, that transaction is the only transaction in the entire record below or on appeal wherein Mr. Schroeder ever shows that there was any actual direct or even indirect contact or involvement with Mr. Haney or CLS.

Critical here is the fact that the 2007 Transaction was terminated and re-written, after a series of negotiations exclusively between

¹ RCW 4.84.185 and RAP 18.1.

² Schroeder's Appeal Brief, p. 4.

³ Id. at pp. 4-5.

Schroeder and Excelsior, wherein Schroeder executed a new Promissory Note, Deed of Trust and Loan Agreement with and in favor of Excelsior, in 2009, the terms of which included the pay off of the 2007 encumbrance (“2009 Transaction”).⁴

In addition, Mr. Schroeder himself testified in his deposition that he understood the 2009 Transaction to have the effect of “abolishing” the 2007 Transaction and all the litigation surrounding it, stating in his deposition as follows:

“ . . . A. [Excelsior] was just going to rewrite the [2007] note and start over and abolish [the 2007 Transaction and all disputes regarding the same]⁵ . . . Q. Would there be a reason for those lawsuits [surrounding the 2007 Transaction] if you had a new loan with Excelsior? A. No. None whatsoever . . . [the lawsuits surrounding the 2007 transaction] was all dismissed, or went away, or something⁶ . . . Q. Okay what is your understanding as to what this [stipulated order] document purports to do? A. . . . [i]t looks like a dismissal with prejudice. Q. Would you agree with me that it is a dismissal of your 2008 lawsuit that was filed against Excelsior . . . A. That’s my understanding. Q. For the first deed of trust [the 2007 Transaction]? A. Yes . . . A. When we did the second note [the 2009 Transaction] [Excelsior] said I could do the second note . . . if I would get rid of this . . . lawsuit [re the 2007

⁴ CP 304-342 (Exhibits A, B and C to Decl. of Sayers; 2009 Note, Deed of Trust and Loan Agreement, respectively).

⁵ CP 262-303 (Exhibit B to Decl. of Haberthur; Schroeder Depo, p.15, ll.13-19).

⁶ Id. (Ex. B, Depo of S.Schroeder, pp. 38-39, ll. 25-13).

Transaction][and this would] release the first note.”⁷

Indeed, as the foregoing demonstrates, there is no dispute that the parties to the 2007 Transaction, Schroeder and Excelsior, agreed by stipulation that all lawsuits and disputes regarding the 2007 Transaction would be dismissed if the 2009 Transaction between these parties was entered, which had the effect of releasing the first note under the 2007 Transaction. As the record reflects, this agreement was carried out and the parties’ stipulated order was entered on April 7, 2008.⁸ In accordance with the parties’ agreements, Excelsior entered a CR 41 dismissal of its Complaint For Judicial Foreclosure.⁹

B. 2009 Transaction Between Schroeder and Excelsior

It is undisputed that the entire set of negotiations surrounding the termination of the 2007 Transaction, and its replacement or “rewrite” encompassed in the 2009 Transaction, was exclusively between Mr. Schroeder and Excelsior.¹⁰ Mr. Schroeder was acutely aware that the 2007 Transaction “went away” by entering into the 2009 Transaction with Excelsior. He was also aware that he had absolutely no dealing with Mr. Haney or CLS surrounding the 2009 Transaction, stating in his deposition

⁷ Id. (Ex. B, Depo of S.Schroeder, pp, 47-49.

⁸ CP 346-48.

⁹ See Excelsior’s Brief, p. 6.

¹⁰ FN 4, *supra*.

that his lawyer handled all the negotiations with Excelsior on the subsequent transaction. “. . . I never even talked to anybody [at Excelsior] about the second loan . . . Matt Sanger did all that.”¹¹

C. Mr. Schroeder’s Subjective Belief That Mr. Haney And CLS Are Parties To This Action Does Not Carry The Day

Unfortunately, Mr. Schroeder has the naïve belief that because he had a conversation with Mr. Haney in 2007 which led to his being referred out to Excelsior, that this somehow translated into Mr. Haney and CLS becoming and remaining legally liable for the subsequent negotiations with Excelsior. This is simply not true, not for either the 2007 or the 2009 Transactions. However, even assuming, for arguments sake, that this conversation in 2007 somehow implicated Mr. Haney (and CLS) with respect to the 2007 Transaction, this tenuous connection was severed when the 2009 Transaction was entered, which superseded the 2007 Transaction.

Mr. Schroeder’s own testimony shows that Mr. Haney and CLS were not involved in the 2009 Transaction, and when asked in his deposition he states the following: “*Q. . . . [w]as CLS involved with the second loan [the 2009 Transaction] . . . A. Well, indirectly because they*

¹¹ CP 262-303 (Exhibit B to Decl. of Haberthur; Schroeder Depo, pp.15-16, ll.4-10).

wrote the first loan.”¹² Regardless of whether they were any part of the first loan, which they were not, it is clear that Mr. Haney and CLS should have never been subjected to this lawsuit involving the second loan. Mr. Schroeder’s own evidence reflects that Mr. Haney and CLS were not parties to the transactions with Excelsior, had not heard from or spoken to Mr. Schroeder since 2007, when he had inquired about a loan and was referred to Excelsior. The actions against Mr. Haney and CLS were groundless, unsupported by any facts and the law, and thus, frivolous.

IV. ADDITIONAL ARGUMENT

In addition to Excelsior’s arguments 1 through 4, Mr. Haney offers the following arguments pertinent to his involvement in this matter.

A. Mr. Schroeder’s Action Against Mr. Haney Was Frivolous And Mr. Haney Is Entitled To Fees Below And On Appeal.

1. RCW 4.84.185 provides for attorneys fees when an action is frivolous and such is at the discretion of the trial court.

RCW 4.84.185 provides that a party may be awarded attorney fees for having to defend a frivolous action.¹³ The Trial Court found that the action against Mr. Haney was, in fact, frivolous and awarded him fees

¹² Id. (Exhibit B to Decl. of Haberthur; Schroeder Depo, p 72 ll.18-20).

¹³ RCW 4.84.185.

with 12% post judgment interest.¹⁴ The standard of review for an award of fees under the frivolous statute is abuse of discretion.¹⁵ Mr. Schroeder attempts to defeat this award by stating that the action as a whole must be frivolous and cites to *Biggs v. Vail* for this proposition.¹⁶ This, however, does not champion Mr. Schroeder's position. To the contrary, it simply supports Mr. Haney's position, since the evidence below and on appeal show that Mr. Haney and CLS were not parties to or connected in any fashion to the 2009 Transaction, the Transaction that is at issue in this lawsuit. Thus, they were never proper parties and the action against them, in its entirety, was frivolous, wholly lacking any support by rational argument on the law and facts.¹⁷ Indeed, the entire record below and on appeal makes scant mention of Mr. Haney and CLS, with absolutely no admissible evidence showing that they were a party to any transaction entered into by Mr. Schroeder. The award of fees and interest below were properly awarded within the sound discretion of the trial court and should be affirmed.

¹⁴ CP 142-143.

¹⁵ *Biggs v. Vail*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992) (Biggs 1)

¹⁶ Appellant's Brief, p. 44 (citing *Biggs*, 119 Wn.2d at 136-137).

¹⁷ *Biggs*, 119 Wn.2d at 136-137

2. Schroeder's Consumer Protection Act argument regarding reducing any fees awarded that relate to the defense of the CPA claim has no bearing here.

Mr. Schroeder makes the argument in his brief that any fees awarded Mr. Haney associated with defending the Consumer Protection Act ("CPA") claim should be deducted, as required by the law.¹⁸ Mr. Haney, however, through his attorney at the time, Mr. Kyle Nolte, merely joined in the Summary Judgment brought by Defendant Excelsior¹⁹, wherein the thrust of the argument was Mr. Schroeder's complete waiver of all claims due to his failure to prevent the Trustee's Sale.²⁰ There was no individual treatment of the claims by Excelsior and no independent treatment supplied by Mr. Haney in his Joinder.

3. RAP 18.1 provides for attorneys fees and costs on appeal.

The trial court determined that the action against Mr. Haney was frivolous and awarded attorney fees, with 12% interest to accrue.²¹ RAP 18.1 provides for attorney fees and costs to the prevailing party, if requested, on appeal.²² Mr. Haney respectfully requests an award of

¹⁸ Appellant's Brief, p. 44-45.

¹⁹ CP 373-375

²⁰ CP 221-232

²¹ CP 142-143.

²² RAP 18.1

attorney's fees on appeal, with interest, as well as the post judgment interest on the award of fees entered below.²³

V. CONCLUSION

For the reasons provided both by adoption of Excelsior's brief and additional briefing herein, James Haney asks that this Court affirm the trial court's decision, both in granting summary judgment in favor of the Respondents/Defendants and awarding attorney fees to Mr. Haney. In addition, Mr. Haney asks for attorney fees on appeal.

DATED this 21st day of March 2011.

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²³ CP 142-143.

CERTIFICATE OF SERVICE

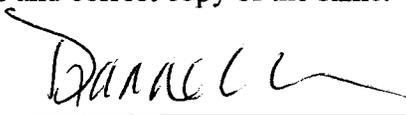
I hereby certify that on the 21st day of March 2011, I caused to be served the foregoing **JAMES HANEY'S BRIEF** on the following parties at the following addresses:

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