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Douglas v. Zions Bank, N.A. Respondent's Brief 3 Dckt. 44645

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID DOUGLAS, TERRY KERRY
Plaintiffs-Appellants

vs.

ZIONS BANK, N.A., NATIONSTAR MORTGAGE LLC, PRINCE AND YEATES, P.C.,
Defendants-Respondents

RESPONDENT NATIONSTAR MORTGAGE LLC'S BRIEF

Supreme Court Case No. 44645-2016
District Court Case No. CV-2016-2713

Appeal from the District Court of the Seventh Judicial District, Bonneville County.
Appeal from the Honorable Joel Tingey, District Judge

David Douglas, Terry Kerr
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Plaintiffs-Appellants

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STATEMENT OF THE CASE

Appellants David Douglas and Terry Kerr have not stated any reason to reverse the trial court's judgment in Nationstar's favor. Their brief is a series of irrational, unsupported conspiracy theories. They do not cite to the record, nor do they otherwise identify facts supporting their assertions. The trial court's judgment should stand.

Though Douglas' and Kerr's brief fails to provide cogent argument, for the Court's reference, Nationstar will recite the background and history of the case to explain why the trial court was right to reject Douglas and Kerr's claims. Douglas and Kerr filed a complaint in Seventh District Court, Bonneville County, alleging wrongdoing in the servicing and foreclosure of real property they jointly owned. R. 8 – 20. The complaint brought causes of action for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, tortious interference with contract, violation of the Truth in Lending Act (**TILA**) 15 U.S.C. 1601, violation of the anti-tying provision of the Bank Holding Company Act (**BHCA**) 12 U.S.C. 1972, and violation of the Racketeer Influenced and Corrupt Organizations Act (**RICO**) 18 U.S.C. 1962(c). R. 13 – 20.

Nationstar answered. R. 21 – 26. It then moved for summary judgment arguing the claims were barred by res judicata and failed on the merits. R. 80 – 226. The district court agreed and granted Nationstar judgment on all causes of action. R. 40 – 51. Douglas and Kerr appealed. R. 57 – 58.

Douglas and Kerr's brief consists primarily of unsupported arguments that the defendants, their counsel and Judge Simpson conspired against Douglas and Kerr.¹ Appellant's brief at 4 – 7. Douglas and Kerr claim they "presented evidence and the facts and the truth" to support their claims "but the culture of corruption in Idaho hands out injustice to crooks willing to pay for injustice." Appellant's brief at 9. They do not cite or describe that evidence. They claim "[t]he content of the claims were made plausible to the court, but the court did not care. The court was only interested in the pay for injustice." Appellant's brief at 8. They provide no citation to or description of evidence supporting these allegations of judicial misconduct. Douglas' and Kerr's claims are the same conclusory statements made in District Court about unspecified corruption and a conspiracy to deny them justice.

The District Court correctly ruled all causes of action in the complaint are barred by *res judicata* and fail on the merits. Douglas filed a nearly identical complaint against Nationstar and Zions Bank in 2015 in the United States District Court for the District of Idaho (the **prior federal action**). The only differences between the complaint in the prior federal action and this case were the addition of Terry Kerr as a plaintiff and an increase in the damages demand. The U.S. District Court dismissed the federal claims in that case with prejudice and dismissed the state-law claims without prejudice. It correctly ruled the federal claims are barred by *res judicata*. Kerr also filed a substantively identical complaint in the Seventh District Court for Bonneville County, Idaho in 2015 against Nationstar, Zions Bank, and attorneys representing Nationstar (the **prior state action**). In that case the District Court granted summary judgment

¹ Appellants include an irrelevant and nonsensical diatribe against Warren Buffet and the Mormon church in their brief. Appellants' brief at 6. This is demonstrative of the unfounded theories underlying appellants numerous prior lawsuits.

for Nationstar, against Kerr. In this case the District Court correctly ruled because Douglas and Kerr were in privity disposition of the prior federal action also bars Kerr's claims and disposition of the prior state action also bars Douglas's claims.

The District Court also correctly ruled all causes of action fail on the merits. The breach of contract fails because Douglas and Kerr identified no contract terms Nationstar allegedly violated. The breach of implied covenant of good faith and fair dealing claim fails because they alleged no facts showing Nationstar prevented them from enjoying any terms of the loan contract and Kerr has no standing to pursue the claim. The unjust enrichment claim fails because Douglas did not dispute the enforceable contract with Nationstar and Kerr introduced no evidence supporting the claim. The breach of fiduciary duty claim fails because Douglas and Kerr do not allege how such a duty arose or any facts that might show Nationstar's alleged breach. The tortious interference with contract claim fails because Nationstar cannot interfere with its own contract and Kerr does not allege facts supporting the claim. The TILA claim is time barred. The BHCA claim fails because Douglas and Kerr alleged no service-tying. And the RICO claim is frivolous and fails to state a claim for relief.

STATEMENT OF FACTS

1. This lawsuit concerns two properties - 2895 Woodbridge Circle in Idaho Falls (**Woodbridge Circle property**) and 900 Wheatstone in Pocatello (**Wheatstone property**). R. at 9, 14.
2. Douglas borrowed \$273,000 (the **loan**) secured by a deed of trust on the Woodbridge Circle property. R. 201 – 225.
3. Nationstar serviced the loan and judicially foreclosed. Appellant's brief at 1.

4. Douglas and Kerr also claim an interest in the Wheatstone property. R. 9 – 10. Nationstar has no interest in that property.

5. Douglas filed the prior federal action in the District of Idaho in February 2015. *David Douglas v. Zions Bank N.A. and Nationstar Mortgage LLC*, in the United States District Court for the District of Idaho, Case No. CV15-055. R. 125 – 137.

6. In the prior federal action Douglas asserted federal causes of action for alleged violations of TILA, the anti-tying provision of the BHCA, and RICO. R. 125 – 137. He also brought state-law causes of action for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, and tortious interference with contract. R. 125 – 137.

7. The prior federal action was dismissed against Nationstar when the court granted Nationstar's motion for judgment on the pleadings. R. 140. The court dismissed the federal causes of action with prejudice. R. 140. It dismissed the state claims without prejudice because it declined to exercise supplemental jurisdiction. R. 140.

8. Kerr filed the prior state action against Nationstar, Zions Bank and Nationstar's attorneys in this Court in 2015. *Terry Kerr v. Nationstar Mortgage LLC et al.* in the District Court of the Seventh Judicial District of Idaho, the State of Idaho in and for the County of Bonneville, CV-2015-2429. R. 142 – 154.

9. Kerr and Douglas each claim a one-half interest in both the Woodbridge Circle and Wheatstone properties. R. 143.

10. The substance of the complaint in the prior state action is identical to the complaint in this case (*compare* R. 8 - 20 with R. 142 – 154).

11. In the prior state action Nationstar moved to dismiss, or in the alternative, for summary judgment and Judge Simpson granted summary judgment in favor of Nationstar by order dated September 22, 2015. R. 156 – 174.

ISSUES PRESENTED ON APPEAL

(1) Are Douglas' and Kerr's claims barred by *res judicata* where they were litigated previously in separate state and federal court cases, brought individually by each plaintiff, when the plaintiffs were in privity?

(2) Do causes of action for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, tortious interference with contract, violation of the Truth in Lending Act, violation of the anti-tying provision of the Bank Holding Company Act, and violation of the Racketeer Influenced and Corrupt Organizations Act survive summary judgment when plaintiffs fail to allege facts or show evidence supporting the claims?

ARGUMENT

I. ALL CLAIMS ARE BARRED BY *RES JUDICATA*

The District Court correctly held Douglas' and Kerr's claims are barred by *res judicata*. R. 43 – 44. "*Res judicata*, or claim preclusion as it is sometimes called, denotes that a valid final judgment by a prior court, between the same parties or their privies, concludes the litigation as to all matters that were or should have been litigated in the first action." *Sullivan v. Allstate Ins. Co.*, 792 P.2d 905, 907, 117 Idaho 880 (1990) (internal quotation marks and citations omitted). The dismissal of a complaint with prejudice results in those claims between the parties being barred by *res judicata*. *Id.* "In an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered

and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit." *Weldon v. Bonner County Tax Coalition*, 855 P.2d 868, 872, 124 Idaho 31 (1993) (internal quotation marks and citations omitted). "Privity is defined as a mutual or successive relationship to the same property rights, or such an identification in interest of one person with another as to represent the same legal rights." *Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 869, 853 P.2d 607 (Idaho Ct. App. 1993).

The complaint contains causes of action under federal law for alleged violations of TILA, BHCA, and RICO. R. 9 – 12. These claims are identical to those in the prior federal action, but for the addition of Kerr as a plaintiff and an increase in the demand for damages from \$30,000,000 to \$50,000,000. *Compare* R. 8 - 20 with R. 133 – 136. The only differences are minor changes in the descriptions of the parties in paragraphs 1-9. R. 126 – 130. These causes of action are barred by *res judicata* as a result of being dismissed with prejudice in the prior federal action and decided on the merits in favor of Nationstar. Because Kerr and Douglas are in privity with each other, all claims arise out of their claimed shared interest in the Woodbridge Circle and Wheatstone properties, so neither may bring these claims.

The prior state action was brought by Kerr against Nationstar. R. 142 – 154. The alleged facts are nearly identical to those in the complaint subject of this appeal and the causes of action are the same. *Compare* R. 8 - 20 with R. 142 – 154. The prior state action resulted in a final adjudication on the merits in favor of Nationstar. R. 158 - 173. The District Court in this case correctly held because Kerr and Douglas are in privity with each other, the results of the prior state and federal actions bar both Douglas and Kerr from bringing the claims again in this case. R. 43 – 45.

Douglas and Kerr do not address res judicata in their brief.

II. THE TRIAL COURT CORRECTLY ENTERED JUDGMENT AGAINST DOUGLAS AND KERR ON THE MERITS

The District Court correctly held all causes of action fail on the merits. R. 45 – 51. Douglas and Kerr allege federal causes of action for violation of TILA, violation of the anti-tying provision of the BHCA, and violation under RICO. R. 9 – 12. They allege state law claims for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, and tortious interference with contract. R. 6 – 8.

A. THE TILA CLAIM IS TIME BARRED

Douglas and Kerr claim Nationstar violated TILA by failing to provide required loan disclosures. R. 9. Under TILA and its associated regulations, a lender must make certain disclosures at, or before, consummation of the transaction. 12 C.F.R. §§ 1026.17 to .19. TILA does not require ongoing disclosures after the consummation of the loan unless the loan is refinanced or assumed. 12 C.F.R. § 1026.20. A claim for damages under TILA must be filed "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). A TILA violation occurs, and the one-year limitations period begins to run, "when the [P]laintiff[] executed [his] loan documents, because [he] could have discovered the alleged disclosure violations and discrepancies at that time." *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir. 2011).

The loan was made on January 3, 2006. R. 4, 176. TILA imposes no obligation to make disclosures after that date. The loan was modified on April 1, 2010 (R. 4, 198 – 200) but TILA does not apply to home loan modifications. *See* 12 C.F.R. § 1026.23(b)(1)(ii)(f). The statute of limitations for a TILA claim expired January 3, 2007. Douglas and Kerr failed to bring his TILA

claim until May 24, 2016, over nine years outside the statute of limitations. The District Court correctly held the TILA claim is time barred. 49 – 50.

Douglas and Kerr do not address TILA or its statute of limitations in their opening brief.

B. THE ANTI-TYING PROVISION OF BHCA IS INAPPLICABLE

Douglas and Kerr allege Nationstar violated the anti-tying provision of BHCA by altering the mortgage contract. R. 9 – 10. The BHCA does not regulate a bank's ability to modify a mortgage loan. *See* 12 U.S.C. § 1972(1). It prevents a bank from extending credit on the condition that a borrower use the bank's other services. *Id.* Douglas and Kerr alleged no service-tying by Nationstar and the District Court correctly dismissed this claim. R. 50.

Douglas and Kerr's arguments regarding the BHCA lack substance. They assert the BHCA states "the original mortgage contract cannot vary the servicer, the conditions, the requirements, from the original mortgage." Appellants' brief at 5. They do not cite a specific statute establishing this prohibition. Their argument also appears circular and illogical. How could an original mortgage contract vary the terms of the original mortgage? The District Court correctly entered judgment for Nationstar.

C. THE RICO ALLEGATIONS FAIL TO STATE A CLAIM

Douglas and Kerr allege Nationstar was involved in an illegal enterprise and pattern of racketeering activity. R. 10 - 12. "To state a claim under RICO [a] plaintiff must demonstrate: (1) the conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity." *Ricotta v. California*, 4 F. Supp. 2d 961, 977 (S.D. Cal. 1998) (dismissing a *pro se* complaint with prejudice because "[p]laintiff [could not] establish a pattern of racketeering activity").

Douglas and Kerr failed to allege facts showing respondents comprise "an ongoing organization, formal or informal" or "continuing unit." See *United States v. Turkette*, 452 U.S. 576, 583 (1981) (describing the proof necessary to establish an "enterprise" under RICO). In *Ricotta*, the court dismissed a pro se plaintiff's RICO claim with prejudice because the plaintiff failed to establish a pattern of racketeering activity. *Ricotta*, 4 F. Supp. 2d at 977. The court held: "[a]t a minimum, to show a pattern of racketeering activity [p]laintiff must illustrate that 'the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.'" *Id.* (quoting *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). Courts have held RICO is not implicated in normal foreclosure proceedings, such as those at issue in this case. See *Coward v. First Magnus Fin. Corp.*, 2009 U.S. Dist. LEXIS 101846, at *14 (D. Nev. Oct. 14, 2009) ("RICO claims arising from garden-variety foreclosure actions are frivolous stalling actions that abuse the court system.").

Douglas and Kerr alleged no facts support the RICO claim. The District Court correctly held this claim was "frivolous" and dismissed it. R. 50 – 51. In their brief on appeal, Douglas and Kerr baldly assert a RICO violation occurred, and argue "this can be totally proven using section 215 of the patriot act." Appellants' brief at 5. They do not allege how, and have failed to show the District Court erred by entering judgment for Nationstar.

D. THE BREACH OF CONTRACT CLAIM FAILS TO ALLEGE FACTS SHOWING A BREACH BY NATIONSTAR.

The breach of contract claim is based on vague allegations regarding Douglas' mortgage and forced placed insurance and tax charges. R. 6. "A breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the

defendant; and (4) damages suffered by the plaintiff." *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843 (8th Cir. 2014) (quotations omitted). The District Court correctly held Douglas and Kerr failed to identify any terms of the loan contract Nationstar allegedly breached. R. 46. Douglas and Kerr do not try to remedy or explain these defects in their opening brief.

E. THE UNJUST ENRICHMENT CLAIM FAILS BECAUSE DOUGLAS HAS A WRITTEN CONTRACT WITH NATIONSTAR AND KERR GAVE NO EVIDENCE SUPPORTING THE CLAIM.

The unjust enrichment claim makes no identifiable allegations against Nationstar. R. 14. To the extent the claims are construed to be based on the same alleged wrongdoing as the breach of contract claim – the loan for the Woodbridge Circle property – that agreement is contained in the written loan documents.

Douglas' cause of action for unjust enrichment cannot succeed because "there [is] an enforceable express contract covering the same subject matter." *Wilhelm v. Johnston*, 30 P.3d 300, 307 (Idaho Ct. App. 2001). Under Idaho law, "[a] right of recovery in quasi-contract, also known as unjust enrichment, occurs where the defendant has received a benefit which would be inequitable to retain at least without compensating the plaintiff to the extent that retention is unjust." *Id.* (quotations omitted). The doctrine of unjust enrichment is not permissible where there is an enforceable express contract between the parties which covers the same subject matter. *Vanderford Co. v. Knudson*, 165 P.3d 261, 272 (Idaho 2007). Because Douglas is a party to the contract the District Court correctly held he cannot bring a cause of action for unjust enrichment. R. 47 – 48. As to Kerr, the unjust enrichment claims fails because he introduced no evidence supporting the claim. R. 48. Douglas and Kerr do not try to remedy or explain these defects in their opening brief.

F. THE BREACH OF FIDUCIARY DUTY CLAIM FAILS BECAUSE NATIONSTAR OWES DOUGLAS AND KERR NO FIDUCIARY DUTY.

The claim for breach of fiduciary duty was properly dismissed because Nationstar owes them no fiduciary duty. R. 48 – 49. "It is well settled that 'Idaho law establishes that no fiduciary duty ordinarily arises between parties to an arm's length business transaction.'" *Burton v. Countrywide Bank, FSB*, 2012 U.S. Dist. LEXIS 39642, at *16 (D. Idaho Mar. 1, 2012) (quoting *Wade Baker & Sons Farms v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 42 P.3d 715, 721 (Idaho Ct. App. 2002)). "No fiduciary relationship generally exists in the context of a debtor-creditor relationship, including that of a lender-borrower." *Id.* To establish a fiduciary duty in this context "[t]he facts and circumstances must indicate that the one reposing the trust has foundation for his belief that the one giving advice or presenting arguments is acting not in his own behalf, but in the interests of the other party." *Id.* at *18 (quoting *High Valley Concrete, LLC v. Sargent*, 234 P.3d 747 (Idaho 2010)). The District Court correctly held Douglas and Kerr failed to identify why Nationstar owed them a fiduciary duty or how Nationstar breached that alleged duty. R. 48. Douglas and Kerr do not try to remedy or explain these defects in their opening brief.

G. THE TORTIOUS INTERFERENCE WITH CONTRACT FAILS BECAUSE NATIONSTAR CANNOT INTERFERE WITH ITS OWN CONTRACT AND KERR ALLEGES NO FACTS TO SUPPORT THE CLAIM.

Under Idaho law, intentional interference requires "intentional interference causing a breach of contract." *Idaho First Nat'l Bank v. Bliss Valley Foods*, 824 P.2d 841, 859 (Idaho 1991) (emphasis in original). A party cannot interfere with a contract to which it is a party. The District Court correctly dismissed this claim by Douglas because Douglas and

Nationstar are parties to the loan contract and by Kerr because Kerr does not allege what contract Nationstar allegedly interfered with or how that interference was tortious. R. 49. Douglas and Kerr do not try to remedy or explain these defects in their opening brief.

III. NATIONSTAR'S COUNSEL'S MISSTATEMENT AT THE SUMMARY JUDGMENT HEARING WAS IMMATERIAL AND QUICKLY CORRECTED.

Douglas and Kerr claim Nationstar's counsel lied at the hearing on Nationstar's summary judgment motion on September 20, 2016. Appellants' brief at 1. At the hearing Nationstar's counsel mistakenly stated the Idaho Court of Appeals had decided Douglas' appeal of Nationstar's foreclosure, affirming judgment in Nationstar's favor. R. at 247. He indicated this ruling may provide further support for Nationstar's res judicata argument. *Id.* Nationstar filed a notice of clarification explaining the mistake the next day on September 21, 2016. R. 247 – 248.² There is nothing in the District Court's order indicating this misstatement affected the court's decision to grant Nationstar judgment. R. 40 – 51. The District Court did not rule on Nationstar's motion until October 6, so it was aware of Nationstar's correction of the misstatement. R. 40-51. The District Court did not rely on Nationstar's counsel's misstatement in deciding this case in Nationstar's favor. R. 40-51. The misstatement was immaterial and quickly corrected and should not affect this appeal.

² The Idaho Court of Appeals subsequently affirmed the District Court's judgment on October 3, 2016. *See Nationstar Mortgage LLC v. David A. Douglas et al*, Docket No. 43540-2015, Bonneville Co. No. CV-2015.239.

CONCLUSION

The District Court correctly ruled Douglas' and Kerr's claims are barred by res judicata and fail on the merits, granting judgment to Nationstar on all causes of action. The District Court's decision should be affirmed.

Submitted this 19th day of July, 2017.

AKERMAN LLP

A handwritten signature in black ink, appearing to read "Robert H. Scott", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2017, I caused to be served two copies of the foregoing **RESPONDENT NATIONSTAR MORTGAGE LLC'S BRIEF** by U.S. Mail, postage prepaid, to the following:

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