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Federal Home Loan Mortgage Corporation v. Butcher Appellant's Brief Dckt. 41188

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IN THE SUPREME COURT OF THE STATE OF IDAHO

FEDERAL HOME LOAN MORTGAGE)
CORPORATION,)
)
Plaintiff-Respondent,)
vs.)
)
MARGARET A. BUTCHER;)
Defendant-Appellant.)
)
DENNIS D. BUTCHER; and John Does 1-10,)
whose true identity is unknown, as Occupants)
of the Premises located at 10512 W. Achillea)
Street, Star, Idaho, 83669,)
)
Defendants.)

APPELLANT'S BRIEF

Supreme Court Docket No. 41188-2013
Ada County Case No. CV-OC-2011-13288

Appeal from the District Court of the Fourth Judicial District for Ada County, Idaho.

The order appealed from is dated May 23, 2013 and was entered by the Honorable Kathryn A. Sticklen, a Senior District Court Judge, Ada County, Idaho, who reviewed this case on appeal from a ruling granting summary judgment to Plaintiff-Respondent by the Magistrate's Division.

The ruling of the Magistrate that was appealed to the District Court of Ada County is dated November 25, 2011 and was entered by the Honorable Christopher Bieter, Magistrate.

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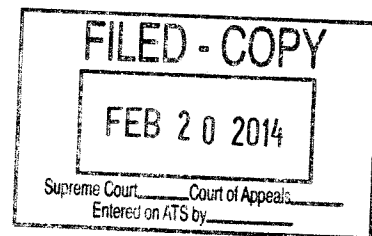


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Plaintiff-Respondent,)	
vs.)	APPELLANT’S BRIEF
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IN THE SUPREME COURT OF THE STATE OF IDAHO

FEDERAL HOME LOAN MORTGAGE CORPORATION,)	
)	
Plaintiff-Respondent,)	
vs.)	APPELLANT’S BRIEF
)	
MARGARET A. BUTCHER;)	Supreme Court Docket No. 41188-2013
Defendant-Ms. McCluskey.)	Case No. CV-OC-2011-13288
)	
DENNIS D. BUTCHER; and John Does 1-10,)	
whose true identity is unknown, as Occupants)	
of the Premises located at 10512 W. Achillea)	
Street, Star, Idaho, 83669,)	
)	
Defendants.)	

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from a District Court Order affirming the ruling of a Magistrate that granted summary judgment of eviction resulting in the ejection of a homeowner from her residence after foreclosure sale. The homeowner (“Margaret Butcher, n/k/a McCluskey”¹) contended below that the Trustee’s Deed obtained at foreclosure sale was invalid and that Plaintiff-Respondent (“FHLMC” or “Freddie Mac”) had no lawful claim for possession to her residence, which is the Subject Property.

Course of Proceedings Below. Freddie Mac filed this action in Magistrate’s Court for ejection of McCluskey from the Subject Property after having obtained a Trustee’s Deed at a

¹ Defendants Peggy Butcher and Dennis Butcher divorced in 2009. Ms. Butcher received the residence at 10512 W. Achillea Street, Star, Idaho, 83669 (“Subject Property”) as her sole and separate property in the divorce. Ms. Butcher married Randall McCluskey in 2013 and herein will be referred to by her married name.

foreclosure sale on May 16, 2011. Freddie Mac filed for summary judgment on September 28, 2011. After having the period for filing extended by the Court, Ms. McCluskey was denied by the Clerk of the District Court of Ada County the opportunity to file her Response to Summary Judgment on November 15, 2011; on that date she was only permitted to file a preprinted form of ‘Answer’ (R. Bates #130). During the hearing of November 22, 2011 she was permitted to ‘bench file’ her “Response to Motion for Summary Judgment,” (see R. Bates #162, et seq.) but she had not received a copy of Freddie Mac’s most recent filing, which was an Affidavit with new information and documents attached, that it was permitted to file on November 21, 2011 (see R. Bates #139).

Although the trial court indicated that he would consider all documents filed by her, Judge Bieter proceeded to enter summary judgment on November 25, 2011 (see R. Bates #552) prior to Ms. McCluskey’s filing of her “Reply Memorandum” on December 5, 2011 (see Bates #557 et. Seq.).

The Certificate of Service (dated November 21, 2011, see R. Bates #133-138) clearly shows that the Ms. McCluskey did not have, before oral argument, adequate notice of Freddie Mac’s Reply Memorandum or the Affidavit of Jeff Stenman and the new documents that accompanied it (R. Bates #139-160). She has indicated that she received them on November 23, 2011. Nevertheless, Judge Bieter assured her that he would consider all her court filings.

When Judge Bieter entered his November 25, 2011 Order Granting Motion for Summary Judgment (R. Bates #552) he clearly did not consider Ms. McCluskey filings of December 5,

2011 (R. Bates #557). Thus, she did not have an opportunity to present rebuttal information nor was she in a position to make an effective oral argument at the summary judgment hearing.

Further, the trial court did not review and consider the documents she timely filed on December 5, 2011 (R. Bates #557) in response to the late-filed documents by Freddie Mac.

In her filings with the Magistrate's Court, Ms. McCluskey raised all the issues that are raised herein, but neither the Magistrate nor the District Court were able to perceive her argument.

Ms. McCluskey appealed the Magistrate's decision to the District Court which was erroneously affirmed and she appeals to this Court for *de novo* review based on a structural defect where she raised the disputed issues of material fact they were ignored or glossed over by both courts below because of an unspoken presumption of correctness attributed to the Freddie Mac.

Concise Statement of Facts. Ms. McCluskey and her former husband put \$80,000 down on the purchase of the Subject Property on December 15, 2005 (R. Bates # 000094) financing the balance of the purchase with a mortgage of \$147,900 through Home Federal Bank of Boise, Idaho. They also executed a Deed of Trust on December 14, 2005 (R. Bates # 000109). Thereafter, Home Federal Bank, indorsed the Note "Without Recourse, Pay to the Order of WELLS FARGO BANK, N.A." (R. Bates #000096) signed "by Peg Mixdorf, Secondary Market Specialist III" of Home Federal Bank.

A second indorsement, confirming the first, appears on the next page of the Record at Bates #000097, with the same language: “Without Recourse, Pay to the Order of WELLS FARGO BANK, N.A.” (R. Bates #000097).

An Assignment of Trust Deed was recorded in the mortgage records of Ada County, Idaho naming Wells Fargo Bank, N.A. (“Wells Fargo”) as the new beneficiary.

Ms. McCluskey’s evidence showed that in 2008, after her divorce, she was informed by Wells Fargo to cease making payments as specified by the Note and to commence making payments under the terms of a loan modification program known as the “Home Affordable Modification Program” (or “HAMP”). HAMP was at that time supervised by Freddie Mac (R. Bates #000745).²

Ms. McCluskey alleged below that she complied exactly with the terms of the Wells Fargo loan modification by, (1) making every loan modification payment as agreed, (2) paying off a second mortgage to clear all liens from the Subject Property, and (3) declaring bankruptcy so that no other creditors could make a claim on her earned income, leaving it fully available to make the loan modification payments.

² ***“...FREDDIE MAC SERVES AS THE PROGRAM'S COMPLIANCE AGENT FOR ALL GSE OWNED OR GUARANTEED LOANS, SERVICER PARTICIPATION IS REQUIRED.”*** Sec 4 pg 39 Attorney General's Report on the Idaho Housing Crisis and How Stakeholders Can Facilitate Cooperative Solutions Consumer Protection Div. Lawrence Wasden, Attorney General, FEB 2011. “Compliance Agent: Freddie Mac acting as a financial agent of the United States Department of the Treasury will manage the compliance and monitoring of Servicer performance under the Program, including performance in accordance with Freddie Mac and Fannie Mae requirements.” C65.3: Delegation of Authority (04/21/09).

Ms. McCluskey claimed in the Magistrate's Court and on appeal to the District Court that she was not in default of her mortgage as of the foreclosure date of May 16, 2011 because of her compliance with the HAMP program sponsored by Wells Fargo and supervised by Freddie Mac. It was Ms. McCluskey's contention that since Freddie Mac was the compliance agent for HAMP and since Freddie Mac regulated Wells Fargo it was charged with notice of her compliance in respect to Wells Fargo's loan modification program.

A key feature of the HAMP program is that the banks under Freddie Mac's regulation including Wells Fargo are prohibited from "Dual Tracking," i.e., proceeding with foreclosure while implementing a loan modification. (R. Bates #287-295.)

Freddie Mac asserted that it was a bona fide purchaser for value of the Note and therefore had no notice as to any of McCluskey's defenses with respect to the mortgage loan on the Subject Property. Part of Freddie Mac's claim was that it became the successor lender to Wells Fargo having the right to purchase the Subject Property by credit bid at the foreclosure sale auction. (R. Plaintiff's Complaint, Bates #s 000006, at ¶ I, and 000117 and 000137). There is no dispute in this proceeding that Freddie Mac purchased the property by credit bid at the Trustee's Sale of May 16, 2011 (R. Bates #554, ¶ 10.)

By claiming that it was a bona fide purchaser for value of the Note, Freddie Mac was claiming that it had protection under the shelter rules of I.C. §§45-1508 and 45-1510. A question of fact was raised by Ms. McCluskey whether Freddie Mac could be both a bona fide purchaser and the successor lender, since the two are mutually exclusive.

ISSUES PRESENTED ON APPEAL

1. Whether Ms. McCluskey, in the Magistrate's Court, raised a dispute as to a material fact that Freddie Mac's claim of possession fails as a matter of law because it did not comply with I.C. §45-1505(1) prior to the foreclosure sale.
2. Whether Ms. McCluskey, in the Magistrate's Court, raised a dispute as to a material fact that Freddie Mac was not the holder of the Note at the time of the foreclosure sale showing that it was not entitled to purchase the Subject Property by credit bid.
3. Whether Ms. McCluskey's right to due process of law prior to being deprived of her property by foreclosure sale was violated by the trial court when it denied her a full and fair opportunity to litigate her claims and defenses to the summary judgment which were aimed at raising disputed issues of material fact.
4. Whether Freddie Mac was entitled to claim the status of a bona fide purchaser for value under the shelter rules of I.C. §§45-1508 and 45-1510 when it was the successor lender that offered a credit bid at the May 16, 2011 Trustee's Sale and whether such assertion was in violation of I.C. §45-1506(9).
5. Whether there was a question of fact presented to the Magistrate as to whether Freddie Mac had a valid interest in the Subject Property as a result of the foreclosure sale when it violated its own rules and regulations against Dual-Tracking by participating in foreclosure on the Subject Property.
6. Whether the Magistrate lacked jurisdiction over this case because Freddie Mac was not the lawful owner of a right of possession of the Subject Property.

ARGUMENT

Issue No. 1: Whether Ms. McCluskey, in the Magistrate's Court, raised a dispute as to a material fact that Freddie Mac's claim of possession fails as a matter of law because it did not comply with I.C. §45-1505(1) prior to the foreclosure sale.

Summary of Argument No. 1: The Trial Court erred in awarding possession of the Subject Property by summary judgment to Freddie Mac when there was a genuine issue of disputed fact whether Freddie Mac had complied with I.C. § 45-1505(1) requiring the recording of all Assignments of the Trust Deed in the mortgage records of the county where the property is located prior to foreclosure and since there was no recorded assignment from Wells Fargo to Freddie Mac, therefore the property sale and the Trustee's Deed are void *ab initio*, because it was a law violation for Freddie Mac to purchase the Subject Property by credit bid without having complied with said statute.

When a mortgage lender seeks to foreclose on a property, it has the choice to pursue a judicial foreclosure, or to foreclose non-judicially. Non-judicial foreclosure is often quicker and more cost effective and generally favored by mortgage lenders. Judicial foreclosure is overseen by an objective court, ensuring that all proper foreclosure requirements have been met by both parties and that the Foreclosure is lawful and fair to both parties.

Non-judicial foreclosure does not provide the same judicial oversight where injustice may occur with less sophisticated parties; hence, the Idaho Supreme Court has held that in a non-judicial foreclosure, strict compliance³ with the Idaho Foreclosure Act⁴ (the “Act”) is required. In order to prevent foreclosure injustice, the Idaho Legislature enacted a very specific foreclosure statute known as the Idaho Foreclosure Act (the “Act”). A mortgage lender, by choosing to foreclose non-judicially, may benefit by a faster, more cost efficient foreclosure process, but to balance the greater likelihood that shortcuts or and to prevent corruption, it must strictly comply with Idaho’s foreclosure statutes (see fn 3).

One provision of the Act is I.C. § 45-1505(1) which provides that prior to foreclosure, the trust deed and “any assignments of that trust deed...by the beneficiary” must be recorded in the mortgage records of the county where the property is located. There was initial compliance with this statute when the Assignment of Trust Deed from Home Federal Bank, as the original beneficiary, assigned the Deed of Trust to Wells Fargo. However, in order for Freddie Mac to claim that it was a creditor of Ms. McCluskey so that it could make a “credit bid,” at the non-

³ *Federal Home Loan Mortgage Corporation v. Appel*, 143 Idaho 42, 44, 137 P.3d 429,431 (2006).

⁴ Idaho Code § 45-1501, et. Seq.

judicial foreclosure sale on the Subject Property it needed to show that it was the holder of the Note and that there had been strict compliance with the Act in order to for the foreclosure and resulting foreclosure sale to be valid. (*See Federal Home Loan Mortgage Corporation v. Appel* 143 Idaho 42, 44, 137 P.3d 429, 431 (2006).

The Subject Property was scheduled for foreclosure on May 16, 2011 upon the Notice of Default by Wells Fargo, as beneficiary of the Deed of Trust and as holder of the Note according to other disclosure documents, such as the Notice of Trustee's Sale. Wells Fargo, not Freddie Mac, is the entity indentified as the holder of the beneficial interest under the Deed of Trust according to the Notice of Default and other foreclosure Documents. In compliance with I.C. § 45-1505(1) an Assignment of Deed of Trust to Wells Fargo was recorded (Trial Record "Tr." at Bates # 265).

The Promissory Note was originally made Payable to Home Federal Bank, but contains two specific indorsements both of which direct payment to the order of Wells Fargo (Tr. at Bates #s 96 and 97).⁵

As of the date of the Trustee's Sale, the current note holder and beneficiary on the Trust Deed was Wells Fargo, making it the only party entitled to issue a credit bid at auction for a non-judicial foreclosure sale under the Act. *See Federal Home Loan Mortgage Corporation v. Appel* 143 Idaho 42, 44 137 P.3d 429,431 (2006). The Trustee's Deed⁶ shows that Purchaser of the Property at the foreclosure sale was not Wells Fargo, but was Freddie Mac. There is no Assignment of Trustee's Deed in favor of Freddie Mac recorded in the real estate and mortgage

⁵ The language of the two indorsements reads as follows: first at R. Bates # 96; second, at R. Bates #97.

⁶ Trustee's Deed R. at Bates #74 and 159-160.

records of Ada County, Idaho.⁷ FREDDIE MAC has admitted that they purchased the property via credit bid at the foreclosure sale.⁸ Pursuant to this Court's holding in *Appel*, only the current note holder has the right to purchase the property by a credit bid, and all other purchasers must pay cash. Since FREDDIE MAC did not pay cash, but submitted a credit bid when it was neither the current Note holder nor beneficiary on the Trust Deed, the foreclosure sale was not valid and was void. Since the foreclosure sale was not valid, the Trustee's Deed is not valid, and must be set aside. Therefore, Freddie Mac had no right to possession of the Subject Property, and the Trial Court erred when it granted its Motion for Summary Judgment awarding it a Writ of Ejectment.

These arguments and issues of fact were brought to the Magistrate's and District court's attention in the previous ejectment hearings, but were not considered by either court. Ms. McCluskey presented evidence to the Magistrate showing that Respondent was not entitled to purchase the property by credit bid because Freddie Mac was not the owner of Ms. McCluskey's Promissory Note as of the date of the foreclosure sale and that there was no Assignment of Deed of trust in favor of Freddie Mac recorded in the mortgage records of Ada County. Wells Fargo was the holder of the note by indorsement and the one entitled to enforce it (not Freddie Mac) and Wells Fargo was the only entity entitled to purchase Ms. McCluskey's residence by credit bid at the foreclosure sale.

Ms. McCluskey made a showing that there was, at a minimum, a material issue of disputed fact whether Respondent had a legal right to claim possession of the Subject Property in

⁷ Affidavit of Peggy Butcher, R. at Bates #642.

⁸ Freddie Mac's admission that it purchased the Subject Property by credit bid R. Bates #117.

the ejectment action before the Magistrate or whether there was a violation related to the issuance of the Trustee's Deed at the foreclosure sale making said deed void or voidable. This question of fact by itself should have blocked the entry of summary judgment.

Issue No. 2: Whether Ms. McCluskey, in the Magistrate's Court, raised a dispute as to a material fact that Freddie Mac's was not the holder of the Note at the time of the foreclosure sale showing that it was not entitled to purchase the Subject Property by credit bid.

Summary of Argument No. 2: The Trial Court erred in awarding possession of the Subject Property to Freddie Mac by summary judgment because there was a genuine issue of material fact as to whether Freddie Mac was the holder of the Note, when there was no specific indorsement from Wells Fargo and there was no indorsement on the Note 'in blank;' therefore, Wells Fargo (and not Freddie Mac) was the only party with authority to offer a credit bid at the foreclosure sale and receive a Trustee's Deed.

Wells Fargo Bank was the proper holder of the Note at the time of the foreclosure sale, and therefore was the only party with authority to offer a credit bid at the foreclosure sale (not Freddie Mac).

Ms. McCluskey raised the issue of ownership of the Note in the Magistrate Court given that Freddie Mac filed a copy of the Note with two indorsements on it, both of which showed that the Note had been indorsed to Wells Fargo (R. Bates #s 96 and 97); however, the Magistrate failed to properly consider the affidavits, pleadings and arguments presented, and erroneously awarded Summary Judgment in favor of Freddie Mac in spite of the fact that, at a minimum, there was a question as to a genuine issue of material fact as to which party was the holder of the Note.

Under the Idaho UCC, a promissory note is a "negotiable instrument". I.C. § 28-3-104(5). Negotiable instruments may be passed from one holder to another by negotiation, transfer and

indorsement. I.C. §§ 28-3-201, 28-3-203, 28-3-204. The UCC further provides that a note may be indorsed to a specific person, or may contain an indorsement in blank. A special endorsement becomes payable to the identified person, and can only be enforced by that person. I.C. § 28-3-205.

The Note presented by the Plaintiff in the present case, was originally made Payable to Home Federal Bank, but contains two specific indorsements with payment to the “order of Wells Fargo Bank, NA” and does not contain an indorsement “in blank.” As such the then current note holder was “Wells Fargo Bank, N.A.” not Freddie Mac. As the current Note holder, creditor and named beneficiary on the Assignment of Trust Deed, only Wells Fargo was entitled to issue a credit bid at auction by a non-judicial foreclosure sale. All other parties if purchasing the property at the foreclosure sale are required to pay cash. I.C. § 45-1508, and see *Appel*, supra. As a result, Freddie Mac did not have legal standing to place a credit bid and the improper acceptance of Freddie Mac’s erroneous credit bid, and issuance of the Trustee’s Deed to Freddie Mac, invalidated the sale.

These issues and argument were brought to the attention of the court of the Magistrate and District Judge, but were not properly considered. Ms. McCluskey asserted that the evidence Respondent presented to the Magistrate misled the judge into believing that Respondent was the holder of the Promissory Note by virtue of an indorsement “in blank” (see R. Bates # 70, O’Neill Affidavit see Bates #s 96 and 97, where there are two indorsements back to back, neither of which are “in blank”) It appears that Freddie Mac was asking the trial court to assume, without any further evidence that somehow, within those endorsements, one of them constituted an

endorsement in blank. However, both are UCC specific endorsements of a negotiable instrument designating “Wells Fargo Bank, N.A.” as the indorsee⁹). In fact, as has been explained herein the Respondent has never provided a copy of the Note showing that was indorsed in blank. The only Note presented contains specific indorsements to Wells Fargo, not to Freddie Mac. (Id.)

Consequently, only Wells Fargo could present a credit bid, and any other entity would be required to pay cash. There is no information in the record that connects Freddie Mac with Wells Fargo making them the same entity authorizing Freddie Mac to present a credit bid on behalf of Wells Fargo. Under the plan providing for non-judicial foreclosure pursuant to the Act, once Wells Fargo offered its credit bid, as the true creditor, it could assign its rights to Freddie Mac; but, that is not what happened here.

Ms. McCluskey asserts that this is not a mere formality to point out the erroneous credit bid and transfer to Freddie Mac failed to meet the standards set by Idaho Code. Ms. McCluskey had real defenses to Wells Fargo’s assertion of a credit bid at the foreclosure sale. For instance, she had the right to assert that she was not in default as against Wells Fargo, which defense, *inter alia*, she attempted to assert before the Magistrate Court. In fact, Wells Fargo’s records showed she had paid exactly as agreed, which means Wells Fargo was not entitled to foreclose; however, by a pretended indorsement in blank, Wells Fargo and Freddie Mac, acting in concert with each other were able to erroneously foreclose on the Subject Property and avoid the question of payment, which Freddie Mac claims does not apply to it because it is a bona fide purchaser.

⁹ The first indorsement to Wells Fargo is on Bates page # 96 and the second indorsement to Wells Fargo is on Bates page # 97.

Thus, the issue of payment was avoided by the pretended authority of Freddie Mac to issue a credit bid. Ms. McCluskey is likely to prevail on her appeal to the Idaho Supreme Court based on the fact that Summary Judgment was predicated on trial court errors and misrepresentation Freddie Mac that created the misimpression that it was the holder of the Promissory Note, by an indorsement in blank when no such indorsement existed. Further, the lower court error was that both the Magistrate and the District Court relied upon the misrepresentation by Freddie Mac with the added error of ignoring Ms. McCluskey arguments and refusing to allow her to file her responses before the final decision was made on summary judgment.

Issue No. 3: Whether Ms. McCluskey's right to due process of law prior to being deprived of her property by foreclosure sale was violated by the trial court when it denied her a full and fair opportunity to litigate her claims and defenses to the summary judgment which were aimed at raising disputed issues of material fact.

.Summary of Argument No. 3: The Trial Court Did Not Provide Ms. McCluskey a Full and Fair Opportunity to Litigate Her Claims and Defenses Because All Disputed Facts and Inferences Should Have Been Taken in the Light Most Favorable to Ms. McCluskey.

Ms. McCluskey raised in her Answer to the Complaint for Ejectment in Magistrate Court and in her other pleadings filed therewith the above questions of fact, but, both her arguments and her pleadings were ignored by the lower court judges. Ms. McCluskey raises on appeal the issue that her written and oral arguments were ignored and not heard and that she did not have a full and fair opportunity to present her case.

Ms. McCluskey, in her pleadings in the court below, in her Notice of Appeal to the District Court, and in her Amended Notice of Appeal to the Idaho Supreme Court, asserts that the trial court did not have jurisdiction to decide the issue of ejectment because the Trustee's

Sale was invalid and the Trustee's Deed was void based on improprieties in the foreclosure sale. Ms. McCluskey asserted that there are genuine issues of material fact, to wit: 1) Ms. McCluskey asserts that Respondent ("Freddie Mac") was not the holder of the Note at the time of the Trustee's Foreclosure Sale ("Trustee's Sale") so it was not entitled to purchase the subject property by credit bid per *Federal Home Loan Mortgage Corp. v. Appel*, 143 Idaho 42, 137 P.3d 429 (2006) as that case interpreted the effect of I.C. §45-1508; and 2) that Ms. McCluskey had paid as agreed on the Note up to and including the time of the foreclosure sale.

Ms. McCluskey raised the genuine issue of fact that the only indorsements on the Promissory Note were to Wells Fargo, and there was no indorsement "in blank" and certainly no indorsement to Respondent, meaning that Freddie Mac was not the owner of the Note entitled to purchase by credit bid; thus, under *Appel* it was improper for the Trustee to have deeded the Subject Property to Freddie Mac because it was Wells Fargo that owned her mortgage loan at the time of the foreclosure sale. At the Trustee's Sale, only Wells Fargo had the right to issue a credit bid, not Freddie Mac. The record discloses that there never was an Assignment of Deed of Trust to Respondent that was recorded in the real estate and mortgage records of Ada County in the time and manner specified in I.C. §45-1505(1). These facts were disputed facts presented by Ms. McCluskey to both the Magistrate and the District Court.

When considering summary judgment, Idaho requires that disputed facts should be construed in favor of the non-moving party, and all reasonable inferences should have been drawn in her favor. *Major v. Security Equipment Corp.*, #38414, _ Idaho _, at 4, (Aug. 13, 2013); *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011); (quoting *Castorena*

v. Gen. Elec., 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). Had the Magistrate considered all reasonable inferences favorably to Ms. McCluskey and construed the disputed facts in favor of Ms. McCluskey, then summary judgment could not have been entered granting Plaintiff possession of the Subject Property because the Trustee's Sale was invalid and the Trustee's Deed void as there was no proof of ownership of the Note by indorsement and no proof of recording of an Assignment of Deed of Trust.

The due process rights of Ms. McCluskey were violated by the Magistrate who stated at the hearing of November 22, 2011 that he would review all of the evidence submitted by the Ms. McCluskey, however, the Magistrate cut off Ms. McCluskey as she was making her argument with the promise to review what she submitted and then failed to review any of the evidence submitted by her. That is, the Magistrate entered his ruling granting summary judgment on November 25, 2011 before Ms. McCluskey had the opportunity to submit her response to the evidence submitted by Freddie Mac on November 21, 2011

Had the Magistrate looked into the actual ownership of the Note, the only decision on summary judgment would have been that Respondent had no legal authority to claim ownership or possession of the Subject Property or ejection therefrom. To the extent that Respondent had no legal authority, then the Magistrate Court would have been compelled to decide as a matter of law that it lacked jurisdiction to enter summary judgment for Respondent and the Complaint should have been dismissed.

Additionally, Ms. McCluskey asserted in her pleadings that she was not in default of payment of the Promissory Note because she was in compliance with the terms of the HAMP

loan modification the terms of which had been dictated by Wells Fargo, as the lender. Ms. McCluskey had put her entire life savings down on the property of \$80,000. Then Ms. McCluskey was instructed to stop making payments as specified under the original Note, and she was required to make all future payments at as specified in the loan modification. Further she was required by Wells Fargo to file for bankruptcy to discharge all of her other creditors so that there would be no dispute that she would have the financial ability to make all modified loan payments. Ms. McCluskey was then required by Wells Fargo to pay off the second position mortgage on her property.

Wells Fargo required Ms. McCluskey to agree to the terms of and make all the payments for three trial loan modifications under HAMP. Ms. McCluskey complied with all these terms exactly as required and had paid a total of \$130,000 over a six year period on a loan in the amount of \$147,900 by the completion of the three HAMP loan modifications. Wells Fargo proceeded to foreclosure on the Subject Property without giving proper notice by posting, as to the date of the Trustee's Sale. After her full compliance with the HAMP terms presented to her by the lender, her evidence showed that the lender then acted in bad faith by conducting what amounts to a secret foreclosure sale without proper notice to her of the time, date and place of said sale and by failing to post the property as required by I.C. §45-1506(5). Plaintiff was denied the opportunity to assert that she was not in default of payment of her loan before the foreclosure sale because said loan was modified by Wells Fargo under HAMP Guidelines and because she was in full compliance therewith and that notice had not been given of the sale as required by Idaho Statute.

Default is a material fact, that when challenged by the evidence offered by Defendant, presents a genuine factual issue negating the ownership and possession claim of Wells Fargo the only party with the right to issue a credit bid. By substituting Freddie Mac as the party submitting the credit bid, Respondent attempted to situate itself in the position of a Bona Fide Purchaser for Value Without Notice as the Trustee's Sale requiring an evidentiary hearing and, if this disputed issue was considered in her favor, it would not have been possible for a summary judgment to grant possession of her property to Respondent.

The finding by Judge Bieter that compliance with HAMP was not relevant was an error as a matter of law when he made no additional findings that compliance with HAMP, a program initiated by Wells Fargo as a replacement of the original terms of the mortgage on the Subject Property. Since, it was Defendant's position that she detrimentally relied upon the lender's adoption of HAMP Guidelines in her case and induced her participation in the HAMP program by insisting that she stop making the initial mortgage payments and only make the HAMP modified payments and that under the modified terms of the loan she was in compliance with all payments required rather than in default.

Certainly, this is a disputed fact, which if taken in the light most favorable to Defendant would result in a determination in her favor, at least as to a disputed fact on summary judgment because if decided in her favor would lead to the dismissal of the ejectment action for lack of jurisdiction over Respondent's claim. By Idaho law, Ms. McCluskey is and should be entitled to all reasonable inferences from the disputed facts. Since Ms. McCluskey raised the issue of whether all required notices of foreclosure sale were given and specifically asserted factually that

the lender did not post the property prior to the “secret” foreclosure sale preventing Defendant from attending the sale and raising her objections thereto. Improper notice makes the sale void and denies Plaintiff the right to claim ownership for the purpose of an ejectment action (Cite). This is also a fact that defeats Summary Judgment and requires determination by the Trier of Fact to render a decision. Due to the foregoing issues having been timely presented, Summary Judgment should not have been granted and the lower courts decisions must be reversed and the case remanded for further proceedings.

Issue No. 4: Whether Freddie Mac was entitled to claim the status of a bona fide purchaser for value under the shelter rules of I.C. §§45-1508 and 45-1510 when it was the successor lender that offered a credit bid at the May 16, 2011 Trustee’s Sale and whether such assertion was in violation of I.C. §45-1506(9).

Argument No. 4. Freddie Mac was not entitled to claim the statutory shelter offered by I.C. §§45-1508 and 45-1510 because it was on either actual notice of Ms. McCluskey’s loan modification compliance or it was on inquiry notice because of its supervisory role over Wells Fargo in the HAMP program.

Issue No. 5: Whether there was a question of fact presented to the Magistrate as to whether Freddie Mac had a valid interest in the Subject Property as a result of the foreclosure sale when it violated its own rules and regulations against Dual-Tracking by participating in foreclosure on the Subject Property.

Argument No. 5. Freddie Mac was in charge of enforcing its own rules that prohibited Dual Tracking, or prevented a bank, such as Wells Fargo from conducting a loan modification and at the same time pursuing foreclosure. Because of this rule violation by Wells Fargo and the knowledge that Freddie Mac had or is imputed, Freddie Mac was estopped from purchasing at foreclosure sale the Subject Property which was promoting a violation of its own rules.

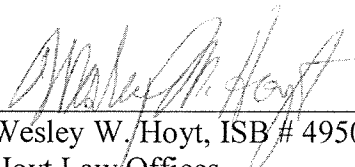
Issue No. 6: Whether the Magistrate lacked jurisdiction over this case because Freddie Mac was not the lawful owner of a right of possession of the Subject Property.

Argument No. 6. Because Freddie Mac had no legal authority to purchase by credit bid, it did not own a right to possess the Subject Property and had no right to bring this action for ejectment. Therefore, there was no jurisdiction in the trial court to grant summary judgment of possession to Freddie Mac.

CONCLUSION

Ms. McCluskey presented numerous disputed issues of fact that, if properly considered by the courts below should have prevented summary judgment and caused the court to grant an evidentiary hearing. This case should be remanded for an evidentiary hearing on the issues raised herein.

DATED THIS 19th day of February, 2014.

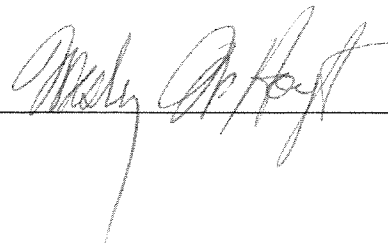


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Hoyt Law Offices
Attorneys for the Ms. McCluskeys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of February, 2014, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Derrick J. O'Neill and Lewis Stoddard ROUTH CRABTREE OLSEN, P.S. 300 Main Street, Suite #150 Boise, Idaho 83701	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Fax: 208-845-3998 <input type="checkbox"/> Email: <input type="checkbox"/> To Tray
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February 19, 2014

By Federal Express Overnight Delivery

Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, ID 83702

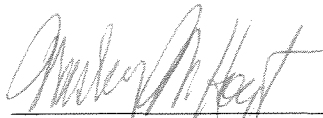
Re: Federal Home Loan Mortgage Corporation v. Margaret A. Butcher, et al.
Supreme Court Dock No. 41188-2013
Supreme Court Case No. CV-OC-2011-13288

Dear Clerk:

Enclosed for filing in the above matter please find the original plus six copies of Appellant's Brief.

Very truly yours,

LAW OFFICE OF WESLEY W. HOYT



Wesley W. Hoyt

WWH:sjh
Enclosures