2-18-2014

US Bank National Association v. Citimortgage Appellant's Reply Brief Dckt. 41252

IN THE SUPREME COURT OF THE STATE OF IDAHO

U.S. BANK NATIONAL ASSOCIATION, N.D.,	) Supreme Court Docket No. 41252-2013
Plaintiff/Appellant/Cross Respondent	) District Court No. CV11-497
vs.	)
CITIMORTGAGE, INC., a savings bank Organized and existing under the laws of New York,	) **RESPONDENT-CROSS APPELLANT'S REPLY BRIEF**
Defendant/Respondent/Cross Appellant,	)

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine

Honorable Robert Elgee
District Judge, Presiding

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I. STATEMENT OF THE CASE

Respondent Cross-Appellant CitiMortgage, Inc. ("CitiMortgage") maintains and restates the Statement of the Case, Course of Proceedings and Concise Statement previously submitted in Respondent's Brief, filed December 26, 2013.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

Did the District Court err when it denied CitiMortgage's attorney fees, concluding that CitiMortgage was not entitled to its fees?

III. ARGUMENT

A. CitiMortgage is Entitled to its Attorney Fees in the District Court Action

CitiMortgage submits its reply to the Appellant-Cross Respondent's Reply Brief, filed on or about January 28, 2014 ("Appellant's Reply Brief") with regard to CitiMortgage's cross appeal. CitiMortgage identified three (3) statutory bases for award of its fees and/or costs in defending the action, namely, I.C. §§ 45-1514 and 45-915 (construed in *pari materia*), I.C. § 12-121, and I.C. § 10-1210, and contends that the District Court's denial based on the first two grounds was an abuse of discretion, while its refusal to make appropriate findings based on I.C. § 10-1210 was reversible error.

1. CitiMortgage is Entitled to Its Fees Under I.C. §§ 45-1514 and 45-915

U.S. Bank opposes CitiMortgage's appeal requesting its attorney fees under Chapters 9 and 15, Title 45, Idaho Code, on two bases: first, because it contends that a showing of bad faith is required; and, second, because it argues that the plain language of I.C. § 45-915 and the Idaho Trust Deeds Act, I.C. § 45-1501, *et seq.*, do not allow recovery of attorney fees by CitiMortgage, despite CitiMortgage being a "grantee" or "successor in interest" under the meaning of the

statute. U.S. Bank is incorrect in both regards, and CitiMortgage should be entitled to its fees under I.C. §§ 45-1514 and 45-915.

a. Bad Faith is Not Required For an Award of Fees Pursuant to I.C. §§ 45-1514 and 45-915

U.S. Bank was found liable for failing to reconvey its deed of trust upon demand as required under I.C. § 45-1514. Idaho Code § 45-1514 provides that any beneficiary who fails to reconvey a deed of trust is "liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property." I.C. § 45-1514; *see also Brinton v. Haight*, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994)(holding I.C. §§ 45-915 and 45-1514 must be construed in *pari materia*).

Idaho Code § 45-915, in turn, provides that any lender who fails to reconvey is liable "for all damages . . . **and shall also** forfeit to him or them the sum of $100." I.C. § 45-915 (emphasis added). Idaho case law has further clarified that "damages" under the statute include all attorney fees accrued in order to secure the release. *See, e.g., Head v. Crone*, 76 Idaho 196, 201, 279 P.2d 1064, 1066 (1955). Thus, U.S. Bank does not dispute that attorney fees may be awarded as damages for failure to reconvey a deed of trust under Idaho law, but argues that an award of damages is treated the same as, and must be lumped together with, the $100 statutory penalty, which requires a showing of bad faith. Yet neither the plain language of the statute nor Idaho case law interpreting I.C. § 45-915 supports U.S. Bank's argument.

Idaho Code § 45-915 provides that a lender who fails to reconvey a mortgage as requested is liable to the mortgagor, purchaser or successor in interest, as follows:

> When any mortgage, affecting the title to real property, has been satisfied, the holder thereof or his assignee must immediately, on the demand of the mortgagor, purchaser, or the successor in interest of either, execute, acknowledge, and deliver

> to him a certificate of the discharge thereof so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage or affecting the title to real property, to be entered of record; and any holder, or assignee of such holder, who refuses to execute, acknowledge, and deliver to the mortgagor, purchaser, or the successor in interest of either, the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, **is liable to the mortgagor, purchaser, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of $ 100.**

I.C. § 45-915 (emphasis added).

Thus, a plain interpretation of the statute is that the lender is liable for two (2) categories of recompense: "damages" and a "forfeit." Notably, this provision is disjunctive and separated by a comma, while including the connective "and," which signifies that two separate types of remedy are possible. The first remedy is an award of money damages, which indicates the legislature's intent to award the mortgagor, or any other party affected by the mortgage, damages caused by the lender's failure to discharge the obligation. The second remedy, a "forfeit" or penalty, is a separate and distinct remedy which serves to punish the liable party for bad conduct in conjunction for his failure to reconvey, over and above the damage he has caused. *See e.g. Platts v. Pacific First Fed. Sav. & Loan Ass'n*, 62 Idaho 340, 111 P.2d 1093 (1941)(noting that the $100 forfeit in I.C. § 45-915 is penal in nature and thus should be strictly construed).

Idaho case law interpreting I.C. § 45-915 does not appear to contradict this commonsense interpretation of the statute. In the case law on point, beginning over a century ago, Idaho appellate courts have routinely dealt with the damage and penalty provisions separately. Early case law interpreting what appears to be the identical predecessor statute to I.C. § 45-915 indicates that damages must be **automatically assessed** for failure to release a statute, *see*

Blackfoot State Bank v. Crisler, 20 Idaho 379, 118 P. 775 (1911); *Cornelison v. United States Bldg. & Loan Ass'n*, 50 Idaho 1, 292 P.243 (1930).

For instance, in *Blackfoot State Bank v. Crisler*, 20 Idaho 379, 118 P. 775 (1911), the Court upheld the statutory penalty despite no finding of bad faith against the lender. *See id.* at 386-87, 118 P. 777-78 (dissent discussing majority's decision to award the $100 penalty, although not discussing award of damages); *Henderson v. Allis-Chalmers Mfg. Co.*, 65 Idaho 570, 579, 149 P.2d 133, 138-39 (1944)(stating, "[t]he statute makes it a legal duty to perform a moral duty, and imposes a penalty if he fails to discharge this duty," without any discussion of bad faith). Likewise, in *Cornelison v. United States Bldg. & Loan Ass'n*, 50 Idaho 1, 292 P. 243 (1930), following a discussion of the $100 penalty to be assessed, the Court suggested that a finding of liability required payment of attorney fees as a matter of course, as follows:

> The principal debt having been paid it was the duty of the mortgagee to satisfy the mortgage. The statute fixes the liability for refusal so to do. (*Blackfoot State Bank v. Crisler*, 20 Idaho 379, 118 P. 775, and cases therein cited.)
>
> Error is also sought to be predicated upon the action of the court in finding and concluding that respondents are entitled to recover $ 400 as damages. C. S., sec. 6369, supra, **provides that any mortgagee who refuses to cause satisfaction of the mortgage to be entered when fully paid shall be liable to the mortgagor for all damages sustained by reason of such refusal. Attorney's fees incurred as the result of necessity of bringing action to compel cancelation of the mortgage are recoverable as damages**. (2 Jones on Mortgages, 8th ed., p. 765, citing *Kelly v. Narregang Inv. Co.*, 41 S.D. 222, 170 N.W. 131.)

Id. at 11, 292 P. at 246 (emphasis added).

Later case law, which notably did not overturn *Blackfoot State Bank* or *Cornelison*, *supra*, merely served to clarify the two categories of recompense called for in I.C. § 45-915, noting that the statutory $100 forfeit was in fact a penalty which must be strictly construed and thus required a prior showing of bad faith. *See Platts v. Pacific First Savings & Loan Ass'n*, 62

Idaho 340, 111 P.2d 1093 (1941); *Head v. Crone*, 76 Idaho at 200, 279 P.2d at 1066. Reading the line of cases interpreting I.C. § 45-915 and its predecessor to present, it is clear that the appellate courts recognized the distinction. A finding of bad faith only to the penalty portion of the statute, while automatically assessing attorney fees against the lender if found liable.

In short, nothing in Idaho law lends itself to the interpretation that U.S. Bank would have this Court adopt, which would inappropriately lump together an award of attorney fees and statutory penalties, although all indicia has been that damages and penalties should be treated differently. Idaho Code §§ 45-1415 and 45-915 requires that U.S. Bank is liable for attorney fees for failure to reconvey its deed of trust upon satisfaction of Defendants Herbert and Julie Thomas's obligation.

b. CitiMortgage is Entitled to Its Fees Under I.C. §§ 45-1514 and 45-915 Because CitiMortgage is a Grantee and Successor in Interest

Next, U.S. Bank incorrectly argues that CitiMortgage cannot avail itself of I.C. § 45-1514 and 45-915 because it is not a "mortgagor, purchaser, or his grantee or heirs."[1] Idaho Code specifically allows for an award of damages to CitiMortgage as grantee and/or successor in interest.

Interpretation of a statute is a question of law over which this Court exercises free review. *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002). Statutory interpretation begins with the literal words of the statute, giving the language its plain, obvious and rational meaning. *International Ass'n of Firefighters*, Loc. No. *672 v. City of Boise City*, 136 Idaho 162, 169-70, 30 P.3d 940, 947-48 (2001). When this Court is tasked with engaging in statutory

[1] Additionally, U.S. Bank waived this argument when it named CitiMortgage as a Defendant in the foreclosure action, agreed that CitiMortgage had standing to defend under I.C. §§ 45-1514 and 45-915, proceeded to trial on that basis, and has not argued on appeal that I.C. §§ 45-1514 and 45-915 do not apply to CitiMortgage.

construction because an ambiguity exists, it must ascertain the legislative intent in enacting the statute and give effect to that intent. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). To ascertain such intent, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. *Id.* It is incumbent upon a court to give an ambiguous statute an interpretation that will not render it a nullity. *Id.* Constructions of an ambiguous statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004).

Here, U.S. Bank essentially argues that an ambiguity exists insofar as the terms "mortgagor," "purchaser," or the mortgagor's or purchaser's "grantee or heir," apply to this case. Further, U.S. Bank wrongly argues that this Court should pick and choose to abide by some language, while completely ignoring terms in I.C. §§ 45-1514 and 45-915, including the express terms "grantee" and "successor in interest." The statutory language relevant to U.S. Bank's argument is as follows:

> **When any mortgage, affecting the title to real property, has been satisfied, the holder thereof or his assignee must immediately, on the demand of the mortgagor, purchaser, or the successor in interest of either, execute, acknowledge, and deliver to him a certificate of the discharge thereof** so as to entitle it to be recorded, or he must enter satisfaction or cause satisfaction of such mortgage or affecting the title to real property, to be entered of record; and any holder, or assignee of such holder, who refuses to execute, acknowledge, and deliver to the mortgagor, purchaser, or the successor in interest of either, the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, **is liable to the mortgagor, purchaser, or his grantee or heirs,** for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of $ 100.

I.C. § 45-915 (emphasis added).

Contrary to how U.S. Bank would have this Court interpret the statute, Idaho Code § 45-915 plainly does not stop short at "mortgagors," but **explicitly includes the mortgagor's**

"grantee." And in case there was any question about who the "grantee" would be in this situation, while Idaho Code does not define "grantee," Chapter 15, Title 45 does define "grantor" as "**the person conveying real property by a trust deed** as security for the performance of an obligation." I.C. § 45-1502(2)(emphasis added). Furthermore, a beneficiary of a deed of trust is "the person named or otherwise designated in a trust deed **as the person for whose benefit a trust deed is given**, or his successor in interest, and who shall not be the trustee." I.C. § 45-1502(1) (emphasis added). Thus, "the deed of trust must have been given to secure an obligation to the beneficiary and for the benefit of the beneficiary." *Edwards v. Mortgage Elec. Registration Sys.*, 154 Idaho 511, 516, 300 P.3d 43, 49 (2013). Thus, the only party who could possibly be a "grantee" as contemplated by I.C. § 45-915, and thus have the right to collect attorney fees from U.S. Bank is CitiMortgage.[2]

It is interesting that U.S. Bank not only fails to explain the effect of I.C. §§ 45-915 and 45-1514 being construed in *pari materia* in these regards, but in effect actually argues this Court should ignore the well-known rule that mortgage release statute and deed of trust reconveyance statute pertain to the same subject and thus must be interpreted in light of each other since they have a common purpose. *See Brinton v. Haight*, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994)(stating I.C. §§ 45-1514 and 45-915 must be construed in *pari materia*). Contrary to U.S. Bank's argument, because these statutes must be interpreted in light of one another, it necessarily requires that I.C. § 45-1502's definition of grantee and beneficiary have bearing on the meaning, purpose and interpretation of I.C. § 45-915.

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[2] Oddly, U.S. Bank argues it is "significant" that "the Act does not define 'grantee.'" *See* Appellant's Reply Brief, p. 25. Yet there is simply no significance as the Idaho Trust Deed Act, Chapter 15, Title 45, and Chapter 9, Title 25, Idaho Code are to be construed in *pari materia* insofar as the chapters are identical in purpose. Because I.C. § 45-1514 refers and has an identical purpose to I.C. § 45-915, *see e.g. Brinton v. Haight*, 125 Idaho 324, 870 P.2d 677 (Ct. App. 1994), such definitions clearly are equally relevant and interchangeable.

U.S. Bank's argument against extending I.C. §§ 45-915 and 45-1514 to CitiMortgage as beneficiary and successor in interest is illogical and would frustrate the intent of the statutes, for if not CitiMortgage then which "grantee" or "successor in interest" would have the right to invoke I.C. § 45-1514? U.S. Bank argues that the only party that could avail itself of the rights created under the statutes is the trustee.[3] Yet under Idaho law, this is incorrect: a trustee has no interest in property. *Long v. Williams*, 671 P.2d 1048 (1983)(holding, a "deed of trust conveys to the trustee nothing more than a power of sale, capable of exercise upon occurrence of certain contingencies (such as default in payment) and leaves in the trustor a legal estate comprised of all incidents of ownership..."). As the deed of trust was given to CitiMortgage to secure the Thomas's obligation to CitiMortgage, the deed of trust was for the benefit of CitiMortgage, who would become the grantee of the deed of trust as the Thomas's successor in interest.

Finally, U.S. Bank's reliance on Utah Code § 78-3-8 (1943) and the Utah state case interpreting the 1943 statute, *Draper v. J.B. & R. E. Walker, Inc.*, 115 Utah 368, 204 P.2d 826 (1949), is misplaced, while actually emphasizing the Idaho Legislature's intent that a lender who fails to reconvey is liable to any successor in interest, including subsequent lenders and grantees like CitiMortgage. Unlike I.C. § 45-915 that provides that a lender is liable to mortgagors, purchasers, grantees and heirs, the Utah statute narrowly applies to only "mortgagors." *Compare* I.C. § 45-915; U.C.A. § 78-3-8 (1943).[4] Thus, in stark contrast to the Idaho statute, the *Draper* Court held that relief was necessarily limited only to "mortgagors" as was plainly provided in that statute. Here, under I.C. §§ 45-915 and 45-1514, the Idaho Legislature expressly sought to

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[3] *See* Appellant-Cross Respondent's Reply Brief, p. 25 ("Under I.C. § 45-1502, only the trustee receives any conveyance in a deed of trust.")

[4] Utah Code § 78-3-8 is no longer law in Utah, and a survey of Utah's current real estate conveyance statutes, Chapter 1, Title 57, Utah Code, reveal a statutory scheme that bears little resemblance to Idaho law.

hold non-reconveying lenders accountable to persons beyond mortgagors, including purchasers, grantees and heirs—which includes CitiMortgage. To deny this intent would be to effectively nullify portions of the statute.

Thus, it follows that CitiMortgage may collect damages it sustained by reason of U.S. Bank's refusal as the person who was conveyed real property by trust deed as security for the performance of the Thomas's obligation, which case law has confirmed includes attorney fees and costs.

2. CitiMortgage is Entitled to Attorney Fees Under I.C. § 12-121 and Discretionary Costs Under I.C. § 10-1210

First, U.S. Bank argues that the District Court's denial of fees was proper under I.C. § 12-121 because its case against CitiMortgage was not brought frivolously. U.S. Bank cites *Coward v. Hadley*, 150 Idaho 282, 289-90, 246 P.3d 391, 398-99 (2010), for the proposition that "[t]he entire course of litigation must be taken into account" before an award of fees under I.C. § 12-121 is warranted and that the losing party may assert "other factual or legal claims that are frivolous, unreasonable, or without foundation" without facing an award under the statute. *See* Appellant's Reply Brief, p. 29. Yet U.S. Bank's hard line stance in pursuing the action meets this threshold because, taken as a whole, the entire course of litigation was frivolous, unreasonable, and without foundation.

The whole record reveals that U.S. Bank literally pursued a case against CitiMortgage based upon nothing but the visibility of staple holes. Although the District Court stated that the mere existence of staple holes was not dispositive, U.S. Bank pursued nothing but the invisibility of staple holes in images full of staple-sized dots. Despite the District Court's invitation to

introduce evidence as to U.S. Bank's procedures and forms in place that could create inferences in its favor, U.S. Bank single-mindedly sought nothing but a judgment deciding the case in its favor based on the invisibility of staple holes upon images full of staple-sized dots. Regardless of the District Court's warning that lay witness testimony concerning the visibility of stable marks would not assist it in finding inferences based on the narrow issue of staple holes, at trial U.S. Bank introduced nothing but the lay testimony of U.S. Bank employee Keith Powers about Powers' lay opinion of the invisibility of staple marks on a copy of a check full of staple-sized dots. Given U.S. Bank's singular focus on an unprovable, ultimately irrelevant issue, it was no surprise when the District Court ruled in CitiMortgage's favor.

In short, this case presented one of those rare occasions where an award under I.C. § 12-121 is not only allowed, but called for given that U.S. Bank completely failed to present even one legitimate issue in its case against CitiMortgage. *See Coward v. Hadley, supra*; *Michalk v. Michalk*, 148 Idaho 224, 220 P.3d 580, (2009). U.S. Bank's "sincere belief" aside, given its narrow and unreasonable focus, the record supports an award of fees under I.C. § 12-121.

Second, although improperly lumped into U.S. Bank's response concerning I.C. § 12-121, the case should be remanded to require the District Court's findings regarding CitiMortgage's discretionary costs under I.C. § 10-1210. U.S. Bank does not appear to contest, and makes no argument to the effect that the District Court properly made findings as required prior to declining to award costs under I.C. § 10-1210. Consequently, this case should be remanded for proper findings to determine any discretionary costs that may be awarded to CitiMortgage given the inequity and injustice of U.S. Bank's novel and short-sighted focus in this case, as discussed *supra*.

B. CitiMortgage is Entitled to Its Attorney Fees and Costs on Appeal

CitiMortgage has requested its attorney fees in accordance with Idaho Appellate Rules 40 and 41, which allow for an award of costs and attorney fees to the prevailing party. More specifically, CitiMortgage has argued that attorney fees are appropriate on appeal here under I.A.R. 41, because the appeal has been brought or defended frivolously, unreasonably, or without foundation. *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990). U.S. Bank has done little more than simply invite the Court to second-guess the trial court's decisions on conflicting evidence, has made no substantial showing that the district court misapplied the law, and has made no cogent challenge with regard to the trial judge's exercise of discretion. *Pass v. Kenny*, 118 Idaho 445, 449, 767 P.2 153, 157 (Ct. App. 1990); *Blaser v. Cameron*, 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct. App. 1991).

U.S. Bank argues that attorney fees on appeal would be inappropriate, but for the reasons set out in CitiMortgage's Respondent's Brief, have not asserted compelling grounds for challenging the District Court's findings of fact and conclusions of law. While U.S. Bank has assigned multiple errors to the District Court, none of them—much less all the issues combined—are sufficient to amount to a cogent challenge with regard to the trial court's exercise of discretion. Consequently, because U.S. Bank has brought this appeal unreasonably and without foundation, CitiMortgage respectfully requests that U.S. Bank be required to pay attorney fees and costs on appeal pursuant to I.A.R. 40 and 41.

IV. CONCLUSION

The District Court properly found that that the CitiMortgage Deed of Trust has priority over the U.S. Bank Deed of Trust, that the Check was stapled to the Release Demand Letter and

delivered to U.S. Bank, and that the Release Demand Letter was effective to require that U.S. Bank reconvey the deed of trust. However, the District Court erred by failing to award CitiMortgage its attorney fees under I.C. §§ 45-1514 and 45-915, by failing to award CitiMortgage its fees under I.C. § 12-121, and by failing to make additional findings awarding CitiMortgage its discretionary costs under I.C. § 10-1210.

Respondent-Cross Appellant respectfully requests that this Court affirm the District Court and find that Respondent has priority over Appellant. Respondent-Cross Appellant further respectfully requests that this Court reverse the District Court's decision that Respondent-Cross Appellant is not entitled to attorney fees, and award its costs and fees at trial and on appeal.

RESPECTFULLY SUBMITTED this 18 day of February, 2014.

PICKENS LAW, P.A.

By: 
Terri R. Pickens, of the firm
Attorneys for Citimortgage, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of February, 2014, I caused to be served two true and accurate copies of the foregoing RESPONDENT-CROSS APPELLANT'S REPLY BRIEF by placing the same in the United States mail, First Class, postage prepaid, to the following:

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