8-25-2014

Federal Nat. Mortg. Ass'n v. Hafer Appellant's Brief Dckt. 41825

IN THE SUPREME COURT OF THE STATE OF IDAHO

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff,

v.

RUSSELL HAFER and John Does 1-10 as Occupants of the Premises located at 402 South Lodestone Avenue, Meridian, ID 83642,

Defendant.

RUSSELL and SANDRA HAFER,

Third Party Plaintiffs,

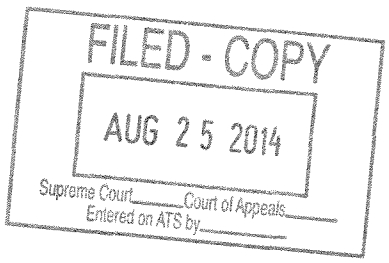
v.

AMERICAN HOME MORTGAGE SERVICING, INC. and Does 1-10,

Third Party Defendants.

Supreme Court Case No. 41825-2015

Fourth Judicial District Court Case No. CV-OC-12-01791



RUSSEL AND SANDRA HAFER'S APPELLANT BRIEF

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA, HONORABLE TIMOTHY HANSEN, DISTRICT JUDGE, PRESIDING

Jeffrey R. Townsend Townsend Law, P.C. 950 W. Bannock St., Ste. 1100 Boise, ID 83702 Telephone (208) 350-7310 *Attorney for Appellant*	Tonn Peterson Perkins Coie 1111 W. Jefferson St., Ste. 500 Boise, ID 83702 *Attorneyy for Respondent, AHMSI*	Derrick O'Neill RCO Legal, P.C. 300 Main St., Ste. 150 Boise, ID 83702 *Attorneyy for Respondent Fannie Mae*

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STATEMENT OF THE CASE

Statement of Facts: Russell and Sandra Hafer ("Hafers") are a married couple. This matter arises out of the Hafers' attempt to refinance their home with American Home Mortgage Servicing, Inc ("AHMSI"), and the subsequent foreclosure and sale of the home. On or about January 27, 2007 Russell Hafer purchased the subject home, located at 402 S. Lodestone Avenue, Meridian, Idaho. R. p. 16. The loan was serviced by AHMSI. R. p. 16. In late 2010 an AHMSI employee advised Sandra Hafer that AHMSI could lower the Hafers' mortgage payment, and convert the mortgage payment from an adjustable payment into a fixed payment over 30 years, through the federal government's Home Affordable Modification Program ("HAMP"). R. p. 112. AHMSI advised Mrs. Hafer that in order to be considered for HAMP the Hafers needed to be behind on their mortgage payments. R. p. 112. At AHMSI's recommendation the Hafers stopped making mortgage payments in order to qualify for HAMP. R. p. 112.

During the latter part of 2010 and early 2011 the Hafers submitted a HAMP application and supporting documentation to AHMSI. On March 15, 2011 AHMSI approved the Hafers for a "trial period plan" under HAMP. R. p. 112. Under the trial period plan the Hafers were required to make three trial period payments in a timely manner. R. p. 112. Pursuant to the trial period plan the Hafers' mortgage would be permanently modified if they made their three trial period payments on time, and submitted the required documents to AHMSI. R. p. 112. The Hafers accepted AHMSI's offer and made the trial plan payments as required and submitted the required documents. R. p. 112.

On June 28, 2011 AHMSI sent the Hafers a Home Affordable Modification Agreement (the "Modification Agreement"). R. p. 112. In order to accept the Modification Agreement the Hafers were to sign two copies of the Modification Agreement in front of a notary public and return both copies to AHMSI by July 13, 2011. R. p. 112. Russell Hafer signed both copies of the Modification Agreement in front of a notary public and returned them to AHMSI. R. pp. 112-113. AHMSI received the notarized copies of the Modification Agreement on July 13, 2011. R. p. 113.

On or about July 26, 2011 the Hafers received a letter from AHMSI advising them that they were ineligible for a HAMP modification because AHMSI did not receive the executed Modification Agreement by the due date. Mrs. Hafer called AHMSI and advised them the signed Modification Agreement had been sent. AHMSI told Mrs. Hafer that they did not receive the Modification Agreement, and that had it must have gotten lost. R. p. 113. However, the UPS tracking slip indicates it was in fact received on July 13, 2011 by Toni Jones, AHMSI's case worker on the Hafers' application. R. p. 113.

After confronting Ms. Jones with the UPS tracking information she acknowledged that it had been received, but was not properly notarized, and that she had sent out another Modification Agreement for Russell Hafer to sign, notarize, and return. R. p. 113.

On or about July 30, 2011 the Hafers received a second Modification Agreement from AHMSI, along with a letter to return the Modification Agreement by August 31, 2011. R. p. 112. Russell Hafer signed, notarized, and returned the second Modification Agreement to AHMSI by August 3, 2011. R. p. 112. AHMSI rejected the second modification agreement, contending that it was not timely received by AHMSI. R. pp. 75-76.

On December 15, 2011 AHMSI foreclosed on the home and had it sold at a trustee's sale. Fannie Mae was the successful bidder. R. p. 77.

Procedural History:

On or about February 1, 2012 Fannie Mae filed a Post Foreclosure Eviction Complaint For Ejectment And Restitution Of Property ("Complaint") against Russell Hafer for possession of the property. R. pp. 7-12. On February 28, 2012 the Hafers filed an answer to Fannie Mae's complaint along with a third party complaint against AHMSI containing the following causes of action: No Default (invalid foreclosure); wrongful foreclosure while being considered for HAMP (wrongful foreclosure); breach of contract; breach of the implied covenant of good faith and fair dealing; promissory estoppel; equitable estoppel; Idaho Consumer Protection Act; Fraud; Negligence; Negligent Infliction of Emotional Distress, and; Intentional Infliction of Emotional Distress. R. pp. 13-25. On May 2, 2012 AHMSI filed an answer to the third-party complaint. R. pp. 26-39.

On February 21, 2013 AHMSI and Fannie Mae filed a joint motion for summary judgment. R. pp. 40-95. The Hafers filed an opposition on March 20, 2013. R. pp. 96-143. AHMSI and Fannie Mae filed a reply on March 27, 2013. R. pp. 144-160. The court heard oral argument on May 29, 2013, at which time the court took the matter under advisement. R. p. 202. The court issued a written Memorandum Decision and Order on July 10, 2013. R. pp. 201-218. The court granted Fannie Mae's motion for possession of the home, and granted AHMSI's motion for summary judgment as to following causes of action: No Default (invalid foreclosure); breach of contract; breach of the implied covenant of good faith and fair dealing; promissory estoppel; Fraud; Negligence;

Negligent Infliction of Emotional Distress, and; Intentional Infliction of Emotional Distress. The court denied AHMSI's motion for summary judgment of the following causes of action: wrongful foreclosure while being considered for HAMP (wrongful foreclosure); equitable estoppel, and; the Idaho Consumer Protection Act. R. pp. 201-218. The district court subsequently ordered the judgments in favor of AHMSI and Fannie Mae be certified as final judgments so that an appeal could be taken. R. pp. 219-224.

ISSUES PRESENTED ON APPEAL

1. Whether the court erred in granting summary judgment based on a legal issue not raised in the pleadings.

It is well established law in Idaho that a party opposing a motion for summary judgment must be given notice and opportunity to oppose the motion, and that the court may not decide an issue not raised in the pleadings. Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527 (Idaho 1994).

In this case, the court granted summary judgment to respondents on multiple causes of action on the basis that AHMSI did not return a fully executed copy of the Modification Agreement to the Hafers, and therefore a condition precedent to the formation of the contract was not met. R. pp. 201-218. AHMSI and Fannie Mae did not argue in their joint motion for summary judgment that a contract was not formed, or that the Modification Agreement was not entered, based on AHMSI's failure to return a signed copy of the Modification Agreement to the Hafers. R. pp. 40-95. The Hafers neither disputed nor agreed that AHMSI failed to return a signed copy of the Modification Agreement, and did not argue the legal significance of any such failure because the issue was not raised in the pleadings. It was error for the court to grant

summary judgment on a legal theory that was not raised in the pleadings, and to which the Hafers did not have a reasonable opportunity to contest.

2. Whether the Court erred in application of legal principle of 'Condition Precedent.'

The court held that there was no Modification Agreement as a matter of law because of the failure of a condition precedent, specifically, that AHMSI did not return a signed copy of the Modification Agreement to the Hafers. R. pp. 204-207. However, under Idaho law a condition precedent to performance by the promisor is excused when the occurrence or fulfillment is within the exclusive control of the promisor and the promisor fails to fulfill the condition. Wade Baker & Sons Farms v. Corp. of the Presiding Bishop of the Church of Jesus Christ of LDS, 136 Idaho 922 (Idaho App. 2002). In this case the condition which the court held operated to impose a duty was AHMSI returning of a signed copy of the Modification Agreement. AHMSI cannot cause the failure of the condition, and then avoid its duty to perform based on such a failure. In this case the condition precedent was excused because its nonoccurrence was caused solely by AHMSI.

ARGUMENT

In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the district court in ruling on a motion for summary judgment. All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Bonz v. Sudweeks, 119 Idaho 539, 541 (1991). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." McCoy v. Lyons, 120 Idaho 765, 769 (1991).

1. The court erred in granting summary judgment based on a legal issue not raised in the pleadings.

It is well established law in Idaho that the party against whom summary judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered. Idaho Endowment Fund Inv. Board v. Crane, 135 Idaho 667, 671 (2001). Furthermore, on a motion for summary judgment a district court may not decide an issue not raised in the moving party's motion for summary judgment. Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527 (1994). In *Thomson* the Idaho Supreme Court specifically held that a non-moving party is not required to respond to issues not raised by the moving party even if the non-moving party ultimately has the burden of proof at trial.

In this case the district court granted summary judgment to AHMSI on the Hafers' first, third, and fourth causes of action, and to Fannie Mae on its claim for possession of the home based on the theory that a contract was not formed because AHMSI did not return a signed copy of the Modification Agreement to the Hafers. R. pp. 204-207. However, neither AHMSI nor Fannie Mae raised that issue in their joint motion for summary judgment. R. pp. 40-95. Accordingly, the district court erred in granting summary judgment based on an issue that was not raised in the pleadings.

First Cause of Action – No Default.

With regard to the Hafers' first cause of action against AHMSI, AHMSI argued in its motion for summary judgment that there was no modification agreement, and that it

was entitled to summary judgment because (1) the first Modification Agreement AHMSI sent to the Hafers was not properly notarized, and; (2) the second Modification Agreement AHMSI sent to the Hafers was not returned until after the stated deadline. R. p. 79.

With regard to the first cause of action AHMSI did not raise the issue that no agreement was entered between AHMSI and the Hafers due to AHMSI's failure to return a signed copy of the Modification Agreement to the Hafers. In other words, the issue of failure of a condition precedent was not raised in the motion. Despite AHMSI failing to raise the issue in its motion, the court expressly granted summary judgment to AHMSI based on AHMSI's own failure to return a signed copy of the Modification Agreement to the Hafers, not based on the issues raised in the motion.

Specifically, the court held that AHMSI was entitled to summary judgment because the parties did not enter into an agreement which resolved Mr. Hafer's default. The court reasoned that the parties did not enter into an agreement because "It is undisputed that AHMSI did not sign and return a copy of the Agreement to Mr. Hafer." R. p. 205.

The Hafers did not dispute, or agree, that AHMSI did not sign and return a copy of the Agreement to Mr. Hafer, because the issue was not raised as a basis for granting summary judgment. Had the issue been raised, the Hafers could have either disputed the alleged fact or made the legal argument that the nonoccurrence of the condition was excused (*See below).* It was error for the court to grant summary judgment on an issue that was not raised in the motion.

There are genuine issues of material fact that preclude summary judgment in favor of AHMSI. AHMSI argued that there was no contract because the first Modification Agreement was not properly notarized, and that the second Modification Agreement was not timely returned. The Hafers have alleged and submitted evidence which demonstrates that the first Modification Agreement was properly notarized (R. pp. 128-130, 161-164), and that the second Modification Agreement was timely returned. (R. pp. 111-114). Accordingly, the court erred in granting summary judgment to AHMSI

Third Cause of Action – Breach of Contract

Similarly, the court granted AHMSI's motion for summary judgment on the Hafers' breach of contract claim on the basis that AHMSI did not return a signed copy of the Modification Agreement to the Hafers. The court stated:

> As noted above, the Modification Agreement sent to Mr. Hafer by AHMSI specifically provided that the loan would not be modified "unless and until" AHMSI accepted the Agreement by signing and returning a copy of the Agreement to Mr. Hafer. . . . Although the Hafers allege that they returned all of the documentation requested by AHMSI in a timely manner, they have not alleged that they received a signed copy of a loan modification agreement from AHMSI. ... As the Hafers have not demonstrated a genuine issue of material fact as to whether a binding loan modification was executed, the Court concludes that summary judgment is appropriate as to the Hafer's breach of contract claim."
> (R. pp. 207).

The Hafers did not allege they received a signed copy of a loan modification agreement from AHMSI because AHMSI never raised the issue in their motion that an return of a fully executed copy was a necessary element for the formation of a contract, or that AHMSI's failure to provide the Hafers with an executed copy was a condition precedent to a valid contract. However, a non-moving party is not required to respond to issues not raised by the moving party even if the non-moving party ultimately has the

burden of proof at trial. Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527 (1994). Therefore, it was an error for the court to grant summary judgment to AHMSI based on an issue that was not raised in the pleadings, and to which the Hafers did not have a reasonable opportunity to respond.

The only issues raised by AHMSI regarding contract formation were notarization and timeliness. R. p. 79. AHMSI argued that the first Modification Agreement was invalid because it was not properly notarized. However, AHMSI has offered no admissible evidence to support that allegation. AHMSI has not produced the "improperly" notarized Modification Agreement, has not stated in what manner the agreement was improperly notarized, or set forth any legal argument that the manner in which it was "improperly" notarized has any legal significance. AHMSI's "evidence" of improper notarization is a mere conclusory, self-serving statement contained in the affidavit from Cindi Ellis, an AHMSI employee, who saw a written notation from someone else that the agreement was improperly notarized. R. pp. 43-46. Ms. Ellis' affidavit it that regard is inadmissible because it lacks foundation and is nothing more than hearsay (her statement), upon hearsay (the written file notes), upon hearsay (the statement by whomever made the notes), upon hearsay (the allegedly improperly notarized document that has not been produced). There is absolutely no admissible evidence that the Modification Agreement was not properly notarized. To the contrary, the Hafers have alleged and submitted evidence demonstrating that the Modification Agreement was properly notarized. R. pp. 128-130, 161-164. At best, there are disputed facts regarding the formation of the first Modification Agreement, and for that reason alone summary judgment should have been denied.

AHMSI contends that the second Modification Agreement was invalid because it was not timely returned. Again, AHMSI has no admissible evidence to support its contention. AHMSI's contention is premised on the affidavit of employee Cindi Ellis, which is nothing more than hearsay upon hearsay. Ellis' statement (hearsay) is based upon her review of service notes (hearsay), which refer to a letter (hearsay – not produced). R. pp. 43-46. Contrary to AHMSI's inadmissible hearsay, the Hafers, who have personal knowledge of the facts, have stated that they received a letter stating that the second Modification Agreement was not due until August 31, 2011, and that they returned the signed and notarized Modification Agreement prior to the due date. R. pp. 111-114. The only admissible evidence is that the second Modification Agreement was in fact timely returned. It is certainly not undisputed that the second Modification Agreement was not timely returned by the Hafers to AHMSI. Accordingly, it was improper for the court to grant summary judgment for AHMSI on the Hafers' breach of contract cause of action.

Fourth Cause of Action – Violation of the Covenant of Good Faith and Fair Dealing

AHMSI combined its argument for summary judgment on the third and fourth causes of action. AHMSI did not argue that there was no binding Modification Agreement because it did not return an executed copy to the Hafers. Nonetheless, the court granted summary judgment to AHMSI on the Hafers' fourth cause of action for violation of the covenant of good faith and fair dealing on the same grounds as it granted summary judgment on the breach of contract claim, stating:

> As discussed above, the Hafers have not demonstrated a genuine issue of material fact as to whether a binding contract to modify the loan was executed. Accordingly, summary judgment is appropriate to this claim. (R. pp. 208).

AHMSI did not raise the issue of its failure to return a signed copy as an element of contract formation or as an element to a claim for breach of the covenant of good faith and fair dealing. Therefore, under the Idaho Supreme Court's holding in *Thomson*, the Hafers were not required to address the issue in their opposition. It was an error for the court to grant summary judgment on an issue not raised in the pleadings. As set forth above there are genuine issues of fact that preclude summary judgment on the issues of the whether the parties entered a Modification Agreement.

Summary Judgment in Favor of Fannie Mae for Possession

Fannie Mae argued that it was entitled to possession of the home following its purchase of the home at the foreclosure sale. The Hafers argued that the foreclosure sale was invalid because at the time of foreclosure they were not in default due to the loan Modification Agreement, and that the notice of default did not comply with statutory requirements.

In its decision on the motion for summary judgment, the district court stated:

> The court notes that the Hafers have asserted that there was no default of their loan obligation at the time the trustee's sale was conducted. [cite omitted]. Idaho Code section 45-1505(2) provides that a trustee may foreclose a trust deed by advertisement and sale if there is "a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision." The statute "requires that the default exist at the time of the sale. It states that the trustee may foreclose a trust deed if there 'is' a default by the grantor, not if there 'has been' a default by the grantor." *Taylor v. Just*, 138 Idaho 137, 140, 59 P.3d 308, 311 (2002). In *Taylor v. Just* the Idaho Supreme Court's Supreme Court concluded that because the grantors and the beneficiary of a trust deed had entered into a forbearance agreement which resolved the grantors' default, the foreclosure sale was void, as there was no default at the time of the sale as required by I.C. § 45-1505(2). The forbearance agreement executed by the parties altered the terms of the promissory note by modifying the

> payments due, and provide that if the grantors made the payments as modified, the beneficiary would not proceed with the foreclosure. The court concluded that the forbearance agreement "did not merely provide that the sale would be postponed. It eliminated the default by altering the terms of the promissory note so that there were no longer any sums past due. (R. p. 204).

The district court then concluded that the "contemplated HAMP loan modification" did not resolve Mr. Hafer's default or alter the terms of the loan obligation so that there were no longer any sums past due at the time of the foreclosure sale." R. p. 204. The rationale for the court's decision was the following:

> On or about June 28, 2011, AHMSI sent Mr. Hafer a proposed Modification Agreement. The Modification Agreement provided, "I understand that the Loan Documents will not be modified unless and until (i) the Lender accepts this Agreement by signing and returning a copy of it to me, and (ii) the Modification Date (as defined in Section 3) has occurred." Ellis Affidavit, Exhibit B at 2. **It is undisputed that AHMSI did not sign and return a copy of the Agreement to Mr. Hafer**." Accordingly, the Court cannot conclude that AHMSI and Mr. Hafer entered into an agreement which resolved Mr. Hafer's default. For the reasons discussed above, the Court concludes that summary judgment in favor of Fannie Mae is appropriate. (Emphasis Added). R. p. 205.

Again, the court granted summary judgment on an issue that was not raised by the moving party. It is only "undisputed" that AHMSI did not sign and return a copy of the agreement because neither AHMSI nor Fannie Mae raised the issue in thier pleadings. It was an error for the court to grant summary judgment on an issue not raised in the pleadings. Thomson v. Idaho Ins. Agency, Inc., 126 Idaho 527 (1994).

There are genuine issues of material fact that preclude summary judgment in favor of Fannie Mae. If AHMSI and the Hafers did enter into a Modification Agreement it is undisputed that the terms of the Modification Agreement modify the terms of the obligation and resolve the default. The June 28, 2011 offer letter and summary provide: "As previously described, if you comply with the terms of the Home Affordable

Modification trial period plan, we will modify your mortgage loan and waive all prior late charges that remain unpaid. ... Any past due amounts as of the end of the trial period ... will be added to your mortgage loan balance." R. pp. 119-120. As set forth above, there are disputed issues of fact in this case regarding contract formation which preclude summary judgment.

2. The Court erred in application of the legal principle of 'Condition Precedent'.

As set forth above, the court erred in addressing the issue of whether AHMSI had to sign and return a copy of the Modification Agreement to the Hafers before the agreement would be effective. However, even assuming the district court properly addressed the issue, the court erred in its application of the doctrine of 'Condition Precedent', and its decision is contrary to Idaho law and the weight of law in other jurisdictions.

"A condition precedent is an event that is not certain to occur, but which must occur, unless its nonoccurrence is excused, before performance under a contract will become due. [cite omitted]. If there is a failure of a condition precedent through no fault of the parties, no obligation of performance arises under the contract. [cite omitted]. However, when the happening of the event is within the exclusive or partial control of the party whose obligation is conditioned upon the event, its nonoccurrence will not always excuse the obligor's performance." Wade Baker & Sons Farms v. Corp. of the Presiding Bishop of the Church of Jesus Christ of LDS, 136 Idaho 922 (Idaho App. 2002) ("*Wade Baker*").

In Fish v. Fleishman, 87 Idaho 126, 133, (1964), the Idaho Supreme Court stated the rule of law concerning the principle of conditions precedent as follows:

> The rule of law determinative of the principal issue raised by this appeal has been well stated by Professors Williston and Corbin: It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. ... The illustrations of this principle are legion. 5 Williston on Contracts, § 677 (3d ed. 19610.
>
> One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised. ... 3A Corbin on Contracts, § 767 (1960).

As noted by the Idaho Court of Appeal in *Wade Baker*, a more recent edition of Williston On Contracts addresses the issue as follows:

> A provision may be both a condition and a promise if one of the parties additionally promised to insure that the condition would occur as part of his bargain, and this independent promise to perform the condition will subject the nonfulfilling party to liability for damages for a failure of the condition to occur. Whether one who has made a conditional promise undertakes impliedly to make the condition possible, depends on reasonable inferences to be drawn in each case. When the occurrence of a condition is largely or exclusively within the control of one party, so that the party is largely or totally dependent on the party within whose control the conditioning event lies, the express language of the condition often gives rise to an implied promise.
>
> If a promisor prevents or hinders the occurrence or fulfillment of a condition to his or her duty of performance, the condition is excused; in other words, "the nonoccurrence or nonperformance of a condition is excused where the failure of the condition is caused by the party against whom the condition operates to impose a duty." Accordingly, the liability of the promisor is fixed regardless of the failure to fulfill the condition. The pertinent rule ... is that where a party's breach by nonperformance contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused, so that performance of the duty that was originally subject to its occurrence can become due in spite of its nonoccurrence. [cite omitted] Wade Baker at 925-926

The Court of Appeal in *Wade Baker*, further stated:

> These longstanding principles governing application of conditions precedent in contract law are consistent with, and tend to merge into, the covenant of good faith and fair dealing which, under Idaho law, is implied in every contract. [cites omitted]. The implied covenant requires that the parties perform in good faith the obligations imposed by their agreement, and a violation of the covenant occurs when the conduct of one party violates, nullifies or significantly impairs any benefit or right conferred on the other party by the contract. [cite omitted]. Thus, the implied covenant places a good faith obligation on each party to take reasonable measures to ensure that the other party obtains the benefits of the agreement." Id. At 926.

In *Wade Baker*, Wade Baker & Sons Farms ("Baker Farms") agreed to sell a 1,800 acre parcel to the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints ("LDS Corporation"). As part of the agreement to purchase the property the LDS Corporation agreed that Baker Farms could retain the monetary benefit of approximately $180,000 from the anticipated lease of 600 acres of the property to a local farmer, Larry Adams. Baker Farms and the LDS Corporation agreed that the LDS Corporation's payment of the $180,000 would be made immediately after (1) the sale of the property was concluded, (2) title insurance was issued, and (3) **the rent has been paid**. The agreement further provided that if Larry Adams did not lease the 600 acres from the LDS Corporation then Baker Farms could lease it to a third party and retain the rent, or could farm the 600 acres itself without paying rent.

The LDS Corporation allowed Larry Adams to farm the 600 acres without paying rent, and did not pay Baker Farms the $180,000. Baker Farms brought suit against the LDS Corporation to collect the $180,000.

The LDS Corporation moved for summary judgment on the grounds that the payment of rent by Larry Adams to the LDS Corporation was a condition precedent to its

obligation to remit payment of the $180,000 to Baker Farms, and that since Adams had never paid rent its obligation to pay Baker Farms the $180,000 never came due. The district court accepted the LDS Corporation's argument and granted it summary judgment on Baker Farms' claims for breach of contract and breach of the covenant of good faith and fair dealing.

In applying the principles discussed above, the Idaho Court of Appeals reversed the district court's decision, noting that there were material factual issues that made summary judgment in favor of the LDS Corporation inappropriate. The Court of Appeals stated:

> First, the nonoccurrence of the condition precedent upon which the LDS Corporation relies--Adams' failure to pay rent--was wholly or partially within the LDS Corporation's control. The LDS Corporation could have required that Adams execute a lease and pay the rent in advance before he could commence farming operations in the spring of 1995. Draft versions of the lease that were exchanged with Adams in early 1995, but not signed, and the lease that was ultimately executed, provided that the rent was due and payable upon execution of the lease, but the LDS Corporation did not enforce this term. There are thus material issues as to whether the LDS Corporation had an implied obligation to take reasonable steps to collect the rent, whether it failed to do so, and whether by its conduct the LDS Corporation materially contributed to the nonoccurrence of the condition precedent. Id. at 926-927.

As was the case in *Wade Baker*, there are material issues that preclude summary judgment in favor of AHMSI and Fannie Mae. Specifically, the occurrence of the condition precedent to AHMSI's obligation – AHMSI signing and returning the Modification Agreement – was exclusively within AHMSI's control. "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." Id. at 925. According to AHMSI it did not sign

and return an executed copy of the Modification Agreement. However, since that condition was solely within AHMSI's control it cannot take advantage of its failure to fulfill the condition and avoid its obligation. Furthermore, since the occurrence of the condition was exclusively within AHMSI's control, such that the Hafers were totally dependent on AHMSI to fulfill the condition, the express language of the condition gave rise to an implied promise by AHMSI to fulfill the condition.

AHMSI had an obligation to fulfill the condition by signing and returning the Modification Agreement. Since AHMSI prevented the occurrence of the condition its nonoccurrence is excused, and AHMSI's duty under the Modification Agreement was fixed despite the nonoccurrence. AHMSI's argument for not signing and returning the Modification Agreement was that the first Modification Agreement was not properly notarized, and that the second Modification Agreement was not timely returned. As set forth above, there are disputed issues of fact regarding both of those contentions.

As was the situation in *Wade Baker*, "There are thus material issues as to whether [AHMSI] had an implied obligation to take reasonable steps to [sign the modification agreement], whether it failed to do so, and whether by its conduct [AHMSI] materially contributed to the nonoccurrence of the condition precedent."

AHMSI cannot take advantage of its failure to fulfill a condition within its exclusive control as a means to avoid liability under the contract. In fact, that was not even an issue raised in the pleadings. It was improper for the district court to grant summary judgment in favor of AHMSI based on the nonoccurrence of a condition precedent within AHMSI's own control.

In this case, the district court's determination that AHMSI's failure to return an executed copy of the agreement to the Hafers rendered the Modification Agreement ineffectual was based on the ruling in Lucia v. Wells Fargo Bank, N.A. 798 F. Supp. 2d 1059 (N.D. Cal 2011) ("*Lucia I*"). In *Lucia I* the district court held:

> As noted above, the Modification Agreement sent to Mr. Hafer by AHMSI specifically provided that the loan would not be modified "unless and until" AHMSI accepted the Agreement by signing and returning a copy of the Agreement to Mr. Hafer. . . . Although the Hafers allege that they returned all of the documentation requested by AHMSI in a timely manner, they have not alleged that they received a signed copy of a loan modification agreement from AHMSI. *See, e.g., Lucia v. Wells Fargo Bank, N.A.* 798 F. Supp. 2d 1059, 1068 (N.D. Cal 2011). *Discussing Grill v. BAC Home Loans Servicing LP*, 2011 WL 1217891 (E.D. Cal. Jan. 14, 2011) (stating that providing documentation was simply part of the application process, and no binding modification would result unless and until the lender sent the borrower an executed modification agreement). ... The *Lucia* court dismissed the borrowers' breach of contract claims because they failed to allege that they had "met all the conditions set forth in the TPP Contract for loan modification, including receipt of a 'fully executed copy of a Modification Agreement,' and therefore failed to allege the existence of a binding contract regarding a permanent loan modification. Id at 1068. As the Hafers have not demonstrated a genuine issue of material fact as to whether a binding loan modification was executed, the Court concludes that summary judgment is appropriate as to the Hafer's breach of contract claim."

The district court's reliance on *Lucia I* was misplaced. Three months after the district court issued its decision in this matter, the 9th Circuit Court of Appeal reversed the holding of *Lucia I*. Lucia v. Wells Fargo Bank, N.A., 728 F.3d 878 (9th Cir. 2013) "Lucia II"). "The issue we must decide is whether a bank was contractually required to offer the plaintiffs a permanent mortgage modification after they complied with the requirements of a trial period plan (" TPP"). The district court held the bank was not, and we reverse." Id. at 880.

The Court in *Lucia II* noted that the HAMP guidelines, as set forth in Treasury Supplemental Directive 09-01, require that "for borrowers who have made all their payments and whose representations remain accurate, the servicer must offer a permanent home modification loan. Id. at 882. The court concluded that the servicer cannot avoid its duty to offer a permanent loan modification to a borrower who has complied with its obligations under the TPP, by exercising unfettered discretion to not return a "fully executed" copy of the TPP and modification agreement. In other words, the very decision and reasoning that the district court relied on in this case to grant AHMSI's and Fannie Mae's motion for summary judgment was reversed.

The *Lucia* matter is substantially similar to the case at bar. The service provider sent the borrowers a TPP, which provided that if they made the TPP payments and returned the required documents the service provider "will" modify the loan. Both sets of plaintiff's in *Lucia* (Corvelo and Lucia) retuned the TPP documents and made the required TPP payments, yet Wells Fargo did not offer them a permanent modification. The same thing as happened in the case at bar. Similarly, Wells Fargo argued that there was no binding loan modification agreement because it did not send a fully executed copy of the modification agreement to the borrowers.

In *Lucia I*, the district court concluded that the language requiring the servicer to provide a "fully executed copy of a Modification Agreement" was conditional for a permanent modification, and that because the bank did not send the plaintiffs a "fully executed copy of a Modification Agreement" that there was no contract for modification.

In reversing the district court's decision in *Lucia II*, the 9th circuit Court of Appeals accepted and followed the 7th Circuit's decision in Wigod v. Wells Fargo Bank,

N.A., 673 F.3d 547 (7th Cir. 2012), which concluded that the conditional language of receiving a "fully executed copy" of the modification agreement was not an enforceable condition to a permanent modification agreement. The court in *Wigod* reasoned as follows:

> In other words, Wells Fargo argues that its obligation to send Wigod a permanent Modification Agreement was triggered only if and when it actually sent Wigod a Modification Agreement. Wells Fargo's proposed reading of section 2 would nullify other express provisions of the TPP Agreement. [...] Under Wells Fargo's theory, it could simply refuse to send the Modification Agreement for any reason whatsoever— interest rates went up, the economy soured, it just didn't like Wigod— and there would still be no breach. Under this reading, a borrower who did all the TPP required of her would be entitled to a permanent modification only when the bank exercised its unbridled discretion to put a Modification Agreement in the mail. In short, Wells Fargo's interpretation of the qualifying language in section 2 turns an otherwise straightforward offer into an illusion." Id. at 884.

The 9th Circuit Court of Appeals in *Lucia II* concluded:

> We believe the reasoning in Wigod is sound. Paragraph 2G cannot convert a purported agreement setting forth clear obligations into a decision left to the unfettered discretion of the loan servicer. The more natural and fair interpretation of the TPP is that the servicer must send a signed Modification Agreement offering to modify the loan once borrowers meet their end of the bargain. Under Paragraph 2G of the TPP, there could be no actual mortgage modification until all the requirements were met, but the servicer could not unilaterally and without justification refuse to send the offer. As the Seventh Circuit stated in *Wigod*, the modification was not complete until all of the conditions were met, "but under paragraph 1 and section 3 of the TPP, Wells Fargo still had an obligation to offer [the borrower] a permanent modification once [the borrower] satisfied all obligations under the agreement." This interpretation of the TPP avoids the injustice that would result were Wells Fargo's position accepted and Wells Fargo allowed to keep borrowers' trial payments without fulfilling any obligations in return. The TPP does not contemplate such an unfair result. *Lucia II* at 883-884

The authority and reasoning relied on by the district court in granting summary judgment to AHMSI and Fannie Mae has been overturned on appeal. (*Lucia II*). The

decisions expressed in *Lucia II* and *Wigod* are consistent with Idaho law on the principle of conditions precedent – that if a promisor has exclusive control of the occurrence or nonoccurrence of a condition precedent, and he does not fulfill the condition, then the condition is excused and he cannot avoid liability, "in other words, 'the nonoccurrence or nonperformance of a condition is excused where the failure of the condition is caused by the party against whom the condition operates to impose a duty.'" Wade Baker at 926.

The district court's decision to grant summary judgment to AHMSI and Fannie Mae was granted based on an issue not raised in the pleadings, is inconsistent with Idaho law on the doctrine of 'condition precedent,' and was premised on the now overturned decision in *Lucia*. For the reasons set forth above the district court erred in granting summary judgment to AHMSI and Fannie on the above referenced claims. The Hafers respectfully request that this court reverse the district court's decision.

ATTORNEY FEES

Appellants hereby requests costs and attorney's fees on appeal pursuant to I.R.C.P. 54(e) and Idaho Code § 12-120(3) as the dispute arose out of a commercial transaction.

CONCLUSION

Appellants respectfully request that his court reverse the District Court's decision on respondents' motion for summary judgment.

Respectfully submitted this 25th day of August, 2014.

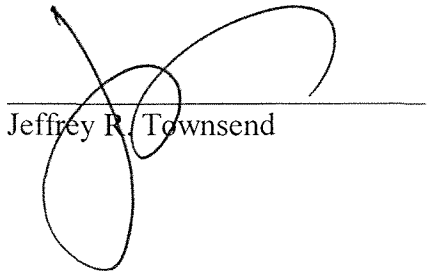
TOWNSEND LAW, P.C.

Jeffrey R. Townsend
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25h day of August, 2014, I caused to be served a true and correct copy of the foregoing RUSSEL AND SANDRA HAFER'S APPELLANT BRIEF, by method indicated below, and addressed to each of the following:

Tonn Peterson Perkins Coie 1111 W. Jefferson St., Ste. 500 Boise, ID 83702	____ U.S. Mail, Postage Prepaid __x__ Hand Delivered ____ Overnight Mail ____ Telecopy
Derrick O'Neill RCO Legal, P.C. 300 Main St., Ste. 150 Boise, ID 83702	____ U.S. Mail, Postage Prepaid __x__ Hand Delivered ____ Overnight Mail ____ Telecopy



Jeffrey R. Townsend