11-12-2014

Federal Nat. Mortg. Ass'n v. Hafer Appellant's Reply 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,

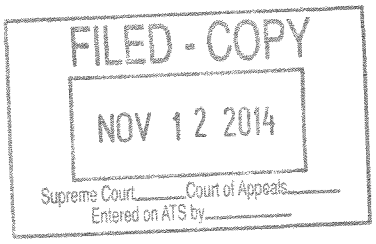
v.

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 REPLY 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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APPELLANTS' REPLY

1. *The grounds upon which the district court granted summary judgment was not an issue raised by the moving party.*

It is undisputed that the district judge granted summary judgment on the grounds that no contract was formed because AHMSI did not return a signed copy of the Modification Agreement to the Hafers. That specific issue - whether AHMSI returned a signed Modification Agreement to the Hafers, and/or whether AHMSI's failure to return the signed agreement precluded contract formation - was not before the court.

AHMSI argued on summary judgment that there was no enforceable contract based on two grounds: (1) the first Modification Agreement AHMSI sent to the Hafers was not properly notarized by the Hafers, and; (2) the second Modification Agreement AHMSI sent to the Hafers was not returned by the Hafers until after the stated deadline. R. p. 79. Nowhere in respondents' motion for summary judgment is there an argument that a valid, enforceable agreement to modify the Hafers loan did not exists between the Hafers and AHMSI because AHMSI did not return a signed copy of the Modification Agreement to the Hafers. Therefore, there is no colorable argument that AHMSI can make that the basis, or grounds, upon which the district court granted summary judgment – that AHMSI did not return a signed copy of the Modification Agreement – was raised by respondents' in their motion for summary judgment.

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.

The Hafers did not have an opportunity to respond to, or contest, the issue of whether AHMSI returned a signed copy of the Modification Agreement to the Hafers, or whether AHMSI had to return a signed copy before the agreement to modify the loan would be enforceable. Accordingly, the district court erred in granting summary judgment to AHMSI.

AHMSI's opposition is nothing more than an untutored attempt at misdirection and sleight of hand. AHMSI contends the issue before the district court was "whether an enforceable agreement to modify the Hafers' loan existed." **OPP Brief p. 7** There are myriad of issues, and/or elements, to consider in determining whether an enforceable contract exists, including but not limited: capacity, offer, definite terms, acceptance, duress, fraud, mistake, impossibility, illusory promise and mutual assent. No matter how AHMSI couches the "issue", the undisputed facts are clear: (1) the court granted summary judgment on the grounds that AHMSI did not return a signed Modification Agreement to the Hafers; (2) respondents did not argue in their motion for summary judgment that an enforceable contract did not exist because AHMSI did not return a signed Modification Agreement to the Hafers. The basis upon which the district court granted summary judgment was not an issue raised in the pleadings. It was therefore improper for the district court to grant summary judgment.

AHMSI argues that because the court was addressing the general issue of contract formation, it had the latitude to rule on the issue of formation based on any grounds, rather or not raised in the motion. AHMSI's argument is akin to the argument that if a moving party raises the issue of negligence then the court could properly grant summary judgment based on any element of negligence whether or not raised in the pleadings. Such is clearly not the case. In Thomson v. Idaho Ins. Agency, 126 Idaho 527 (1994) the defendant moved for summary judgment on a negligence cause of action based on the argument that it did not owe plaintiff a duty. The district court found there were issues of fact that precluded summary judgment on the issue of duty, but granted summary judgment based on lack of evidence of proximate cause. The Supreme Court overturned the grant of summary judgment because the defendant had not raised the issue of proximate cause in its motion, stating "if the movant does not challenge an aspect of the nonmovant's case in that party's motion, the nonmovant is not required to address it at the summary judgment stage of the proceedings." Id. at 531.

Similarly, in Sales v. Peabody, No 41446, 2014 WL 4656522 (Idaho, Sept. 19, 2014) this court held that summary judgment cannot be granted on issues not raised in the pleadings. In *Sales* the defendant moved for summary judgment on a negligence claim on the grounds that plaintiff could not establish duty or causation. The district court granted summary judgment based on the finding that a certain fact contained in the pleadings was a superseding cause of the injury. This court stated that of summary judgment could not be granted on the "superseding cause" theory because it was not raised by the moving party.

Similar to the *Sales* case, the district court in the case at bar latched onto a fact that had no apparent relevance to any issue or theory presented in the moving the papers, and granted summary judgment on an issue not raised in the moving papers. Accordingly, it was improper for the district court to grant summary judgment in this case.

Respondents argue for the first time on appeal that a valid contract to modify the loan did not exist between the Hafers and AHMSI because AHMSI did not sign the Modification Agreement. Respondents inaccurately state that it is "undisputed" that AHMSI did not return a signed Modification Agreement to the Hafers. To the contrary, it is neither disputed nor undisputed. It is in fact not an issue at all, because respondents did not raise it as an issue in the pleadings.

Respondents' new argument that AHMSI had to sign and return the modification agreement is based on the Court's decision in Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp., 136 Idaho 233 (2001) ("*Intermountain Forest*"). It is telling that respondents utterly fail to set forth the facts in *Intermountain Forest*, or how the facts are comparable to the case at bar. The obvious reason for the dearth of information in respondents' brief is because the decision of *Intermountain Forest* is distinguishable on the facts, and is neither controlling nor informative.

In *Intermountain Forest* Gary Briggs, the president of Intermountain Forest Management ("IFM") made an offer to Laurie Stone, and employee of Louisiana Pacific Corp. ("L-P") with whom IFM had worked on a logging project, to have L-P complete a logging project on another tract of land. Stone prepared a contract based on the offer made my IFM. Briggs signed the contract on behalf of IFM. In his deposition Briggs

admitted he was aware Stone had no authority to bind L-P on the contract, the contract was unsinged at the time Briggs signed it, and Stone told Briggs she had to take the contract back to L-P for a signature.

The court held "The undisputed facts in the record reasonably support the district judge's conclusion that the presentation of the contract to Briggs for a signature was not an offer and Briggs was not justified in assuming his assent would conclude the bargain, ..." Id at 237.

The facts of *Intermountain Forest*, are substantially different than the facts of the case at bar in many significant aspects. First, the issue of AHMSI's signature on the contract was not raised in the summary judgment motion. Second, the Hafers did not make the offer to AHMSI, AHMSI made the offer to the Hafers. Third, based on the language of the TPP Mr. Hafer is justified in his understanding that by accepting the offer, by making his TPP payments, the loan would be modified.[1] "An offer 'is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.' RESTATEMENT (SECOND) CONTRACTS" Id. at 237. Finally, it is undisputed that Mr. Hafer timely made his TPP payments. R. p. 45. Mr. Hafer then signed, notarized and returned the Modification Agreement to the AHMSI. AHMSI's argument that no

[1] The Trial Period Plan specifically provides:

> Congratulations! You are approved to enter into a trial period plan under the Home Affordable Modification Program.
>
> To accept this offer, you must make your first monthly "trial period payment." To qualify for a permanent modification, you must make the following trial period payments in a timely manner: [April, May and June]. After all trial period payments are timely made and you have submitted all the required documents, your mortgage will be permanently modified. R. p. 49

contract is formed until it returns a signed copy of the modification agreement "turns an otherwise straight forward offer into an illusion." *Wigod* at 884.

2. *AMSI's signing and returning the Modification Agreement is an unenforceable condition precedent.*

As set forth in the appellants' opening brief, the requirement that AHMSI sign and return a copy of the Modification Agreement to the Hafers is an unenforceable condition precedent. AHMSI argues that its duty, if any, to sign the modification agreement was premised on Mr. Hafer properly accepting the Modification Agreement and returning it to AHMSI by the stated deadline. Contrary to AHMSI's contentions, AHMSI's duty to provide Mr. Hafer with a **signed** modification agreement arose once Mr. Hafer made his third timely TPP payment. However, even assuming AHMSI's duty to provide a singed modification agreement did not arise until Mr. Hafer properly accepted the modification agreement, the summary judgment pleadings clearly establish that there are disputed issues of material fact regarding whether Mr. Hafer "properly" accepted and returned the Modification Agreement.

3. *The foreclosure sale is void if there was not default.*

AHMSI offers no opposition to the argument that if the Hafers had an agreement with AHMSI then they were not in default and foreclosure sale is void. As set forth in appellants' opening brief, material questions of fact exist which preclude summary judgment on the issue of contract formation. It is undisputed that the Hafers complied with the terms of the TPP. The weight of legal authority and precedent establishes that when the borrower complies with the terms of a TPP the lender **must** present borrower with a signed permanent modification agreement. Giving the lender unfettered discretion of whether to provide the borrower with a signed modification agreement after the

borrower has fulfilled his obligations of the TPP turns an otherwise straight forward promise into an illusion.

CONCLUSION

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

Respectfully submitted this 12th day of November, 2014.

TOWNSEND LAW, P.C.

Jeffrey R. Townsend
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of November, 2014, I caused to be served a true and correct copy of the foregoing RUSSEL AND SANDRA HAFER'S REPLY 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