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Skinner v. Peterson Appellant's Reply Brief Dckt. 42065

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GREG L. SKINNER and JESSICAL L. SKINNER,
husband and wife,

Plaintiffs/Appellants,

v.

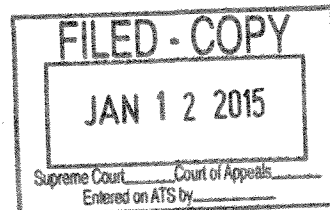
ALBERT D. PETERSON and BABETTE
PETERSON, husband and wife, individually and
d/b/a PCS COMPANY and PCS COMPANY, INC.,
U.S. BANK HOME MORTGAGE, a United States
Corporation, SAFEGUARD PROPERTIES, LLC, a
Delaware corporation, JANE DOES and/or JOHN
DOES I-X who may be individuals employed by
defendants,

Defendants/Respondents.

Supreme Court No. 42065

APPELLANTS, GREG L. SKINNER AND JESSICA L. SKINNER'S, REPLY BRIEF
APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

THE HONORABLE JEFF M. BRUDIE
DISTRICT JUDGE



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INTRODUCTION

Plaintiffs/appellants, Greg and Jessica Skinner, stand on the position taken in their opening brief. The following discusses the legal issues and the factual issues that were not completely addressed by the defendant/respondent, U.S. Bank Home Mortgage, in its brief.

REPLY TO THE RESPONDENT'S ARGUMENT

I. THE DEFENDANT/RESPONDENT, U.S. BANK HOME MORTGAGE, HEREINAFTER U.S. BANK, HELD THE SOLE AUTHORITY TO INSPECT THE WORK AND DETERMINE WHETHER TO PAY MONEY TO THE CONTRACTOR.

The specific language involved regarding the inspection of the construction work is in the Deed of Trust. It says:

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. **During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly.** Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. R. Vol. II, p. 350. Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. R. Vol. II, p. 351. (Emphasis added.)

This part of the Deed of Trust shows it is U.S. Bank which had total control of the inspection process. U.S. Bank tries to evade it was in complete control of the inspection by saying the borrower had control because the borrower had to sign off on the payment. For U.S. Bank to

say U.S. Bank does not have responsibility for the inspection that was done incorrectly shows U.S. Bank will do anything to avoid responsibility.

The insurance proceeds which U.S. Bank held were improperly and incorrectly disbursed by U.S. Bank based on the inspection that U.S. Bank had done pursuant to language in the Deed of Trust which said the Bank (Lender) had the right “to ensure the work was completed to the Lenders’ satisfaction.” (R. Vol. II, p. 350).

II. \$139,400.62 WAS RELEASED BY U.S. BANK TO THE CONTRACTOR BASED ON THE INSPECTION DONE BY U.S. BANK’S HIRED INSPECTOR.

On page four of U.S. Bank’s Respondent’s Brief, U.S. Bank states:

On September 25, 2007, U.S. Bank had the Skinners’ property inspected by Safeguard Properties, LLC, and [sic] independent contractor used by U.S. Bank for the purpose of inspecting its mortgage collateral, and in this instance, the Skinner residence. The inspection report reflected that the percentage of completion was 65% complete, that the contractor was present and that the mortgagor was satisfied with the work to date. R. Vol. II, p. 341-342. On October 4, 2007, U.S. Bank then issued a third draw for partial payment for damage to the property in the amount of \$139,400.62 payable jointly to the Skinners and their contractor. R. Vol. II, p 376; 384.

Because of the inspection by U.S. Bank’s hired inspector, money was released by U.S. Bank. Additional problems were created by the improper inspection of U.S. Bank’s hired inspector. The contractor worked only a short time after the improper inspection and left the job. Unpaid subcontractors had to be paid to avoid having liens placed against the property. Additional insurance money had to be disbursed because the inspection was so improperly done by U.S. Bank’s inspector, Safeguard Properties, LLC., hereinafter Safeguard.

III. THE PLAINTIFFS/APPELLANTS, GREG AND JESSICA SKINNER, HEREINAFTER THE SKINNERS, HAVE BEEN DAMAGED BY THE IMPROPER INSPECTION WHICH U.S. BANK WAS IN CHARGE OF.

U.S. Bank says the Idaho Supreme Court precedent results in U.S. Bank having no liability for the improper inspection it was totally in charge of. The inspector sent to the job by U.S. Bank's agent, Safeguard, made a major mistake. In the inspector's deposition she said the job was only 42 percent complete, not the 65 percent she had reported to U.S. Bank which resulted in the improper disbursement of the Skinners' insurance funds being held by U.S. Bank. (R. Vol. I, pp. 144-162).

No one disputes that the Skinners have been substantially damaged by the improper inspection. U.S. Bank says Idaho law confirms that even though U.S. Bank was the one that hired the inspection company and wrongly issued payment on an extremely wrong inspection which caused the Skinners' damages, U.S. Bank is not liable.

On page six of U.S. Bank's Respondent's Brief, U.S. Bank states:

Generally, the relationship between a borrower and a lender is a debtor-creditor relationship, not a fiduciary relationship. *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 277, 824 P.2d 841, 852 (Idaho 1991). Fiduciary duties may arise between lenders and borrowers in limited circumstances where there is "an agreement creating a duty, or if the lender exercises complete control over the disbursement of funds." *Wooden v. First Security Bank of Idaho, N.A.* 121 Idaho 98, 100, 822 P.2d 995, 997 (Idaho 1991). This is consistent with federal law. As explained in *Teaupa v. U.S. National Bank N.A.*, 836 F.Supp.2d 1083, 1100 (D. Hawai'i 2011).

The first word used is "generally." The law clearly is not the way U.S. Bank wants the Court to believe. U.S. Bank says "fiduciary duties may arise." The facts in Skinners' case makes it

clear U.S. Bank had full control in hiring Safeguard which resulted in the wrongful inspection of the job – and had complete control of the funds as to the inspection process.

The damage to the Skinners is huge. The amount of \$139,400.62 of the Skinners' insurance funds were released by U.S. Bank based on U.S. Bank's wrongful inspection by its hired inspector. Additional damages were caused by U.S. Bank's inspector saying the house was 65 percent complete when, in fact, it was only 42 percent complete.

IV. U.S. BANK'S ATTORNEY REPRESENTED THE INSPECTION COMPANY AND ARGUED SKINNERS COULD NOT RECOVER THEIR LOSS BECAUSE THE INSPECTION COMPANY CONTRACTED WITH U.S. BANK NOT THE SKINNERS.

U.S. Bank has denied it is responsible for its wrongful disbursement of the Skinners' insurance funds it was holding based on U.S. Bank's hired inspection. The Skinners were forced to attempt to collect their damages from the inspection company hired by U.S. Bank because U.S. Bank was doing nothing to collect the wrongly disbursed funds.

U.S. Bank's attorney, Scott Smith, represented Safeguard and argued since Skinners did not have a contract with Safeguard, Skinners had no right to collect from Safeguard.

The hiring of the inspection company was done by U.S. Bank. U.S. Bank did nothing to get the money back from its hired inspection contractor. This forced Skinners to proceed against Safeguard. But, U.S. Bank's attorney, Scott Smith, appeared for Safeguard. This makes no sense. U.S. Bank would have substantial money put back in the insurance held fund account U.S. Bank was holding by recovering from Safeguard. U.S. Bank's security would be enhanced. The wrongful inspection occurred in September of 2007. The Skinners have lived in a garage building beside the partially constructed house for over seven years. U.S. Bank

allowed its attorney to represent Safeguard. It is clear the two entities are working together to avoid responsibility for the admitted wrongful inspection. The inspection was substantially wrong. The Skinners have been severely damaged by U.S. Bank's conduct. Idaho law clearly says "fiduciary duties may arise between lenders and borrowers." *Wooden v. First Security Bank of Idaho, N.A.*, supra.

U.S. Bank chose Safeguard as its inspector. Safeguard's inspection was done incorrectly. This has been admitted to. Idaho law clearly makes U.S. Bank liable for Skinners' damages caused by the wrongful inspection. U.S. Bank has taken an additional step to show it was in total control of the inspection of the Skinners' house. Safeguard said it had no contract with the Skinners, its contract was with U.S. Bank. U.S. Bank's attorney represented Safeguard in this case. U.S. Bank was in total control of the inspection and wrongly paid money for work that was not done which has deprived the Skinners the opportunity to be in their home. U.S. Bank is liable for the Skinners' damage.

CONCLUSION

The plaintiffs/appellants, Greg and Jessica Skinner, have been damaged by defendant/respondent, U.S. Bank Home Mortgage, not protecting the Skinners insurance money. U.S. Bank has breached its duty to the Skinners. U.S. Bank picked the inspection company and knows the inspection was done grossly wrong by its contractor, Safeguard. Clearly, U.S. Bank has breached its duties to the Skinners and caused the Skinners' damage.

RESPECTFULLY SUBMITTED this 9th day of January, 2015.

AHERIN, RICE & ANEGON

By Darrel W. Aherin
Darrel W. Aherin
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I, Darrel W. Aherin, hereby certify that on the 9th day of January, 2015, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

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