4-23-2018

# Bergeman v. Select Portfolio Servicing Appellant's Brief Dckt. 45338

IN THE SUPREME COURT FOR THE STATE OF IDAHO

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| DARIN BERGEMAN<br><br>Appellant,<br><br>v.<br><br>SELECT PORTFOLIO SERVICING,<br>J.P. MORGAN CHASE BANK,<br>ALLIANCE TITLE COMPANY,<br>SILVERCREEK REALTY GROUP,<br>MOHAMED ELABED and<br>JOHN DOES 1 -6.<br><br>Respondents. | ) | Supreme Court Docket No.: 45338 |

Appeal from the District Court of the Seventh Judicial
District for Bonneville County
The Honorable Bruce L. Pickett presiding.

# APPELLANT'S OPENING BRIEF

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## STATEMENT OF THE CASE

COMES NOW, the above-named appellant by and through his counsel of record, Robert K. Beck of BECK & ASSOCIATES, P.C., and hereby files his initial memorandum as a result of the dismissal of his complaint filed in the District Court of the Seventh Judicial District in and for the County of Bonneville (Case No. CV-2017-1430), the Honorable Bruce L. Pickett presiding. The appellant believes that the District Court errored in failing to apply the correct standard of review as required when the defendants in the underlying case filed a Rule 12 (b) (6) motion to dismiss.

## STATEMENT OF APPEALABILITY

The plaintiff/appellant filed his initial complaint in the abovementioned District Court on March 9, 2017. This complaint outlines various causes of action against the defendants as listed in the complaint. The complaint was amended (and filed) by the plaintiff on or about April 10, 2017 and again on April 21, 2017. Basically, the complaint sought to set aside a non-judicial foreclosure sale that occurred on February 23, 2017 as conducted by the co-defendant/respondent, SELECT PORTFOLIO SERVICING (hereafter referred to as "SPS"). Another co-defendant/respondent, MOHAMED ELABED (hereafter referred to as "Mr. Elabed") is identified in the complaint as the purchaser of the real property at the aforesaid non-judicial foreclosure sale on February 23rd. Mr. Elabed also filed a motion to dismiss the abovementioned complaint. The other parties as named in the complaint were never served as the complaint (and amendments hereto) was dismissed by the Court prior the service of the summons and complaint upon these additional parties.

Following the filing of the above complaint in District Court, the two defendants (as mentioned above) appeared and filed a joint, Rule 12 (b) (6) motion to dismiss. The Court entered its memorandum decision and order dismissing the complaint as filed against SPS and Mr. Elabed on June 5, 2017. The plaintiff/appellant filed his notice of appeal on July 13, 2017. Although this Court initially entered an order conditionally dismissing the appeal on September 8, 2017, the District Court entered another order of judgement on September 21, 2017 and this Court allowed the case to proceed pursuant to the notice of appeal as filed on July 13th.

The appellant herein strongly believes that the Court has utilized a standard of review that it wrongfully applied to the facts as stated in the complaint filed in District Court. Furthermore, the District Court has allowed the defendants herein to misstate and misconstrue the relevant factual issues that should be considered when it issued its order of dismissal. Therefore, appellant concludes that the District Court has committed gross error as explained below.

## PROCEDURAL HISTORY

Although this case may appear to be a simple question of whether the Court applied the correct standard of review as a result of a motion to dismiss as filed by the above defendants, it has a complex procedural history that should be fully discussed. The plaintiff filed his complaint in the Bonneville County District Court within three weeks of the aforementioned non-judicial foreclosure sale. The first motion to be filed by any party in this case was a motion to consolidate as a result of Mr. Elabed filing an eviction proceeding in the Magistrate Court in Bonneville County (Case No. CV-17-46 – before Magistrate Judge Jason Walker). This motion to consolidate was filed on April 10, 2017.

Following the filing of this motion by the appellant, Mr. Elabed (through his attorney – Mr. Steve Taggart) filed an objection to the motion to consolidate and a motion to dismiss on or about April 12, 2017. Mr. Taggart did not file a notice of appearance although he did complain at one point (during a hearing) that he was never served with a copy of the complaint (even though he filed a meaningful motion to dismiss which strongly suggests he had fully reviewed any and all terms of any complaint or amended complaint). Thereafter, the Court held a hearing on the motion to consolidate (along with objections and other motions made by Mr. Elabed) on April 17, 2017. As a result of this hearing, the Court reset the hearing on the motion to consolidate and motion to dismiss as filed by Mr. Elabed for May 4, 2017. Part of the reason to vacate this hearing on the motion to dismiss was the Court's misperception that the initial complaint (or any amendments thereto) should somehow be served upon Mr. Elabed when he was well aware of the provisions of the complaint by virtue of many statements made in his motion to dismiss (and also made in hearings before the District Court and Magistrate Judge – Jason Walker) and in the complaint for eviction in the Magistrate Court (see Affidavit of Robert K. Beck dated May 2, 2017).

Following the unnecessary service of the complaint upon Mr. Elabed (and apparently as a result of Mr. Elabed's contact with Mr. Eli Watkins – co-defendants attorney), SPS (without formal service upon it) filed a Rule 12 (b) (6) motion on April 27, 2017. The plaintiff responded by filing a motion to vacate a hearing scheduled by Mr. Elabed on May 4, 2017. The Court, agreed that the hearing should be vacated and issued its order dated May 5, 2017. Thereafter, all parties that had filed any meaningful pleading were able to file briefs and present oral argument at a hearing on May 18, 2017. This

hearing transcript has been submitted to the Supreme Court and is part of the most pertinent records of the case at this point. Many statements made at this hearing suggest the inability of the defendants and the District Court to focus on the appropriate standard of review and the relevant issues of this case.

## STATEMENT OF FACTS

The appellant will discuss the pertinent facts as stated in his amended complaint (dated April 21, 2017) and memoranda filed with the District Court as included in the record on appeal. Count One of the complaint states as follows:

> 16. When the plaintiff herein has made attempts to discuss curing the above alleged default of mortgage payments, the defendants have employed numerous tactics, excuses and misrepresentations in an intentional effort to proceed with the above mentioned foreclosure and issue a bogus trustee's deed to co-defendant Mohamed Elabed. These tactics and excuses include, but are not limited to, the following acts:
>
> a. Refusing to discuss the current status of the mortgage foreclosure with anyone other than the executor of the estate of Karen Hansen even though the executor's deed had been issued to the plaintiff herein.
> b. Refusing to discuss the current status of the mortgage foreclosure even when provided a copy of the abovementioned power of attorney designating Jerry Bergman as an appropriate agent for the plaintiff herein.
> c. Indicating, after numerous phone calls from Jerry Bergeman, that the defendants would accept a certain payment, including penalties and interest, from the plaintiff -- then refusing to accept a payment in the approximate amount of $16,000.00 that was wired transferred to the defendants prior to the wrongful non-judicial foreclosure and sale conducted on February 23, 2017 in the Bonneville County Courthouse.
> d. Ignoring efforts by plaintiff's attorney to discuss the above payment and allowing the non-judicial foreclosure to proceed in spite of misrepresentations made by the defendants that the sale would be vacated.
> e. Continuing to send mortgage statements to the plaintiff (and addressed to the Estate of Karen Hansen) in which the defendants made misrepresentations that in the event the plaintiff made a mortgage payment, that the non-judicial foreclosure sale could and would be

vacated, regardless of the sale held at the Bonneville County Courthouse on or about February 23, 2017.

f. Accepting a payment from the plaintiff in the amount of $19,422.87.00 and further admitting that the non-judicial foreclosure sale was vacated and invalidated by virtue of numerous payments made to the defendants herein.
g. Holding conversations with co-defendant, Mohamed Elabed, in which the defendants have mislead Mr. Elabed and attempted to misrepresent that the non-judicial foreclosure sale held on or about February 23, 2017 is valid.
h. Failing to admit to co-defendant, Mohamed Elabed, that these defendants did in fact receive a meaningful payment prior to the non-judicial foreclosure sale on or about February 23, 2017 and further refusing to admit that these defendants have received other payments from the plaintiff herein.
i. Attempting to conspire, control and coerce co-defendant, Mohamed Elabed, into believing that he has made a valid purchase of real estate through a bogus non-judicial foreclosure sale.

These respondents admit that they are relying on the language as quoted in the Deed of Trust which allows them to foreclose on the subject property unless the borrower complies with the following terms and conditions:

> . . . Borrower (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument shall continue unchanged. (Memorandum in Support of Select Portfolio Servicing's Motion to Dismiss – Page 6)

When the appellant/plaintiff filed the above complaint, it stated that the plaintiff is contesting any and all problems that may arise as a result of what plaintiff believed to be a bogus non-judicial foreclosure proceeding as pursued by the named defendants therein. The co-defendant, Mr. Elabed, as noted in the abovementioned complaint for eviction,

sought to improve his chances for claiming title and possession by virtue of filing his complaint for eviction even though he was aware that the plaintiff herein had filed a complaint in the District Court for Bonneville County.

As a result of the complaint for eviction as filed by Mr. Elabed, the plaintiff filed a motion to vacate any eviction hearings and a motion to consolidate any and all claims as made by Mr. Elabed. The Honorable Jason Walker, Magistrate Judge, held a hearing on Thursday, April 6, 2017 which was attended by the parties as named (and unnamed) in the complaint for eviction. During the hearing, Mr. Elabed, through his attorney, attempted to persuade Judge Walker that he should grant an order for eviction regardless of concerns as expressed by Judge Walker that he should perhaps defer an action to grant an order for eviction. Mr. Elabed suggested that Judge Walker totally ignore the plaintiff's complaint as filed District Court. It would appear that the abovementioned defendant was attempting to suggest that Judge Walker grant some form of order based on Mr. Elabed's interpretation of the final amended complaint that outlines the basic cause of action herein.

Although the above respondents will likely suggest that they, in good faith, attempted to educate the District Court on issues pertinent to the motion to dismiss, it would appear that they agreed (along with the District Court) that no facts would be considered other than those facts alleged in the pleadings. When dealing with various motions to strike as filed by the appellant and SPS at the hearing on May 18, 2017, the discussions as held by all parties led the court to conclude as follows:

> THE COURT: Let's deal with the motion to strike . . . The statements made in those pleadings. . . . this is a 12 (b) (6) motion. **We're**

**going to deal with the facts that are in the pleadings, not that have been filed in addition to those.**

* * * *

So under Rule 12 (d) it talks about if on a motion under Rule 12 (b) [(]6[)] matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment.

It talks about if I allow that**, then I have to give reasonable opportunity to present all the information that is pertinent to the motions**.

Based upon that, the Court is going to exclude those statements, just because they're not relevant to a 12 (b) (6) motion. **The fact that there was allegedly some funds that were submitted later**, for a 12 (b) (6) motion, it, frankly, doesn't matter. So the Court is going to exclude those. (Hearing Transcript – May 18, 2017 – page 6, lines 4-24) [emphasis added].

When referring to the pleadings that the District Court would consider in granting or denying any motion to dismiss, it specifically stated there were some funds submitted later and that it would exclude those statements. The final amended complaint as partially quoted above does state that SPS did accept a payment in the amount of $19,422.87 following the non-judicial foreclosure sale on February 23, 2017 and that the agents of SPS did agree to vacate the non-judicial foreclosure sale based on the payments as specifically made. Regardless of the standard of review as may have been correctly stated by the Court, it granted the motion to dismiss regardless of the admissions of the various unidentified employees or agents of SPS as stated in the amended complaint.

SPS made several statements during the hearing that suggest the District Court ignored the factual statements as made in the amended complaint and that the Court was persuaded by the mis-statements as made by SPS at the hearing on May 18, 2017:

MR WATKINS: . . . .Your honor, **you can cure a default**. If you haven't paid your mortgage – in this case for several months – **you can cure the default by paying the required amount that's sent to you.**

And according to the deed of trust, which is Exhibit A to the Watkins declaration, which the Court can, of course, consider without converting this to Rule 56, because it's referenced extensively in the complaint, **they had to give any payment five days prior to the foreclosure sale. . . .**

* * * * *

Second, what they allege is . . . we paid quote, 'approximately $16,000.'

THE COURT: $16,000.

MR WATKINS: . . . frankly, I don't know if they even said they paid it so much as they say they were informed by somebody at SPS that they would accept approximately $16,000.

THE COURT: I think the claim says wired."

MR. BECK: Correct.

MR WATKINS: That they wired ? Okay. **So they say that they wired $16,000.** (Hearing Transcript – May 18, 2017 – page 35, lines 22-25; page 36, lines 1-25) [emphasis added].

As mentioned above by SPS, the complaint as written easily can be construed in favor of the non-moving party and that the above referenced $16,000.00 was paid to SPS as directed by the agents of SPS. However, the complaint does not in any way admit that the $16,000.00 was not timely paid, as suggested by SPS, prior to the non-judicial foreclosure sale on February 23, 2017.

Although the complaint says that the appellant made another payment in the amount of $19,422.87.00 to SPS, the Court refused to construe this fact, once again, in favor of the non-moving party. Part of the reason for this unrealistic application of the

standard of review by the District Court is understood better if we review other statements of Mr. Watkins on behalf of his client, SPS:

> MR. WATKINS: . . . [T]hey keep bringing up this idea that SPS isn't talking to them. In their second amended complaint, they admit that they did not assume the loan. That [the mortgage bills] weren't going to the [Darin Bergeman]. They were going to the estate. That's who's on the account.
>
> SPS, as a company, we can't just talk to whoever calls us. I think the Court would appreciate the fact that I cannot call the Court's bank and say, 'Tell me about the Court's Mortgage. Tell me what the payments amounts are. Tell me when the due dates are of these payments.'
>
> And so the idea that we didn't talk to some people who were calling us, who we have no record of, doesn't have an argument. And it certainly has no bearing on whether or not there was a fraud here. . . (Hearing Transcript – May 18, 2017 – page 38, lines 15-25; page 39, lines 1-8)

The above statements as made by SPS acknowledge that it understood the relationship between the management of SPS and the employees of the company who were charged with the duty of allowing a debtor to cure a mortgage that was in default by virtue of contacting the agents of SPS and providing a payment pursuant to instructions as directed by the said employee of SPS. The Court virtually admits that it misunderstood this point when it agrees that a supervisor of employees is guilty of negligent supervision when said employer "fails to exercise due care to protect third parties from the foreseeable tortuous acts of an employee." . (District Court Opinion and Order . . . Motion to Dismiss – page 4). Somehow the District Court has made a glaring error by virtue of participating in the misleading comments of SPS during the hearing on May 18th when it concludes there is no employer/employee relationship between Mr. Elabed and SPS. It ignores the clear statements as made in the complaint with respect to the managers and employees of

SPS and concludes that there is no negligent supervision as between SPS and Mr. Elabed when it states:

> . . . Plaintiff has failed to allege that a recognized legal duty existed between himself, Defendant SPS and/or Defendant Elabed as required. Not only was there no duty alleged, but Plaintiff admits that he did not assume the mortgage of Karen Hansen after her death. Defendant has also failed to allege that the tortious acts of the defendants were foreseeable by a third party or the other named defendants . . . (District Court Opinion and Order . . . Motion to Dismiss – pages 4-5).

## ISSUES PRESENTED ON APPEAL

1. Whether District Court has committed errors of fact and law by virtue of issuing an order that ignores the specific statement of a cause of action as described in the Complaint and the terms of the deed of trust as duly quoted above when it granted the motion to dismiss.
2. Whether the District Court ignored the appropriate standard of review when it denied the motion to consolidate as filed by the appellant/plaintiff.

## ATTORNEY FEES ON APPEAL

The appellant believes that the District Court and the above co-defendants have committed gross errors of fact and law in this case. The District Court's memorandum decision and order contain a gross misapplication of the facts and the law that will be explained in the arguments below. These co-defendants are well aware of their efforts to mislead the District Court and the appellant believes that his attorney fees should be reimbursed as a result of the necessity of filing this appeal. It is clear that the District Court, and these defendants, have ignored the appropriate standard of review in denying the motion to consolidate and in also granting the motion to dismiss.

## STANDARD OF REVIEW

### A. Rule 12 (b) (6) Motion to Dismiss

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard based upon the grant of a motion for summary judgment. The non-moving party is entitled to have all inferences from the record and pleadings viewed in his favor, and only then may the question be asked whether a claim for relief has been stated. *Miles v. Idaho Power,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for "a short and plain statement of the claim showing that the pleader is entitled to relief" and a demand for relief. *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Idaho App.,1992) (citing I.R.C.P. 8(a)(1), (2)). As with a motion under Rule 8(a), every reasonable intendment will be made to sustain a complaint against a Rule 12(b)(6) motion to dismiss. *Idaho Comm'n on Human Rights v. Campbell,* 95 Idaho 215, 217, 506 P.2d 112, 114 (1973). A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." *Id. Harper, Supra* (citing *Wackerli v. Martindale,* 82 Idaho 400, 405, 353 P.2d 782, 787 (1960); *Ernst v. Hemenway and Moser, Co.,* 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct.App.1991). It need not appear

that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. *Harper, supra* citing WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 339 (1990).

The only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, supplemented by such facts as the court may *properly* judicially notice. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Idaho App.,1990) (citing *Cohen v. United States,* 129 F.2d 733 (8th Cir.1942). However, a trial court, in considering a Rule 12(b)(6) motion to dismiss, has no right to hear evidence; and since judicial notice is merely a substitute for the conventional method of taking evidence to establish facts, the court has no right to take judicial notice of anything, with the possible exception of *facts of common knowledge* which controvert averments of the complaint. *Id.*

If a trial court considers factual allegations outside the pleading on a Rule 12(b)(6) motion, it errs if it fails to convert the motion to one for summary judgment. *Id.* Furthermore, if a court considers matters outside pleadings on a Rule 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment *and* the proceedings thereafter must comport with the hearing and notice requirements of Rule 56. *Id.*

**B. Motion to Consolidate**

IRCP 42(a) allows a court to consolidate trial, actions, or other matters in a case "[i]f actions before the court involve a common question of law or fact[.]" *Id.* There is very little by way of Idaho case law on the subject of consolidation. However, the Idaho Rule of Civil Procedure is similar to the Federal Rule, which "provides persuasive authority

when interpreting rules under the I.R.C.P. that are substantially similar to rules under the F.R.C.P." *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 247 P.3d 620 (2010) (citing *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 515, 81 P.3d 416, 420 (2003); see also *Chacon v. Sperry Corp.*, 111 Idaho 270, 275, 723 P.2d 814, 819 (1986) (noting that whenever possible, the Court should " interpret[ ] our rules of civil procedure in conformance with the interpretation placed upon the same rules by the federal courts.")

The U.S. Supreme Court has stated with regard to this rule that it "was designed to encourage such consolidations where possible." U.S. v. Knauer, C.C.A.7 (Wis.) 1945, 149 F.2d 519, certiorari granted 66 S.Ct. 265, 326 U.S. 714, 90 L.Ed. 422, affirmed 66 S.Ct. 1304, 328 U.S. 654, 90 L.Ed. 1500, rehearing denied 67 S.Ct. 25, 329 U.S. 818, 91 L.Ed. 697, petition denied 68 S.Ct. 210, 332 U.S. 834, 92 L.Ed. 407. "One of the primary objectives of consolidation is to prevent separate actions from producing conflicting results." Bank of Montreal v. Eagle Assoc., 117 F.R.D. 530, 533 (S.D.N.Y.1987). Int'l Paving Sys., Inc. v. Van-Tulco, Inc., 806 F. Supp. 17, 22 (E.D.N.Y. 1992). In an action involving the same set of facts, witnesses, and overlapping parties, the concern of conflicting results due to separate actions is legitimate and consolidation is warranted. Consolidation in such circumstances also serves the interests of judicial economy, as "multiplicity of litigation is frowned upon, and should be avoided by consolidation." Johnson v. Mississippi Valley Barge Line Co., W.D.Pa.1963, 34 F.R.D. 140. Indeed, the "[p]aramount objective of consolidation is accomplishment of great convenience and economy administration of justice; [seeking] to avoid overlapping duplication in motion practice, pretrial and trial procedures occasioned by competing counsel representing

different plaintiffs. *Barcelo v. Brown*, D.C.Puerto Rico 1978, 78 F.R.D. 531. See, also, *Feldman v. Hanley*, D.C.N.Y.1969, 49 F.R.D. 48.

It would appear the federal (and Idaho) courts have broad discretion to consolidate actions, *Moore v. Am. Telephone and Telegraph Communications, Inc.*, No. 85 Civ. 4028, 1990 WL 250145 (S.D.N.Y. December 21, 1990) (citing *In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir.1987)), and may use that discretion to consolidate cases at the pretrial stage to serve judicial economy, as long as any confusion or prejudice that may result does not outweigh efficiency concerns. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284–85 (2d Cir.1990).

Even in cases with several parties potentially liable, courts have encouraged consolidation. For example, in defective products or construction actions the same issues of fact and law apply regarding the parties and their respective responsibility, and which parties, if any, should recover on their contracts. In such cases the courts have granted consolidation, noting the potential for inconsistent verdicts as well as the inefficient use of judicial resources as concerns favoring consolidation. See *Bank of Montreal v. Eagle Assoc.*, 117 F.R.D. 530, 533 (S.D.N.Y.1987); *Int'l Paving Sys., Inc. v. Van-Tulco, Inc.*, 806 F. Supp. 17, 22 (E.D.N.Y. 1992)

Although the federal courts seem to favor consolidation, some courts have denied motions to consolidate when consolidation would cause prejudice due to confusion of parties, facts, and issues. In *Atkinson v. Roth*, C.A.3 (Pa.) 1961, 297 F.2d 570, the appellate court found that the trial court had erred in consolidation as it resulted in consolidation for trial of automobilist's claim against a truck driver and separate

counterclaim against him with claims arising out of injury to, and death of, automobilist's passengers. *Id.*

Confusion and prejudice are unlikely, given the facts, law, and parties involved in this case. Indeed, many similar cases have been upheld as properly consolidated. Consolidation of five personal injury actions by plaintiffs, who were driver and guest passengers and spouses of guest passengers of an automobile involved in multiple head and tail accident with two other automobiles and did not create multiplicity of parties and claims and issues as to confuse a prospective jury preventing it from giving separate claims proper attention and was not abuse of discretion where a jury was required to use carefully prepared interrogatories dealing separately with different phases of the cases rather than to return general verdict. *Stemler v. Burke*, C.A.6 (Ky.) 1965, 344 F.2d 393.

In a case involving four personal injury actions commenced by a plaintiff, who was struck at his place of employment by paper roll which fell from its wrapper while being lifted by lifting device, against manufacturer of paper roll, purchaser of roll, manufacturer of lifting device, and employer's workmen's compensation carrier would not be consolidated on issue of liability, in view of fact that each case presented a complex theory of liability and would, if combined, result in confusing a prospective jury. *Mays v. Liberty Mut. Ins. Co.*, E.D.Pa.1964, 35 F.R.D. 234.

A plaintiff was not prevented from presenting a case fully and fairly because a court consolidated two wrongful death claims and two personal injury claims arising out of same collision between two tractor-trailers. *Moss v. Associated Transport, Inc.*, E.D.Tenn.1963, 33 F.R.D. 335, affirmed 344 F.2d 23. On a motion to consolidate two cases stating that both were pending in court, that both arose out of same automobile

collision, and that both involved common questions of law and facts, the trial court had discretion to consolidate the actions where there was no denial of allegations or showing of prejudice. *Polito v. Molasky*, C.C.A.8 (Mo.) 1941, 123 F.2d 258, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204

Consolidation has even been favored when an opposing party was arguably prejudiced by the untimely request, one day prior to trial, of separate actions against drug company. *Kershaw v. Sterling Drug, Inc.*, C.A.5 (Miss.) 1969, 415 F.2d 1009. That case involved common questions as to whether a specific drug caused disease, defendant's knowledge of disease, nature of warnings, and defendant's duty to warn and reasonableness of warnings, was proper.

Rule 42(a) is "intended to encourage consolidation, and courts in the exercise of broad discretionary authority allowed by this rule should allow such remedy as a matter of convenience and economy whenever it is reasonable under the circumstances to do so." *Attala Hydratane Gas, Inc. v. Lowry Tims Co.*, N.D.Miss.1966, 41 F.R.D. 164.

## ARGUMENT

### A. With Respect to the Motion to Dismiss, the District Court Committed Numerous Errors of Fact and Law when Attempting to Apply the Standard of Review.

The plaintiff will now address the various legal arguments in light of the above undisputed facts and standard of review. Perhaps the strongest argument employed by SPS and by Mr. Elabed is the assertion that the plaintiff has no basis to dispute the validity of the non-judicial foreclosure sale conducted on February 23, 2017 as a result of the

plaintiff's admission that he was in default in making payments. Regardless of numerous efforts on the part of the plaintiff to cure any default, this argument ignores the language as above quoted (and admitted to) by Mr. Watkins, attorney for SPS, in the above Deed of Trust.

It is agreed by virtue of the District Court's poor effort to apply the facts and law that SPS was quite successful in persuading the District Court to focus on the relationship between SPS and Mr. Elabed instead of the relationship between SPS and its employees. This Court will note that the case was dismissed by the District Court prior to any party conducting discovery or taking any depositions. This Court will also note that the appellant named additional defendants in his complaint. As an offer of proof, the appellant will state his intent to identify the exact employees and agents of SPS who were poorly managed. Regardless of numerous complaints (by these defendants during hearings) about the two amendments to the complaint made prior to the order dismissing the complaint, the appellant believes he would have spent at least a year conducting discovery, taking depositions and filing amended complaints which would have been properly served within the time frame as prescribed in the Idaho Rules of Civil Procedure. Perhaps the District Court saw that this case was one that would be very complex and difficult to manage – resulting in an effort to manage this case by virtue of ordering its dismissal.

The language in the Deed of Trust clearly states that the borrower (now Mr. Bergeman in this case) can cure any defaults by virtue of paying the lender all sums which then would be due and payable under the terms of the Deed of Trust as if no acceleration had occurred. The facts as alleged in the complaint clearly state that Mr. Bergman (on

behalf of the estate of Karen Hansen) made numerous attempts to contact SPS and that SPS would not discuss any facts of the pending foreclosure sale. When the plaintiff finally was able to contact someone who would speak with him or his representative, the plaintiff actually tendered payment of what was represented to be the amount due and owing under the terms of the Deed of Trust. The records of what was due and owing and the terms and conditions of redemption as noted in the Deed of Trust were all in the possession and control of SPS who essentially refused to discuss anything with Mr. Bergman. Thus, SPS made it virtually impossible to make any payments and then is now blaming Mr. Bergman for his failure to cure any default when he (through numerous phone calls and other efforts) was able to talk to someone who did indicate that the default could be cured.

These co-defendants have suggested that this Court should agree that the non-judicial foreclosure is valid when SPS committed various acts of misrepresentation, avoidance and excuses to avoid a meaningful payment. The fact that the plaintiff was willing and able to pay any amount to bring the mortgage current was clear and concise. This fact was ignored by these defendants (intentionally) and perhaps intentionally ignored by the District Court. It is clear that SPS and Mr. Elabed were successful in procuring a dismissal order from the District Court when they were able to persuade the Court to focus on the relationship between SPS and Mr. Elabed and ignore the relationship between SPS and its employees as clearly plead in the complaint.

These defendants mistakenly believe they can allege compliance with Idaho Code Section 45-1503 by virtue of plaintiff's admissions that there was a default and then they ignore plaintiff's numerous attempts to cure the default (long before the non-judicial sale

on February 23, 2016) pursuant to the clear language admittedly as contained in the Deed of Trust and confirmed as the numerous efforts made by the plaintiff in the Amended Complaint.

It is easy to conclude that these defendants are extremely unreasonable in their non-existent effort to comply with the terms and conditions of the Deed of Trust. The numerous facts as alleged in the complaint outline the difficulties associated with the many "Bad Faith" avoidance behaviors as employed by SPS. It would appear that this Court should employ the appropriate standard of review and allow this litigation to go forward.

It would also seem that these defendants are relying on case law that does not apply in this case or suggesting that this Court should be obtuse in granting the motion to dismiss by just coming to the conclusion that the defendants can take one admission of default and jump over the many efforts on the part of the plaintiff to cure the said default. Although there are significant facts stated in the complaint that strongly suggest these defendants are totally ignoring the efforts on the part of the defendant (who was in jail at the time) to cure any default, it is easy to conclude that these defendants are, once again, ignoring the appropriate standard of review when they conclude that this Court should dismiss the complaint and thus avoid the six to twelve months of discovery and depositions that will likely support the claims of the plaintiff herein.

Although SPS will attempt to further confuse this Court in its reply brief (citing to numerous unrelated cases) by suggesting that the Court should use the misrepresentations and confusing statements of the defendants to apply case law that

suggests the establishment of a professional relationship or fraud and failing to plead this case with specificity, it would appear that SPS will waste a significant amount of time making misrepresentations of fact and law to this Court in an attempt to confuse the facts as simply plead in the Complaint and confirmed in the Deed of Trust.

This case is very similar to many cases where a bank or an insurance company commits an act of bad faith. Such claims often include numerous acts of misconduct or misrepresentations and do not involve a professional relationship such as a patient doctor relationship or an attorney client relationship. As such, the cases as may be cited by SPS and Mr. Elabed are distinguishable and should be totally ignored by this Court.

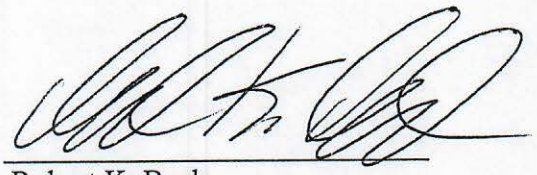
### B. The District Court Committed Error When it Denied the Motion to Consolidate

As noted above, the standard of review in a motion to consolidate is fairly broad and encouraged by appellate courts in general. It is quite clear that the District Court was so convinced that the case should be dismissed that it was overpowered when it actually did dismiss this case as a result of the Rule 12 (b) (6) motions as made by the current defendants herein. When the District Court concludes that "there is no overlap of legal claims" between the eviction proceeding filed in Magistrate Court and the wrongful non-judicial disclosure proceeding in District Court, it was easy to deny the motion to consolidate filed at the district court level. It is not hard to conclude that the District Court was more focused on the headache presented to it by virtue of the filing of the complaint (and amended complaints) in District Court. It would appear that this poor decision by the District Court was motivated by an intense desire to avoid the headache of presiding over a case it did not properly perceive.

## CONCLUSION

This Court should reverse the orders of the District Court denying the motion to consolidate and granting the motion to dismiss. This case should be remanded to an appropriate District Court (who will more appropriately understand the Idaho Rules of Civil Procedure) and that will allow the case to proceed with discovery, depositions and further amended complaints prior to an appropriate trial if need be.

Respectfully submitted this 23 day April, 2018.



Robert K. Beck

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23 day of April, 2018, I served the original or a true and correct copy of the following described document on the parties listed below, by mailing, postage prepaid, or by causing the same to be hand delivered as noted:

DOCUMENT SERVED:

Appellant's Opening Brief

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