6-5-2018

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

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DARIN BERGEMAN Appellant, v. SELECT PORTFOLIO SERVICING, J.P. MORGAN CHASE BANK, ALLIANCE TITLE COMPANY, SILVERCREEK REALTY GROUP, MOHAMED ELABED and JOHN DOES 1 -6. 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 REPLY BRIEF

Robert K. Beck **for Appellant**
Residing at 3456 E 17th Street
Suite 215, Idaho Falls, ID 83406

Elijah M. Watkins **for Respondent**
Select Portfolio Servicing
Residing at 101 S. Capitol Blvd., Suite 1900
Boise, ID 83702

Steven Taggart **for Respondent**
Mohamed Elabed
Residing at PO Box 3005
Idaho Falls, ID 83403

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF CASE 1

INTRODUCTION 1

ARGUMENT 3

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page

Orthman v. Idaho Power Co., 126 Idaho 960 6

RULES OF PRACTICE

Idaho Rules of Civil Procedure 12(b)(6)..... 2, 6

STATEMENT OF THE CASE

COMES NOW the above named appellant, Darin Bergeman, by and through his counsel of record, Robert K. Beck of Robert K. Beck & Associates, P.C. and hereby files his memorandum in reply to the briefs as filed by the respondents, Select Portfolio Servicing (hereafter referred to as "SPS") and Mohamed Elabed (hereafter referred to as "Mr. Elabed"), as filed herein.

INTRODUCTION

The briefs as submitted by the above respondents contain many misleading statements of fact, law, issues and conclusions that strongly suggest the above mentioned respondents are very confused about the actual standard of review that a court should employ when any named defendant is seeking to dismiss a case pursuant to a Rule 12 (b) (6) motion. In addressing this problem in this reply brief, the appellant will attempt to address some of the confusing and incoherent arguments of opposing counsel. Needless to say, there is not enough time and man power to address all of the arguments that the respondents have made in this reply memorandum. Regardless of limited time, this memorandum will attempt to focus on what may be the more relevant arguments (although misleading) as may be utilized by the respondents -- many of which are incoherent and incomprehensible.

As a result of the success of these respondents in persuading the district court to dismiss this case (by virtue of utilizing the wrong standard of review), it would appear that the above respondents are suggesting that they should be awarded attorney fees and costs on appeal. In light of the district court's failure to employ the correct standard of

review and the respondents' willingness to further misstate the facts, issues and law surrounding the district court's erroneous decision, it would appear that these respondents are fairly certain they will be awarded attorney fees and costs on appeal.

Hopefully, this Court will agree that the standard of review is correctly stated in the appellant's opening brief. Prior to discussing this standard and suggesting to this Court the correct application of the standard, the appellant will note that SPS has submitted a brief containing 26 pages and that Mr. Elabed has submitted a brief containing 20 pages. In these briefs, the respondents discuss many issues (and remedies) that might be reviewed by a district court in the event of an actual trial where the parties present evidence pursuant to the rules that may apply for submitting this evidence. This reply brief will not address any issues as may be presented in the brief of the respondents herein when it requires significant research and effort in employing a standard of review that should be clearly utilized in a summary judgment motion or in an appropriate deliberation of facts and evidence as presented in a jury trial.

As admitted by the respondents herein, the District Court has dismissed this case as a result of their Rule 12 (b) (6) motion. Although these defendants (and the district court) demonstrate a willingness to employ the incorrect standard of review (for whatever reason), this brief will not discuss cases or law when the arguments surrounding those as mostly presented in the 46 pages of briefing (as noted above) are merely an attempt to mislead this Court and waste the appellant's time herein.

Having stated the above concerns, the appellant would hope that this Court is well aware of the appropriate standard of review and the simple application thereof. Part of the concern of the appellant herein is the many misstatements as contained in the respondents' briefs, mostly which boil down to the wrongful conclusions of these

respondents in which they misstate that the appellant has not cited to any authority in support of his legal conclusions as contained in his initial brief.

When this Court actually realizes that these respondents herein have expended hours and hours of toiling (in district court and other efforts) to present 46 pages of briefing to misstate the correct standard of review, the appellant respectfully requests that this Court attempt to understand what might be perceived as a lack of effort on the part of the appellant herein, rather than a willingness to pursue the pertinent facts, issues and law of this case.

In other words, it may appear that the appellant is playing a game of football and the respondents are playing a game of soccer. Regardless of the meaningful time and effort spent by this Court in an attempt to resolve the legal disputes of the parties herein, the appellant concludes that he has adequately discussed what he reasonably concludes to be the correct issues and standard of review as presented in his initial brief. Therefore, this reply brief will not reiterate the issues or the standard of review as stated in the appellant's initial brief. The appellant will attempt to address the most basic arguments as are misstated in the respondents' briefs and point out the specific fallacies related to these arguments.

ARGUMENT

It appears that these respondents have stated the correct standard of review for a motion to dismiss in their briefs. However, they wrongfully apply this standard when they allege that the appellant has waived his assignments of error as committed by the district court and the respondents by virtue of failing to submit appropriate legal authority or argument. In support of these allegations, the respondents ignore the appellant's meaningful discussion of how the court committed error in failing to recognize that the

appellant/plaintiff had adequately and specifically plead facts in his second amended complaint. They ignore the facts as plead in light of the standard of review requiring the District Court to conclude that any payment (or payments) that were made to SPS by virtue of the direction and demand of SPS in the amount of $16,000.00 (**or for that matter, $19,477.87 paid later**). These payments were made by virtue of representations made by the employees of SPS. The specific arguments in the appellant's opening brief clearly conclude that the district court became so excited when it concluded that there was no misrepresentation on the part of Mr. Elabed that it totally ignored the facts as stated in the complaint surrounding the misrepresentation and mismanagement by SPS and of its employees. In addition, Mr. Elabed's attorney made many statements in various hearings that were incorporated into the amended complaint, and if construed as true, should **not** have been ignored by the district court.

Regardless of what may have been Mr. Elabed's dispute regarding his lack of collusion with SPS and his effort to misrepresent a meaningful payment of $16,000.00 (or $19,477.87) which this Court must now assume to be true, it is clear that the district court mis-applied the correct standard of review by dismissing the provisions in the complaint with respect to Mr. Elabed. The amended complaint alleges many facts that the district court clearly construes against the appellant with respect to both respondents.

It is clear that the respondents understood some of the specific facts as plead in the complaint. However, they intentionally ignore the facts that are stated in the complaint 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.

It is clear that the respondents can easily ignore the above facts when they merely state that the appellant's "opening brief is a general attack on the district court's findings .

. . and nothing more." They can also ignore the above facts when they incorrectly state that the appellant cites no authority in support of the allegations made in the complaint. It is easy to state that the appellant cites to no authority when these respondents misstate the facts as specifically plead in the complaint.

Although the appellant is still somewhat discouraged that the district court would attempt to ignore the clear and compelling statements of the appellant herein, these respondents are deeply involved in an effort to misrepresent the correct application of the standard of review for a motion to dismiss. It would appear that the defendants are admitting that Idaho is a state in which the courts have upheld the idea of "notice pleading" when they cite to case law that suggests that a plaintiff is not required to prove in his complaint that he will ultimately prevail, but that he be able to produce evidence to support the claims specifically alleged in the complaint **at the time of a trial**. *Orthman v. Idaho Power Co.*, 126 Idaho 960.

So how is a Court able to promote the notion that it will willingly allow notice pleadings and then dismiss a complaint when it is compelled to consider the above statements of the amended complaint of the appellant herein in a light most favorable to the plaintiff unless it misapplies the standard of review as the district court did in this case? Practically, the only way that a case can be realistically dismissed on a Rule 12 (b) (6) motion is **to ignore the correct standard of review (and lie about it)** as the respondents have done herein.

This problem is further illustrated by virtue of the fact that the plaintiff/appellant herein filed a motion to strike the statements as made by SPS in its brief (and affidavits) supporting the motion to dismiss. This Court will note that this issue is partially discussed on page seven of his opening brief:

> 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].

In light of the attempt by these defendants to handcuff the appellant herein by virtue applying some inconsistent standard of review (and their willingness to ignore the plaintiff's motion to strike any evidence other than the evidence submitted in the pleadings), let us examine how the correct standard should be applied herein.

There are two problems with the statements of the above district court. The first problem is to determine what was in the pleadings that was submitted by the parties. The pleadings that were submitted are those contained in the second amended complaint and the briefs supporting the motions to dismiss. Anything that may have been stated in the briefs of SPS and Mr. Elabed (other than affidavits submitted in support of said motions) should be ignored in a motion to dismiss if the district court followed the appropriate rule which it partially admits it should do above. Regardless, in applying this rule the district court demonstrates a willingness to ignore the above rule when it states

that it will ignore facts (as submitted in the amended complaint – and properly before the court) suggesting that it would ignore **another payment made to SPS in the amount of $19,422.87.00**. When the defendants/respondents suggest that the district court's ruling should be upheld on appeal and that they should be granted attorney fees as a result of the appeal, it appears that they are saying that any and all appellants should be assessed attorney fees whenever the district court makes any mistake and any appeal is taken.

The second problem is very alarming when this Court looks at the briefs of opposing counsel and observes that SPS is making all sorts of allegations about the money paid (or not paid to SPS) prior to the initiation of non-judicial foreclosure proceedings. If the district court considers matters as may be contained in an affidavit in support of a motion to dismiss (as may be submitted by the defendant/respondents herein), it would appear that such affidavit would convert the motion to dismiss into a summary judgment motion and suggests utilizing a somewhat different standard of review. Regardless of the district court's willingness to ignore its own apparent instruction to itself regarding statements outside the pleadings, it certainly demonstrated a willingness to ignore its own instructions to itself when it states as follows:

> . . . 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).

In light of this Court's willingness to hear cases on appeal when mistakes are made by a district court, it would appear that the court in this case is unable to follow its

own directives to itself when it says it will ignore facts other than those as submitted in the pleadings.

This appellant was considering filing a motion to strike portions of the respondents briefs as a result of many statements that are inaccurate and prejudicial. This appellant determined that it would not pursue this attempt to clarify the issue at this level because the appellant already filed a motion to strike at the trial level. The appellant is thankful that Mr. Elabed has assisted in this effort by virtue of filing his objection to the clerks record on appeal in which it is apparent that we now have preserved a record of the plaintiff's motion to strike.

Generally, civil courts are hesitant to grant a motion to dismiss as these district courts know that they will not be upheld on appeal. It would appear that the summary judgment standard of review (although a little more complex) allows a district court to make some effort to weigh facts that are inconsistent or glaring. Most district courts know that they can easily dismiss a case on a motion for summary judgement when they allow the case to proceed and the plaintiff is unable to produce or find any evidence to support his claims.

Certainly, it would appear that the district court was impatient in this case as there were plenty of specific facts as plead that would either lead to a point where these defendants/respondents could martial evidence that would support their misstatements rather than concluding that their misstatements were true (or false as the district court has done in this case). It is rather difficult to conclude that these defendants have made any appropriate legal arguments that would support their case other than their glaring misstatements (as supported by the district court).

It is interesting to note that these defendants are relying on the notion that this district court was correct in suggesting that the appellant had no basis to timely reconcile with SPS by virtue of his efforts to pay off the note or to bring it current. Part of this argument suggests that the district court could wrongfully assume that it could ignore the specific provisions in the deed of trust (allowing reconciliation) as a result of the appellant's admitted failure to enter into an assumption agreement with SPS although he made extensive payments to SPS which were accepted for numerous years.

Although these respondents ignore the well made point that there is no citation to any authority that would allow the district court to ignore the correct application of the standard of review –the respondents attempt to mislead this Court by virtue of their allegation that the appellant has failed to cite any authority based on their incorrect interpretation of the district court's wrongful decision.

Had the district court allowed this case to go forward, it would have been subjected to reviewing a motion for summary judgment in which it would have reviewed depositions taken by the plaintiff in which SPS admitted a willingness to accept a $16,000.00 payment and vacate the mortgage foreclosure. In addition, had the district court been willing, it would also be able to review further deposition statements that show admissions **of SPS in which it accepted and never returned a payment in the amount of $19,422.87.00 and is now attempting to keep this money by virtue of these court proceedings in which the district court has committed error.**

It seems that the action of these defendants/respondents is somehow bordering on fraudulent when it would appear that SPS has an additional $19,422.87.00 of the plaintiff's money and has dismissed this case with the assistance of the district court. It is easy to understand why the appellant is so irritated by the actions of these defendants as it

appears that they have colluded between themselves and sold the plaintiff's property through a bogus non-judicial foreclosure sale in which they, **in open court, utilize some vague notion or argument of confidentiality to persuade the district court to rule in their favor**.

Regardless of the efforts of the district court and the respondents herein to engage in what may be a successful effort to dismiss this case, it would appear that these opposing parties were trying to avoid further problems by making what appeared to be persuasive but wrongful arguments (when considering the appropriate standard of review). The actions of these defendants suggest that they have engaged in numerous acts that would support a motion to amend the complaint to add a claim for punitive damages. As we all know, a plaintiff here in Idaho must avoid the initial filing of a complaint stating a cause of action for punitive damages in civil cases. He must first obtain specific evidence that would support the claim by virtue of taking depositions, obtaining expert opinions and obtaining answers to written discovery. Then the plaintiff can file his action for punitive damages by filing a motion to amend the complaint.

It appears that the district court and the defendants herein are not aware of this rule regarding punitive damages as they are definitely arguing a different standard of review that is admittedly utilized in a trial setting where the district court must weigh evidence and determine whether the plaintiff has submitted evidence to the jury at trial rather than admit that any allegations as may be mentioned in the case are reasonable. Why admit that allegations may be reasonable when you can get the judge to buy into an argument that should be made a trial.

The plaintiff/appellant is unaware of any cases in Idaho that would support the notion that the district court must weigh evidence as it has done at the hearing on the motion dismiss as filed by the respondents herein.

The other problem as discussed in Mr. Elabed's motion to dismiss is the issue of applying a remedy at the point of a motion to dismiss when the district court (or a jury) **must weigh any and all evidence at a trial**. Mr. Elabed's suggestion that this case must be dismissed because the plaintiff had three shots to amend his complaint (which failed by virtue of the district court's wrongful ruling) are ridiculous in light of the **fact that the district court must review the evidence at the trial** in order to determine if the plaintiff has met his burden of proof and if there is an appropriate remedy. It would appear that the district court has forgotten its obligation to wait and allow appropriate discovery (and perhaps allow the trial to happen) prior to ruling on a motion to dismiss.

Any and all arguments against the motion to consolidate are likewise unpersuasive since we can easily conclude that the district court would have granted the motion to consolidate had it denied the motion to dismiss. The respondents appear to suggest that the district court was correct in granting the motion to consolidate because the appellant has failed to show that there was an abuse of discretion. It is easy to argue irrelevant issues when the district court is so easily persuaded to grant a poorly conceived motion to dismiss.

CONCLUSION

It is easy for this Court to conclude that the district court has committed error and that this case should be reversed and sent to a different judge. The appellant could spend hours and hours in submitting a 46 page brief that would maybe discuss all the irrelevant issues of this case. Rather than make this appeal more complex, it appears that the

district court committed error as encouraged by these respondents. Yes, it appears that the appellant is playing a game of football and that these respondents are playing a game of soccer. However, it would appear that this Court would agree that we are (figuratively) playing a game of football – at least if we agree that the standard of review **is as partially admitted by the defendants and the district court** in its decision (although full of many errors).

DATED this 5th day of June, 2018.

Robert K. Beck

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5 day of June, 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 Reply Brief

PARTIES SERVED:	METHOD OF SERVICE:
Steven L. Taggart Maynes Taggart, PLLC PO Box 3005 Idaho Falls, ID 83403 Email: staggart101@gmail.com	☐ Hand Delivery ☑ Mailing ☐ Facsimile ☐ Email
Elijah M. Watkins Anna E. Courtney STOEL RIVES, LLP 101 S. Capitol Blvd., Suite 1900 Boise, ID 83702	☐ Hand Delivery ☑ Mailing ☐ Facsimile ☐ Email

Robert K Beck