
NO. SC94152

**IN THE
SUPREME COURT OF MISSOURI**

**THOMAS BINKLEY, HARLENE H. BINKLEY, ROLAND E. STURHAHN, and
SUSAN J. STURHAHN,**

Plaintiffs-Appellants,

v.

AMERICAN EQUITY MORTGAGE,

Defendant-Respondent.

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
DIVISION 8, CASE NO. 12SL-CC01661
THE HONORABLE TOM W. DEPRIEST**

APPELLANTS' SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

Plaintiffs Thomas and Harlene Binkley and Roland and Susan Sturhahn hired and paid Defendant American Equity Mortgage, Inc. (American Equity), to serve as their mortgage broker. The Binkleys and Sturhahns each paid American Equity fees of over \$2,300.00 to refinance their loans. (L.F. 151-55.)

The Binkley and Sturhahn families brought suit alleging that American Equity illegally practiced law (or engaged in the law business) without a license by “procuring legal documents” for their mortgages and loans without the involvement of a Missouri attorney. (L.F. 143.)

In its brief before this Supreme Court, American Equity essentially admits that it did “procure” the legal documents by providing information and paying for the legal documents from a non-attorney third party. (Resp’t’s Br. at 7.)

American Equity moved for summary judgment asserting that a necessary element of Plaintiffs’ cause of action was that American Equity must have charged a separate, express, and specific fee for preparation of legal documents. (L.F. 89-91.) American Equity did not charge a separate, express, and specific fee for preparation of legal documents.

Plaintiffs contested, opposed, and objected to American Equity’s motion for summary judgment and stated that it was not an element of Plaintiffs’ claims that American Equity has charged a separate, express, and specific fee for preparation of legal documents. Plaintiffs stated that because the failure to charge a separate, express, and

specific fee for document preparation was not an element of Plaintiffs' claims, American Equity was not entitled to judgment as a matter of law. (L.F. 77-79.)

The Circuit Court granted American Equity summary judgment. (L.F. 10.)

The Binkley and Sturhahn families appealed. (L.F. 11.)

LEGAL ARGUMENT

I. THIS SUPREME COURT SHOULD REVERSE THE SUMMARY JUDGMENT GRANTED DEFENDANT AMERICAN EQUITY BECAUSE THIS SUPREME COURT HAS PREVIOUSLY RULED THAT A PERSON MAY ILLEGALLY PRACTICE LAW WITHOUT CHARGING ANY FEE.

For summary judgment, movant must show that there is an undisputed material fact which entitles movant to judgment. *ITT Commercial Fin. Corp., v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). A summary judgment movant must show through undisputed material fact that the plaintiff cannot establish an element of its cause of action. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 381.

American Equity moved for summary judgment on the sole basis that in order to show that American Equity illegally committed the unlicensed practice of law, it was an element of the cause of action that American Equity charged a separate, express, and specific fee for document preparation. (L.F. 84-85.)

However, this Supreme Court has previously expressly ruled that someone could commit the unlicensed practice of law without charging any fee. *Miller v. St. Louis Union Trust Co.*, 74 S.W.2d 348, 355 (Mo. banc 1934).

In 1934, this Missouri Supreme Court construed the same terms and words as are in Missouri Revised Statutes § 484.020.2 and which are at issue in the instant case. *Miller*, 74 S.W.2d at 355. In 1934, the Missouri Supreme Court rejected the legal argument made today by American Equity.

Today, American Equity asserts that it must specifically, separately, and expressly charge a document preparation fee in order to be in violation of conducting the unlicensed practice of law, and that it is an element of the Sturhahns' and Binkleys' cause of action under Section § 484.020.2. Today, American Equity asserts that "valuable consideration" mentioned in Section § 484.020.2 only means a separate, express, and specific document preparation fee.

In 1934, the Missouri Supreme Court rejected each of the assertions made today by American Equity. *Miller*, 74 S.W.2d at 355.

In 1934, the Missouri Supreme Court considered the meaning of "valuable consideration" in the essentially identical predecessor to Section §484.020.2 and considered whether a person could violate the Missouri statutes on illegally practicing law without a license absent charging a fee. The Missouri Supreme Court expressly held that it was not necessary to charge any fee. *Miller*, 74 S.W.2d at 355.

In *Miller*, St. Louis Union Trust was drafting wills, life insurance trusts, and living trusts but charging no fee. *Miller*, 74 S.W.2d at 349-50. St. Louis Union Trust was putting itself or its employees as trustees or executors in the documents it was drafting. *Miller*, 74 S.W.2d at 349-50. The Missouri Supreme Court declared that St. Louis Union Trust was illegally conducting the unlicensed practice of law. The Missouri Supreme Court declared that "valuable consideration" was not limited to a separate, express, and specific fee for document preparation; rather, "valuable consideration" included merely causing the customer to go into the transaction or receiving money for later services under the legal documents drafted. *Miller*, 74 S.W.2d at 355.

According to the words of Section 484.020.2, and according to this Missouri Supreme Court's *Miller* decision, American Equity received the following "valuable consideration" from the Binkleys and the Sturhahns:

1. The Binkleys and the Sturhahns each paid fees of over \$2,300.00 to American Equity;
2. Both the Binkleys and the Sturhahns each entered into the loan transactions proposed by American Equity;
3. American Equity was the lender for both the Binkleys and the Sturhahns and received payments from the Binkleys and the Sturhahns;
4. American Equity could sell the Binkley and Sturhahn loans.

Each of these four categories of consideration constitutes "valuable consideration" under Section 484.020.2 and according to the Missouri Supreme Court. *See Miller*, 74 S.W.2d at 355.

In addition, American Equity paid and bought the legal documents from a nonlawyer third party.

American Equity did not move and claim there was no consideration and the Binkleys and Sturhahns never agreed or conceded there was no consideration for the loans and for the procuring of legal documents by American Equity.

In spite of the Binkleys' and Sturhahns' having discussed and cited *Miller v. St. Louis Union Trust Co.*, 74 S.W.2d 348, 355 (Mo. banc 1934), in their initial brief before this Supreme Court, American Equity does not mention nor discuss that case in its brief

before this Supreme Court. Likewise, American Equity has made no argument against the application of *Miller* to this case.

American Equity has several times in its brief incorrectly accused the Binkleys and the Sturhahns of raising new arguments in this appeal. The Binkleys and the Sturhahns, however, have from the beginning consistently argued that there is no requirement or element of their claim that required them to prove that American Equity separately, expressly, and specifically charged a document preparation fee. As time went on, the grounds in favor of the Sturhahns' and Binkleys' argument have become stronger, but the argument and claim have not changed.

American Equity also devotes a significant portion of its brief to the alleged noncontestability of HUD-1 forms. But since there is no requirement under Missouri law for a separate, express, and specific charge for document preparation, American Equity's HUD-1 argument is irrelevant.

Because American Equity did not disprove through an undisputed material fact an element of the Binkleys' and Sturhahn's claims, American Equity was not entitled to summary judgment, and this Supreme Court should reverse the summary judgment granted to American Equity.

II. THIS SUPREME COURT SHOULD REVERSE THE SUMMARY JUDGMENT GRANTED TO AMERICAN EQUITY BECAUSE NOT CHARGING A SEPARATE, EXPRESS, AND SPECIFIC FEE FOR DOCUMENT PREPARATION IS AN ELEMENT OF THE FILL IN THE BLANK SAFE HARBOR CASES AND NOT A GENERAL DEFENSE TO ALL UNAUTHORIZED PRACTICE OF LAW CASES.

As set forth above, according to Section 484.020.2, it is not an element of a claim of unauthorized practice of law, that the defendant charges a separate, express, and specific charge for document preparation. *Miller v. St. Louis Union Trust Co.*, 74 S.W.2d 348, 355 (Mo. banc 1934).

As explained in the Binkleys' and Sturhahns' initial brief, the Missouri Supreme Court has never announced that persons can practice law as long as they send a bill which does not expressly charge for legal services. In 1952, in a bow to commercial convenience, the Missouri Supreme Court allowed regulated real estate brokers merely to fill in the blanks on standard forms prepared by Missouri attorneys, so long as the broker did not specifically charge for filling in the blanks. *Hulse v. Criger*, 247 S.W.2d 855, 861 (Mo. banc 1952).

Recently, the Missouri Supreme Court, in discussing the general law of unauthorized practice of law, repeated that the charging of a separate fee was only relevant for the fill-in-the-blank cases and was not a general element of all Section 484.020.2 actions. *See In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 865 (Mo. banc 1996).

American Equity's public policy argument—that nonlawyers should be allowed to draft and procure legal documents and give people legal advice, as long as the nonlawyer does not explicitly, expressly, specifically, and separately charge for the legal services—is a recipe for public disaster.

Because the Binkleys and Sturhahns were not required to show that American Equity charged a separate, express, and specific charge for document preparation or document procuring, this Supreme Court should reverse the grant of summary judgment to American Equity.

CONCLUSION

For the foregoing reasons, and to protect Missouri homeowners from the unlawful and dangerous practice of outsourcing the legal-document component of the mortgage banking business, the circuit court's judgment should be reversed and the case remanded so that this action and class action may proceed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief includes the information required by Missouri Supreme Court Rule 55.03, complies with limitations contained in Missouri Supreme Court Rule 84.06(b) and Local Rule 360, contains 1,823 words, and was prepared in Microsoft Word 2010.

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I certify that a copy of the foregoing filed electronically with the Clerk of the Court this 7th day of August, 2014, to be served by operation of the Court's eFiling system upon the following:

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