Appeal No. ED 84118

MISSOURI COURT OF APPEALS

EASTERN DISTRICT

RODNEY GLASS and DIANE GLASS,

Plaintiffs/Respondents,

vs.

FIRST NATIONAL BANK of ST. LOUIS, N.A.,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

DIVISION SEVENTEEN

Cause No.: 02CC-1704

Honorable Larry L. Kendrick

REPLY BRIEF

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ARGUMENT

I. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because their demand letter failed to follow the requirements of section 443.130 RSMo. 2000 in that it did not reference section 443.130 and did not request that the deed of release be sent within 15 business days.

First National Bank, N.A. ("First National Bank") asserted in its Appellant's Brief that this appeal is governed by Lines v. Mercantile Bank, N.A., 70 S.W.3d 676 (Mo. App. 2002), which held that the demand letter sent by the plaintiffs was not sufficient to invoke the penalty provided by section 443.130.1 RSMo. 2000[1] because the letter did not reference section 443.130 and did not request a deed of release within 15 business days. Lines, 70 S.W.3d at 680. In their Respondents' Brief, the Glasses argue that First National Bank has given Lines an overly broad reading and misstated its holding.[2] (Resp. Br. p. 19). Specifically, Respondents' argue that the holding in Lines is very limited and applies only to the specific situation existing between the plaintiffs and Mercantile Bank whereby the plaintiffs' demand letter incorporated the settlement agreement and its provision for release

[1]All future statutory references are to RSMo. 2000 unless otherwise indicated.

[2]References to the Legal File will be as follows: L.F. Vol. __, p. __. References to Respondents' Brief will be as follows: Resp. Br. p. __.

of the deed of trust and did not invoke the provisions of section 443.130. (Resp. Br. pp. 19-20).

While the holding in Lines was limited to the particular facts presented in that case, nothing in the opinion suggests that the analysis employed by the Missouri Court of Appeals in reaching its holding is in any way limited. Moreover, the Glasses attempt to distinguish Lines by applying an overly strained interpretation of the facts. It is tenuous to argue that Lines is inapposite because of the existence of the settlement agreement that was reached between the plaintiffs and Mercantile Bank. The settlement agreement was merely the vehicle by which the plaintiffs' security interests were satisfied and released. 70 S.W.3d at 677. The focus of the Court of Appeals' decision was that the plaintiffs' demand letter did not sufficiently invoke the provisions of section 443.130. Id. at 680.

Finally, any argument that Lines is inapposite based on the existence of a settlement agreement is undermined by the Supreme Court of Missouri's recent decision in Garr v. Countrywide Home Loans, Inc., SC85578, 2004 Mo. LEXIS 95 (Mo. banc July 1, 2004), which also held that the plaintiffs' demand letter was insufficient to place the financial institution on notice that section 443.130 was being invoked.[3] Id. at *7.

In Garr, Countrywide Home Loans, Inc. ("Countrywide") appealed from the grant of summary judgment in favor of the Garrs for violation of section 443.130. Id. at *1. Because

[3]Docket entries from Case.net show that a Motion for Rehearing was not filed in Garr v. Countrywide Home Loans, Inc., SC85578, and a mandate was issued by the Supreme Court on July 19, 2004.

Countrywide alleged that section 443.130 was unconstitutional, the case was heard before the Supreme Court of Missouri under its exclusive appellate jurisdiction. Id.

The Garrs signed a promissory note in March 2002 in favor of Mortgage Resources for $165,000.00, and a deed of trust secured the note. Id. Mortgage Resources assigned its interest in the note and deed of trust to Countrywide. Id. at *2. Shortly after this assignment, the Garrs refinanced their home with another mortgage lender, Matrix Financial. Id. Mr. Garr mailed the full payoff amount for the note and Countrywide received the payment on August 2, 2002. Id. Also on that date, Mr. Garr sent a letter via certified mail, return receipt requested to Countrywide. Id. The letter stated:

> On August 2, 2002, we closed on our Marlann Drive home. On August 8, 2002, I confirmed via the Countrywide Automated Customer Service Line that our loan with Countrywide Home Loans was paid in full on August 8, 2002 and that an escrow balance of $60.84 would be refunded to me. We still have not received a Deed of Release to release the lien against our personal residence at 1417 Marlann Drive, Des Peres, Missouri 63131.
>
> We are demanding immediate release of the Deed of Trust against our Marlann Drive property. Enclosed is a check payable to your institution in the sum of $30.00 to cover the costs of filing and recording the Deed of Release regarding the transaction. Please deliver in hand to me evidence of the release of the Deed of Trust. In the event the Deed of Release has already been sent, please return my check to above listed address.

Id. at *2-3.

This letter was received by Countrywide on August 12, 2002, and a deed of release was prepared directing the recorder of deeds to mail the recorded deed to the Garrs, as instructed in the letter. Id. at *3. The deed of release was recorded on August 26, 2002. Id. On September 3, 2002, Mr. Garr sent a second letter by regular mail to Countrywide stating that he and Mrs. Garr were seeking damages against Countrywide Home Loans for the flagrant violation of section 443.130. Id. at *3-4. Mr. Garr demanded in the letter that Countrywide forfeit the statutory penalty of 10 percent and deliver a sufficient deed of release within 10 days of the letter or suit would be filed. Id. at *4. The Garrs were mailed a copy of the deed of release on September 12, 2002. Id.

The Garrs filed suit against Countrywide and the case was submitted to the trial court on cross-motions for summary judgment. Id. The trial court ruled in favor of the Garrs. Id. at *4-5. Countrywide's first point on appeal was that the Garrs' letter of August 8, 2002, was not sufficient to invoke section 443.130. Id. at *5.

In analyzing this first point, the Supreme Court recognized that section 443.130 is penal in nature, so it must be strictly construed. Id. at *6-7. For this reason, any demand letter purporting to invoke section 443.130 should closely track the language of the statute to place the mortgagee on notice that a statutory demand is being made. Id. at *7. The Supreme Court found that the Garrs' letter was insufficient to place Countrywide on notice that section 443.130 was being invoked. Id.

First, the Garrs demanded an "immediate release" of the deed of trust, rather than allowing for 15 business days for Countrywide to respond as allowed under the statute. Id.

Second, the Garrs demanded that Countrywide record the deed of release, which is an action not required by the statute. Id. Finally, "reading the Garrs' letter as a whole, nothing places Countrywide on notice that the Garrs are making a demand under section 443.130, whether directly, by reprinting, citing, or referencing, or otherwise." Id.

The Supreme Court of Missouri recognized the holding in Martin v. STM Mortgage Co., 903 S.W.2d 548, 550 (Mo. App. 1995), that the statutory demand need not consist of any particular form of words. Nevertheless, the Court found Martin inapposite because the demand letter in that case apparently included a recitation of section 443.130 that was sufficient to place the mortgagee on notice that the statute was being invoked. Id. at *8. Because the August 8, 2002, letter did not sufficiently track the statutory requirements of section 443.130, the judgment in favor of the Garrs was reversed. Id.

Contrary to the argument submitted in Respondents' Brief, the letter authored by Rodney Glass in the instant case is strikingly similar to the Garr letter that was ruled insufficient to invoke the statutory penalty in section 443.130. First, neither letter specifies the 15-day compliance period in section 443.130. The Garr letter requested an "immediate release" and the Glass letter requested a "deed of release promptly." 2004 Mo. LEXIS 95, at *7; L.F. Vol. I, p. 144. Second, both letters requested that the mortgagee record the deed of release. The Garr letter stated that a check was enclosed to "cover the costs of filing and recording the Deed of Release regarding the transaction." 2004 Mo. LEXIS 95, at *2-3. The Glass letter stated that a check was enclosed "as and for costs, including recording fees, for the filing and recordation of the deed of release." L.F. Vol. I, p. 144. Finally, neither letter

read in its entirety, is sufficient to place a mortgagee on notice that a demand is being made under section 443.130. Neither letter references, cites, or reprints section 443.130 or its statutory requirements. L.F. Vol. I, p. 144.

As in Garr, the Glass letter is insufficient to invoke section 443.130 because it does not closely track the language of section 443.130 to place First National Bank on notice that a statutory demand is being made. Pursuant to this precedent from the Supreme Court of Missouri, this Court should reverse the grant of summary judgment in favor of the Glasses.

II. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because First National Bank of St. Louis, N.A. fulfilled its obligations under section 443.130 RSMo. 2000, in that it executed the Glass deed of release and forwarded it to the St. Louis County Recorder of Deeds' office prior to receiving Rodney Glass's demand letter, but due to circumstances beyond the control of First National Bank, the deed of release was not recorded within 15 business days.

First National Bank refers this Court to pages 25-28 of Appellant's Brief for a full recitation of the facts and law in support of its second Point Relied On.

III. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because their predatory use of section 443.130 RSMo. 2000 for personal financial gain is not within the legislative intent of the statute to facilitate

the clearing of title through the filing of deeds of release because the Glasses have not suffered any prejudice from the failure to receive the deed of release given that they have been able to successfully refinance their home mortgage on three subsequent occasions, each time attempting to collect the penalty provided within section 443.130.

In response to the argument advanced by First National Bank that the Glasses have not suffered any prejudice from the failure to receive the deed of release given that they were able to successfully refinance their home mortgage on three subsequent occasions, the Glasses assert, without any citation to the Record on Appeal, that they were only able to refinance because the title insurance company issued a hold harmless agreement to the refinancing lender. Resp. Br. pp. 45-46. Because this argument lacks any support whatsoever in the Record on Appeal before this Court, it should be stricken from the Respondents' Brief. See Rule 84.04(i) (requiring that all statements of fact shall have specific page references to the legal file or the transcript). Nevertheless, any agreement entered into between a title insurance company and the refinancing lender is clearly not relevant to the issues presented in this case.

IV. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because they do not have standing to challenge compliance with section 443.130 RSMo. 2000, in that the statute requires the deed of release to be

delivered to the person making satisfaction, which in this case is the lending institution subsequent to First National Bank of St. Louis, N.A., and not the Glasses.

By its terms, section 443.130.1 requires that a mortgagee deliver a sufficient deed of release to the "person making satisfaction" of the mortgagor's debt. While the "person making satisfaction" and the "mortgagor" may sometimes be the same, there are instances where they are not the same. For example, in a refinancing situation, the refinancing lender pays off the mortgagor's debt, and is the "person making satisfaction." Therefore, the refinancing lender is the party entitled to receive the deed of release under section 443.130.

This issue was addressed in Masterson v. Roosevelt Bank, 919 S.W.2d 9 (Mo. App. 1996), where the court held that "if the legislature intended that only the mortgagor receive the deed of release, regardless of who made the satisfaction, it would have simply used the word mortgagor" instead of "person making satisfaction." Id. at 11. This argument is strengthened by the fact that the legislature did in fact use the word "mortgagor" in section 443.130.2. The legislature clearly knew how to specify "mortgagor" when that is what was meant to be specified.

The Glasses characterize as a non-issue the drawing of any distinction between a mortgagor who pays off a mortgage debt and a "person making satisfaction," such as a refinancing lender who pays off a mortgagor's debt. Nevertheless, the distinction is certainly important in the context of refinancing situations and could certainly have been taken into account by the legislature when drafting the first two sections of section 443.130. First, a

refinancing lender has a substantial interest in removing the prior lender's lien from the property that secures its new loan to the mortgagor. Second, the refinancing lender is better equipped and more accustomed to recording real estate deeds than the mortgagor. Third, a refinancing lender would not want to depend on a mortgagor to promptly and properly record a deed of release, which might have an adverse impact on its collateral and/or lien status.

Pursuant to the express terms of section 443.130, First National Bank could only be subject to the statutory penalty if it failed to timely deliver a sufficient deed of release to the "person making satisfaction" - here, National City Mortgage. L.F. Vol. I, p. 176. The Glasses do not have standing to challenge compliance with section 443.130 given that they were not the party making satisfaction. For the foregoing reasons, this Court should reverse the grant of summary judgment in favor of the Glasses.

V. The trial court erred in granting summary judgment in favor of Rodney and Diane Glass because sections 443.060 and 443.130 RSMo. 2000 are unconstitutional in that they violate the due process, equal protection, unlawful takings, and excessive fines clauses of the United States Constitution and the Missouri Constitution.

In their Respondents' Brief and Memorandum Regarding Transfer of This Cause to the Missouri Supreme Court, the Glasses argue that First National Bank has not properly preserved the constitutional issues. Specifically, the Glasses claim that First National Bank did not properly raise and preserve the constitutional issues, that the issues are not real and

substantial and are merely colorable, and the constitutional issues were not ruled on by the trial court.

Generally, constitutional issues must be raised at the earliest opportunity if they are to be preserved for review. Call v. Heard, 925 S.W.2d 840, 847 (Mo. banc 1996). This is necessary in order to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue. Id. The constitutional issues were fully raised by First National Bank as affirmative defenses in its first two Answers and in its Second Amended Answer, the latter of which was filed on April 21, 2003, (L.F. Vol. VI, pp. 1141-1148),[4] and in the Supplemental Response in Opposition to Plaintiffs' Motion for Summary Judgment, filed on May 9, 2003. (L.F. Vol. VI, pp. 1178-1184). In addition, First National Bank has extensively briefed these issues in its Appellant's Brief. This is sufficient to preserve the constitutional issues for appellate decision. State ex rel. Webster v. Telco Directory Publ'g, 1992 Mo. App. LEXIS 1545, at *3 (Mo. App. Sept. 29, 1992) (holding that the constitutional issues were properly preserved and the Court of Appeals lacked jurisdiction).

While the Glasses argue that First National Bank did not plead sufficient facts within its Second Amended Answer and Supplemental Response, even a cursory glace at these documents shows otherwise. First National Bank asserted its

[4]The Glasses have not raised any issue regarding the prior Answer or Amended Answer filed by First National Bank.

constitutional defenses and the underlying facts in support with sufficient particularity and well in advance of judgment, which was entered on December 31, 2003. (L.F. Vol. VI, pp. 1206-1209). *See* Winston v. Reorganized Sch. Dist., 636 S.W.2d 324, 327 (Mo. banc 1982). Both the Glasses and the trial court were well-apprised of First National Bank's constitutional defenses. The purpose of the rule requiring that constitutional issues be raised at the earliest opportunity is to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issues. Id. *See also* Call, 925 S.W.2d at 847. The purpose of the rule was clearly satisfied here. Winston, 636 S.W.2d at 327.

The Glasses also take issue with the fact that First National Bank raised the constitutional issues in a Supplemental Response in Opposition to Plaintiffs' Motion for Summary Judgment. First National Bank sought leave of the trial court to file this response, and leave was granted. (L.F. Vol. VI, p. 1175). Rule 74.04(c)(5) allows the trial court to grant leave to the parties to file additional papers not specifically set forth in Rule 74.04. It became necessary for First National Bank to supplement its response in opposition to the Glasses' motion for summary judgment based upon new documents obtained in discovery related to the Glasses repeated statutory demand letters sent to their refinancing lenders. The constitutional issues were raised as a precautionary measure to ensure preservation.

In addition, the Supplemental Response was filed on May 9, 2003, but judgment was not entered until December 31, 2003. Within this seven and a half-

month period, the Glasses had the same opportunity, exercised by First National Bank, to seek leave to file a supplemental motion pursuant to Rule 74.04(c)(5) but chose not to do so. They should not be heard to cry foul now for a conscious decision they made to not address the arguments raised in the Supplemental Response.

The Glasses also argue that First National Bank's constitutional challenges are not real and substantial, but are merely colorable. The guideline for determining if a constitutional challenge is "colorable" has been described as follows:

> A claim of violation of a constitutional guaranty may be said to be substantial when, upon preliminary inquiry, the contention discloses a contested matter of right, involving some fair doubt and reasonable room for controversy; but if such preliminary inquiry discloses that the contention is so obviously unsubstantial and insufficient, either in fact or in law, as to be plainly without merit and a mere pretense, the claim may be deemed to be merely colorable.

Telco Directory Publ'g, 1992 Mo. App. LEXIS 1545, at *3-4. If the constitutional issue has not been decided by the state supreme court, the contention is not merely colorable. Id. at *4. *See also* In re G.P.C. v. Cabral, 28 S.W.3d 357, 362 (Mo. App. 2000).

In the present case, it is evident from the briefs submitted on appeal that there is fair doubt and room for controversy regarding interpretation of sections 443.060 and 443.130. Moreover, the Glasses concede that the constitutionality of these statutory sections has not been addressed in previous court decisions. Resp. Br. pp.

55, A-6. The issues raised by First National Bank are real and substantial and not merely colorable.

Finally, the Glasses argue that the constitutional issues have not been properly preserved because the trial court did not expressly rule on the constitutional questions raised. The Glasses further contend that the inherency doctrine has not been an accepted theory in Missouri since 1949. Nevertheless, in State ex rel. State Highway Comm'n v. Wiggins, 454 S.W.2d 899 (Mo. banc 1970), the Supreme Court held that as a general rule, in the absence of evidence to the contrary, a general judgment for one party involves a finding in that party's favor on all issues properly before the court. Id. at 901-02.

Moreover, the Western District recognized the continued validity of the doctrine, albeit recognizing that it was "dubious." *See* McCluney v. McCluney, 871 S.W.2d 657, 659 (Mo. App. 1994) (holding that had the trial court not expressly pretermitted any ruling on the constitutional issues, the appellate court would be obliged to consider the constitutional issues under the inherency doctrine). The constitutionality of sections 443.060 and 443.130 were properly raised before the trial court and a finding in favor of the Glasses for the statutory penalty necessarily presumes a finding that the underlying statutes were constitutional.

One matter raised by the Glasses in their Respondents' Brief is worthy of mention. The Glasses argue that First National Bank's void for vagueness constitutional argument has not been properly preserved because First National

Bank has argued for the first time on appeal that the phrase "person making satisfaction" was vague. (Resp. Br. p. A-20). Nevertheless, in its Second Amended Answer, First National Bank raised the challenge that sections 443.060 and 443.130 were void for vagueness. Moreover, First National Bank's Supplemental Response in Opposition to Plaintiffs' Motion for Summary Judgment sufficiently lays out the argument that "person making satisfaction" was vague. (L.F. Vol. VI, pp. 1178-79). The Glasses were fully aware of this challenge to the constitutionality of section 443.130 and cannot fairly argue any surprise. The purpose of the rule requiring that constitutional issues be raised at the earliest opportunity was satisfied here.

In addition to the fact that phrases such as "party aggrieved," "the person making satisfaction," and "sufficient deed of release," within section 443.130 are vague and undefined, amendments to section 443.130 make the statute unclear and confusing to persons of common intelligence. Prior to 1994, section 443.130 allowed a bank to elect between two means of satisfying the statute. A bank could either file the deed of release on the margin of record with the recorder of deeds or deliver the deed of release to the borrower. In 1994, however, the legislature amended section 443.130 and deleted the language allowing a bank to file the deed of release with the recorder of deeds as a means of compliance.

Confusion was created in 1996, however, when the statute was amended and added a provision requiring a proper statutory demand by a mortgagor to include the

expense of filing and recording the release. This provision is contradictory to the 1994 amendment which eliminated any recording requirement.

Pursuant to the foregoing, the constitutional issues have been properly preserved and exclusive appellate jurisdiction is vested in the Supreme Court of Missouri. First National Bank respectfully requests that this cause be ordered transferred to the Supreme Court.

CONCLUSION

For the reasons set forth above and in First National Bank's Appellant's Brief, this Court should reverse the grant of summary judgment in favor of the Glasses.

Should this Court affirm the grant of summary judgment on points one through four, First National Bank contends that sections 443.060 and 443.130 are unconstitutional. Jurisdiction over this point, therefore, would be within the exclusive appellate jurisdiction of the Missouri Supreme Court, and this cause should be transferred.

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CERTIFICATE OF SERVICE

The undersigned states that on the 5th day of August, 2004, an Original and nine (9) copies of Reply Brief were filed with the Missouri Court of Appeals, and two (2) copies of Reply Brief were mailed to: **Mr. John W. Rourke**, **Ms. Jennie Bartlett**, Attorneys for Respondents, 812 N. Collins, Laclede's Landing, St. Louis, Missouri 63102-2174.

_____

CERTIFICATE OF COMPLIANCE

Appellants' Brief includes the information required by Rule 55.03, complies with the requirements of Rule 84.06(b), and contains 3,842 words. It was prepared using Word Perfect 7.0. The computer disks containing said brief provided to the Court of Appeals and opposing counsel are virus-free.

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