ORIGINAL

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

ANDRES CSANYI,
Defendant/Appellant,
vs. Appeal No. 35,279

MARINERS PAC HOLDINGS, LLC,
Plaintiff/Appellee.

BRIEF IN CHIEF OF THE APPELLANT ANDRES CSANYI

AN APPEAL FROM DISTRICT COURT BERNALILLO COUNTY
THE HONORABLE VALERIE HULING
District Court No. CV 2009-090702

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II. SUMMARY OF THE PROCEEDINGS

This is an appeal by Defendant/Cross-Claimant/Appellant Andres Csanyi of the dismissal of his Counterclaims granted during a motion for summary judgment hearing by Second Judicial District Court Judge Valerie Huling in favor of Plaintiff/Cross-Defendant/Appellee Mariners Pac Holdings, LCC ("Mariners Pac"), in a foreclosure proceeding. See Order Resulting from October 13, 2015 Hearing, which was entered on October 23, 2015 ("Order Resulting from Hearing."). He also appeals the District Court's denial of his Motion to Amend Counterclaims to add additional Counterclaims and the District Court's discovery orders, namely its partial denial of his Motion to Compel Plaintiff/Appellee's further responses to his first discovery requests and its refusal to rule on Plaintiff/Appellee's Motion for Protective Order which resulted in his inability to receive responses to his second set of discovery requests. See id.

Early Relevant History of the Case

This case originated on August 19, 2009, when then-Plaintiff Jaguar Associated Group, LLC ("Jaguar"), filed a Complaint for foreclosure against Defendant/Appellant Csanyi and other defendants. On January 21, 2010, Jaguar

filed a Motion for Summary Judgment. On June 10, 2010, the case was dismissed for lack of prosecution.

On July 8, 2010, Jaguar filed a Motion for Order Reinstating the Case and Motion to Substitute Plaintiff. On September 8, 2010, an Order Reinstating Case and Substituting Plaintiff was filed over Defendant/Appellant Csanyi's objection, with CS Vandelay Receivables Holdings LLC ("Vandelay") substituted as the Plaintiff.

On January 4, 2011, Defendant/Appellant Andres Csanyi filed his Response to Vandelay's Motion for Summary Judgment. On January 19, 2011, Vandelay filed its Reply, and then on January 28, 2011, Defendant/Appellant Andres Csanyi filed his Supplemental Reply.

On May 4, 2011, Defendant/Appellant Andres Csyani served then-Plaintiff Vandelay with discovery requests, and filed a Certificate of Service for same. His Request for Production of Documents and Things sought, among other items, various documents relevant to Plaintiff's claims and his affirmative defenses and potential counterclaims: the entire loan underwriting file, including the appraisal, Defendant/Appellant's application for the Mortgage Note including his Statement of Income and Assets, policies of insurance, including but not limited to private mortgage insurance which provide benefits to Defendant or any party in privity with Defendant or original lender or successor

thereto upon default by borrower in connection with the mortgage loan, all documents setting forth any payment made or received in connection with the proceeding requests, and all documents evidencing any agreement between the original Lender and any person or party relating to the servicing in any respect of the mortgage loan.

On June 7, 2011, then-Plaintiff Vandelay filed a Motion for Protective Order in relation to Defendant/Appellant Andres Csanyi's discovery requests. On June 21, 2011, Defendant/Appellant Andres Csanyi filed his Response to Motion for Protective Order.

Defendant/Appellant Andrews Csanyi repeatedly sought discovery and opposed summary judgment on the basis that he had reason to believe the original loan was fraudulent and/or obtained by fraudulent or negligent misrepresentation, that it was over-reaching and in violation of state and Federal consumer protection statutes. The owner of the entity that was the original Plaintiff, Jaguar, was sentenced in Colorado to sixteen years in prison and ordered to pay $2.5 million in restitution in connection with a Ponzi scheme to defraud banks.

Jaguar's owner was convicted of obtaining loans from "warehouse" lenders at interest rates of 5 to 7 percent, then making subprime loans to consumers and charging the consumers with exorbitant interest rates. Neither Jaguar nor the subsequent Plaintiff in this case, Vandelay, were registered in the State of New

Mexico at the time of the relevant proceedings. Since then, the Plaintiff in the case was changed to Mariners Pac and then to Nestor II, despite Defendant/Appellant Csanyi's repeated objections to the ever-changing Plaintiff/Appellee' s lack of standing as a real party in interest. Further, at the time of the loan transaction, Defendant/Appellant Andres Csanyi was unemployed and had no income or assets. Therefore, he had reason to believe the loan was predatory and/or fraudulent, and that he was entitled to inspect the loan origination and application documents to determine whether Jaguar was truthful in its dealings with him. The Adjustable Rate Note originally had an interest rate of 10.990% and then an eventual interest rate of 18.990%,

A hearing was held and on July 15, 2011, the District Court entered an Order Granting Plaintiff's Motion for Protective Order. On July 15, 2011, another Order Substituting Plaintiff was entered over Defendant/Appellant's objection, with Mariners Pac Holdings, LLC now substituted as the Plaintiff. On September 21, 2011, the district court entered Summary and Default Judgment in favor of Plaintiff/Appellee Mariners Pac Holdings, LLC.

The First Appeal

Defendant/Appellant Andrews Csanyi appealed the Summary and Default Judgment. On February 3, 2012, this Court issued a Notice of Proposed Summary Disposition, proposing reversal. On March 22, 2012, it issued a Memorandum

Opinion reversing. The Memorandum Opinion agreed with Defendant Csanyi's argument that the District Court "should have permitted additional discovery because [Defendant Csanyi] had reason to believe that the original lender may have engaged in fraud." Memo. Opin. at p. 3. This Court noted that in Defendant Csanyi's response to Plaintiff's motion for the protective order, "Defendant argued that the loan was voidable because of suspected fraud." Id. This Court also noted that Defendant Csanyi has raised assertions relating to possible criminal behavior by the original lender Jaguar, which was also the original plaintiff in this case, and therefore the current plaintiff, Mariners, stands in Jaguar's shoes, with the same obligations and burdens of proof as the original lender. Id.; see also Provencio v. Price, 57 N.M. 40, 45-46, 253 P.2d 582, 585 (1953)); Hobbs v. Cawley, 35 N.M. 413, 413, 299 P. 1073, 1073 (1931).

For these reasons, this Court found that Defendant/Appellant Csanyi should have been permitted additional discovery. Defendant/Appellant's Docketing Statement to this Court in his first appeal stated that he had reason to believe that the loan was predatory and/or fraudulent, and/or in violation of Federal and/or state consumer protection laws, and that he was entitled to inspect the loan origination and application documents to determine whether Plaintiff made misrepresentations in its dealings with him.

This Court agreed with Defendant Csanyi and remanded this case back to the District Court for proceedings consistent with its opinion. The Mandate was filed on May 7, 2012. The crux of Defendant/Appellant Csanyi's current appeal was that the Mandate was not correctly followed by the District Court after the case was remanded.

Subsequent Case after Remand

On April 27, 2012, Mariners Pac served Defendant/Appellant Andres Csanyi with its Response to his Request for Production of Documents and Things ("Discovery Responses") to Defendant/Appellant Csanyi. See Pl.'s Resp. to Def.'s Req. for Prod., Exhibit A to Def./App. Csanyi's Mot. to Compel and for Sanctions ("Motion to Compel"), Filed 12/15/2014. These discovery responses were woefully lacking and inadequate. In the discovery responses, Plaintiff/Appellee admits it does not possess Defendant/Appellant Csanyi's application for the Mortgage Note, including his Statement of Income and Assets, id., the very thing that this Court has ruled that Defendant/Appellant Csanyi is entitled to discover. See May 7, 2012 Mandate.

Plaintiff/Appellee objected to producing and does in fact fail to produce any information regarding Defendant/Appellant Csanyi's requests as to the funding or servicing of the mortgage loan or the consideration exchanged in connection with the assignment or sale of the Mortgage Loan. See Ex. A to 12/15/2014 Mot. to

Compel. It also provided many general and boiler-type objections to the discovery requests. Id. Therefore, Plaintiff/Appellee failed to provide Defendant Csanyi with discovery regarding the loan origination documents, which this Court has deemed highly relevant in this case. See Memo. Opin. in Appeal No. 31,715, filed 3/22/2012.

On May 25, 2012, Mariners Pac filed a Motion for Summary and Default Judgment ("Motion for Summary Judgment"). On June 18, 2012, Defendant/Appellant Andres Csanyi filed his Cross-Motion for Summary Judgment and Response in Opposition to Plaintiff Mariners Mac's Motion for Summary Judgment ("Cross-Motion and Response"), arguing that this Court had ruled that Defendant/Appellant Csanyi is entitled to discovery regarding the loan origination documents and Plaintiff/Appellee did not provide them, and in fact even admitted it did not have them. Therefore, as he had previously argued to the District Court and this Court, Defendant/Appellant Csanyi once again argued that the contract is void and judgment should be granted in favor of Defendant/Appellant Csanyi. Id.

In the alternative, in his Cross-Motion and Response, Defendant/Appellant Csanyi argued that in the event that the District Court does not grant judgment in his favor, then it should not grant judgment in favor of Plaintiff/Appellee, because Plaintiff/Appellee cannot prove that the contract is not void or voidable due to fraud, misrepresentation and/or violations of consumer protection laws. Further, in his Cross-Motion and Response Defendant/Appellant Csanyi argued that he should be

allowed to amend his Answer, Affirmative Defenses and Counter-Claims based on his newly discovered evidence as to the lack of loan origination documents, and his evidence regarding the fraudulent conduct of the original plaintiff in the lawsuit.

On July 13, 2012, Plaintiff/Appellee Mariners Pac filed its Reply to its Motion for Summary Judgment and Response to Defendant/Appellant Csayni's Cross-Motion for Summary Judgment ("Reply and Response"), in which it incorrectly argued that this Court reversed the District Court's original summary judgment Order solely on the issue of whether Defendant was entitled to discovery responses prior to the summary judgment hearing. Mariners Pac argued that because it had served discovery responses on Defendant/Appellant Csanyi, Plaintiff/Appellee is entitled to an entry of summary judgment because the amount due and owing on the Note had been decided by the District Court prior to this Court's reversal. It also argued that this Court "both oversimplified and confused the issue" in its Memorandum Opinion and that Defendant/Appellant Csanyi should be prohibited from raising claims of fraud and predatory lending because he did not plead them in his original Answer to the Complaint. Id.

On August 14, 2012, Defendant/Appellant Csanyi filed his Reply in Support of Cross-Motion for Summary Judgment ("Reply"). In his Reply he argued that the opening statement contained in the Response and Reply of Plaintiff/Appellee Mariners Pac that this is Defendant/Appellant Csanyi's "third bite at the apple in an

attempt to avoid the valid summary judgment, previously entered by this court, on September 21, 2011" is erroneous. Id. The Summary Judgment was not valid because it was overturned by this Court. Further, this is Defendant/Appellant's first "bite of the apple" since this Court issued its ruling, which was quite clear that Defendant/Appellant Csanyi is permitted "discovery dealing with the making of the loan in the first place." Id.

Further, in his Response and Reply Defendant/Appellant Csanyi countered Plaintiff/Appellee's erroneous argument—that this Court did not order Plaintiff/Appellee to produce the application package of the loan in question, but rather that it only ordered Plaintiff/Appellee to respond to the discovery requests—by stating that this Court's Memorandum Opinion states that Defendant/Appellant is permitted additional discovery because he was seeking to challenge the legality of the actions of the original lender. Id. The Notice of Proposed Summary Disposition also points out that although Defendant/Appellee submitted documents related to the assignment of the Mortgage Note, he should be permitted additional discovery "because there is a difference between discovery dealing with assignment of the note and discovery dealing with the making of the loan in the first place." See 2/3/2012 Not. of Prop. Summ. Disposition in prior appeal.

Additionally, Defendant/Appellant Csanyi argued in his Reply that the argument of Plaintiff/Appellee that summary judgment should be granted now that

it produced discovery in accordance with this Court's mandate fails because the discovery documents that Plaintiff/Appellee served on Defendant/Appellant did not include the very discovery responses that the Court of Appeals ruled that Defendant/Appellant is entitled to inspect— the loan origination documents— and indeed the only relevant response pertaining to that request was an admission that Plaintiff/Appellee does not have those documents. See 8/14/2012 Reply.

Finally, Defendant/Appellant pointed out that this Court has ruled that, contrary to Plaintiff/Appellee's assertion, he did previously raise relevant arguments. Id. He requested additional discovery in response to Plaintiff's Motion for Summary Judgment, "arguing that the loan was voidable because of suspected fraud." Id. Due to pleading requirements that fraud be plead with particularity, Defendant/Appellant Csanyi requested discovery of the loan origination documents so that he could investigate and substantiate his suspicions that Plaintiff/Appellee made fraudulent and/or negligent representations to him (or about his assets and ability to repay the loan) and/or violated consumer protection laws during the loan origination process. Id. Once Plaintiff/Appellee admitted that it does not have those documents, the suspicions of Defendant/Appellant were confirmed and he could then move forward in seeking permission from the District Court to amend his Answer and add Counter-Claims, which justice freely allows. Id.

A hearing was held on the Cross-Motions for Summary Judgment in District Court on October 29, 2012. On November 19, 2012, the District Court entered an Order Denying Cross-Motions for Summary Judgment, finding that neither Motion was well-taken at that juncture and therefore denying summary judgment to both parties.

Issues on Appeal

On December 3, 2012, after defeating summary judgment, Defendant/Appellant Csanyi filed his Motion to Allow Defendant Andres Csanyi to Amend His Answer to Add Counterclaims ("Motion to Add Counterclaims"). In his Motion to Add Counterclaims Defendant/Appellant Csanyi stated that only after the case was remanded and Plaintiff/Appellee responded to the discovery requests did he have a good faith basis to bring his counterclaims, many of which are required to be plead with particularity. Id. Further, the Motion to Add Counterclaims explained that because Defendant/Appellant Csanyi had only recently had the opportunity to discover the basis for his counterclaims, they were therefore not compulsory counterclaims that were known or available to him at the time he served his Answer, but rather they were claims that were acquired after the filing of his original Answer, which the District Court had the discretion to allow. Id.

Further, Defendant/Appellant argued that other counterclaims, such as violations of consumer protection laws, do not relate directly to the foreclosure on

the property but instead to separate and independent torts that Plaintiff/Appellee engaged in against Defendant/Appellant Csanyi and are therefore permissive counterclaims. Id. Finally, the Motion to Add Counterclaims stated that if the District Court finds that there are any compulsory counterclaims involving actions that Plaintiff/Appellee engaged in before filing its Complaint and of which Defendant/Appellant had knowledge when he filed his Answer, the counterclaims were omitted by mistake, inadvertence or excusable neglect and therefore the interest of justice so requires that he be permitted to amend his Answer and Counterclaim, which is within the District Court's sound discretion to allow. Id.

On January 11, 2013, Plaintiff/Appellee Mariners Pac filed its Response to Defendant/Appellant Csanyi's Motion to Add Counterclaims. On March 23, 2013, Defendant/Appellant Csanyi filed his Reply in Support of his Motion to Add Counterclaims. On April 14, 2014, a hearing was held and on July 1, 2014, the Court entered a Stipulated Order Granting Defendant Andres Csanyi's Motion to Amend Answer and Add Counterclaims ("Order Allowing Counterclaims"). The Order Allowing Counterclaims was stipulated to by agreement with and approval of counsel for Plaintiff/Appellee Mariners Pac and specifically included the following language:

"Defendant/Counter-Claimant Andres Csanyi['s] Counterclaims . . . shall refer back to and be dated back to the Complaint filed by the Plaintiff/Counter-Defendant herein."

On September 15, 2014, Defendant/Appellant Andres Csanyi filed his Counterclaims and included a Jury Demand. The Counterclaims included Count I: Intentional and/or Negligent Misrepresentation, Count II: Home Loan Protection Act, Count III: Intentional and/or Negligent Spoliation. Count II was based on Plaintiff/Appellee's violations of the New Mexico Home Loan Protection Act, NMSA 1978 § 58-21A-11, due to the facts that Defendant/Appellant Csanyi had no regular income at the time that the loan was approved, the loan was a high-cost loan with an interest rate of approximately 9% over the prime rate, and Plaintiff/Appellee did not reasonably ensure that the loan was not a predatory loan when it took the file from the loan originator since, per the discovery, Plaintiff/Appellee does not have the original loan file.

On November 12, 2014, Plaintiff/Appellee Mariners Pac filed a Motion to Substitute Plaintiff, arguing that Nestor I LLC should be substituted because it had been assigned and now allegedly possesses the Note and is the legal owner of the mortgage being foreclosed in this case. The Court later granted this Motion although Defendant/Appellant argued against it.

On November 12, 2014, Plaintiff/Appellee Marines Pac filed a Motion to Dismiss Counterclaims of Defendant Andres Csanyi ("Motion to Dismiss"). The three bases of the Motion to Dismiss were: 1) All three Counterclaims are barred by the applicable statute of limitations; 2) All three Counterclaims were compulsory and should have been filed in response to Plaintiff's original Complaint; and 3) Even if the Court finds that any of the claims can continue, they are not properly brought against the current holder of the Note and Mortgage. Id.

As for the first basis, Plaintiff/Appellee argued that the allegations pertain to the mortgage loan in question, which originated on September 29, 2004. Id. Therefore, Plaintiff/Appellee erroneously argued that the three Counterclaims are time-barred by NMSA 1978 § 37-1-3, which states that actions founded upon a promissory note or other contract in writing must be brought within six years. Id. Plaintiff/Appellee also incorrectly argues that it does not stand in the shoes of the original Plaintiff. Id.

On November 20, 2014, Defendant/Appellant Csanyi filed his Response to Plaintiff/Appellee's Motion to Dismiss Counterclaims ["Response to Motion to Dismiss"]. This Response to Motion to Dismiss makes clear that Csanyi has rightfully *not* sued the original lender, as NMSA § 58-21A-11 (A) states that if a lender acquires a high cost loan actionable under the Home Loan Protection Act, that lender becomes liable under the Act. Id. It further explains that since the

initiation of the counterclaim, additional facts regarding the subject loan have surfaced to show that at the time the foreclosure suit was initiated Defendant/Appellant Csanyi was not in default, and therefore should be granted leave to amend his counterclaims. Id. Further, any arguments that the Counterclaims are barred by statutes of limitation clearly defy the District Court's July 1, 2014 Order granting the Motion to Amend, which states that Defendant/Appellant's Csanyi's Counterclaims "*shall refer back to and be dated back to the Complaint filed by Plaintiff/Counter-Defendant herein.*" Id.

The Answer referenced in the Order was filed on September 14, 2009, within five years of the loan origination. The Response to Motion to Dismiss pointed out that Plaintiff/Appellee's Motion to Dismiss defies the clear langue of the Home Loan Protection Act, NMSA § 58-21A-11, which provides that such an action may be brought "at any time during the term of a high-cost home loan, any defense, claim or counterclaim." Id. Finally, the Response to Motion to Dismiss showed that equitable tolling applies in claims for fraud and operates to suspend the statute of limitations in situations where circumstances beyond a plaintiff's control prevented the plaintiff from filing in a timely manner. Id. On January 2, 2015, Plaintiff/Counter-Defendant/Appellee Mariners Pac filed its Reply Brief to its Motion to Dismiss Counterclaims of Defendant Andres Csanyi.

Before the hearing on the Motion to Dismiss, other briefing took place. On December 15, 2014, Defendant/Appellant Csanyi filed a Motion to Compel and for Sanctions ("Motion to Compel"), regarding the woefully inadequate discovery responses of Plaintiff/Appellee Mariners Pac. Defendant/Appellant had sent a Good Faith Letter to counsel for Plaintiff/Appellee, and otherwise attempted multiple times to work out the issues and receive further discovery responses, which Plaintiff/Appellee kept claiming were on their way and would be delivered shortly.

As of the date that the Motion to Compel was filed, however, Plaintiff/Appellee had not served any further discovery responses on Defendant/Appellant. Therefore the Motion to Compel showed how the discovery responses of Plaintiff/Appellant contained many general, boilerplate objections routinely deemed to be improper by New Mexico Courts, instead of providing substantive responses. The Court of Appeals later granted in part Defendant/Appellant's Motion to Compel but also denied it in part, and significant discovery was still not produced.

Next, Defendant/Appellant Csanyi had served a second set of discovery requests along with his Counterclaims, due to new issues having arisen and also due to not having been able to receive complete discovery responses on the first set of discovery requests. On November 12, 2014, Plaintiff/Appellee Mariners Pac filed a Motion for Protective Order as to Defendant's Second Set of Interrogatories and

Requests for Production, arguing that it should not have to respond to the discovery until its subsequently-filed Motion to Dismiss Counterclaims is decided. On November 20, 2014, Defendant/Appellant filed his Response to Motion for Protective Order arguing that there was nothing preventing Plaintiff/Appellee Mariners Pac from responding to the discovery requests in accordance with the rules of civil procedure and that the motion for protective order "has no basis in law and is merely an attempt by a well-heeled litigant to exhaust the resources of the homeowner." On January 2, 2015, Plaintiff/Appellee Mariners Pac filed its Reply in support of its Motion for Protective Order.

On January 2, 2015, Defendant/Counter-Claimant/Appellant Csanyi filed a Motion for Leave to File Second Amended Counterclaim and Third-Party Complaint. He argued that new research and information had been discovered that necessitated additional Counterclaims and Third-Party Complaints against additional entities. The matter was fully briefed and argued, and the District Court ruled against Defendant/Appellant Csanyi's motion to file amended counterclaims but in favor of his motion to add a third party complaint. As further shown in the Statement of the Issues, this was an incorrect result.

Further, at the October 13, 2015 hearing of the final Order being appealed, the District Court inexplicitly ruled in favor of Plaintiff/Appellee's Motion to Dismiss the very same Counterclaims of Defendant/Appellant Csanyi's that it had previously

ruled (in its Order Granting Defendant/Appellant's Motion to Add Counterclaims) he could add. See Transcript of Proceedings of October 13, 2015 Hearing ("Transcript"). Its incorrect reasoning was that since Defendant/Appellant Csanyi had settled its claims with Nestor II, that once a foreclosure complaint was dismissed with prejudice, no counterclaims could survive.

This ruling is clearly not legally sound, as many cases include counterclaims that survive after an original claim is dismissed and, as further explained in the Statement of the Issues portion below, the Home Loan Protection Act and other of Defendant/Appellant's Counterclaims clearly allow for claims to be brought against entities who commit statutory violations, torts or breaches of contract. In fact, as argued during the October 13, 2015 Hearing, the very purpose of the Home Loan Protection Act is to allow the homeowner to recover attorneys' fees and costs in cases such as the one at hand, and to disallow an assignee of a predatory loan to "play hot potato" with a bad loan and dump it off on another entity, which would leave the homeowner without any recourse. See Transcript at p. 16, line 16 through p. 17, line 16 and p. 18, line 23 through p. 22, line 7. Therefore, the District Court's ruling at the October 13, 2015 was incorrect and should be overturned.

III. STANDARD OF REVIEW

An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed *de novo*. Montgomery v. Lomos Altos, Inc., 2007-

NMSC-2, ¶ 16, 141 N.M. 21, 150 P.3d 971. Summary judgment is only appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Id. Only where reasonable minds will not differ as to an issue of material fact, may the court properly grant summary judgment." Id.

A motion to dismiss "tests the legal sufficiency of the claim; that is, it tests 'the law of the claim, not the facts that support it.'" Saylor v. Valles, 2003-NMCA-037, ¶ 6, 133 N.M. 432 (internal citations omitted). The district court can only grant a motion to dismiss "if Plaintiffs are not entitled to recover under any theory of the facts alleged in their Complaint." Callahan v. New Mexico Federation of Teachers, 2006-NMSC-010, ¶ 4, 139 N.M. 201.

The standard of review to be applied to a district court's discovery order is for an abuse of discretion. Estate of Romero ex rel. Romero v. City of Santa Fe, 2006-NMSC-028, ¶ 6, 139 N.M. 671, 137 P. 3d 611.

IV. ISSUES / ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFF/APPELLEE MARINER PACS' MOTION TO DISMISS COUNTERCLAIMS.

The District Court erred by granting Plaintiff/Appellee Mariner Pac's Motion to Dismiss Counterclaims, when Defendant/Appellant Csanyi had not been able to pursue his Counterclaims until after receiving the discovery this Court ruled he was entitled to receive (and without his having received actual or complete discovery

responses) and discovering that Plaintiff/Appellee did not have the loan origination file that this Court ruled he was entitled to review, and after the District Court had granted his Motion to Add Counterclaims.

While Rule 1-013(A) NMRA mandates that a pleading shall state any "compulsory counterclaim," which is "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim...," the rule applicable to Defendant/Appellant Csanyi's Counterclaims is Rule 1-013(E) NMRA, which states that a "claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." Rule 1-013(B) NMRA, dealing with "Permissive Counterclaims," mandates that a "pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.").

This Court's Notice of Proposed Summary Judgment in the prior appeal was quite clear that Plaintiff should provide "discovery dealing with the making of the loan in the first place." See Not. of Prop.'d Summ. Disp. in prior appeal at p. 3; see also Memo. Opin. in prior appeal at p. 2 (Defendant Csanyi should be "permitted additional discovery" because "he was seeking to challenge the legality of the actions of the original lender.").

After remand, however, Plaintiff/Appellee Mariners Pac admitted that it does not have, nor can it produce, the discovery responses that this Court has stated that Defendant/Appellant Csanyi is entitled to receive. See Pl.'s Resp. to Def.'s Req. for Prod. [Ex. 3 to Cross-Mot. for Summary Judgment in the District Court case] at pp. 2-3, in which Plaintiff responds that it "cannot locate the Defendant's application for the Mortgage Note."

Despite filing a Motion to Compel, Defendant/Appellant Csanyi never received complete discovery to his first discovery requests and due to a pending Motion for Protective Order that Plaintiff/Appellee Mariners Pac filed and the District Court deemed moot when it granted the Order Dismissing Counterclaims, neither did he receive any discovery responses to his second set of discovery requests, which is contrary to this Court's prior ruling as well as to the Rules of Civil Procedure. Rule 1-026 NMRA.

To the extent that this Court would find that there are any compulsory counterclaims involving actions that Plaintiff/Appellee engaged in before filing its Complaint and of which Defendant Csanyi/Appellant had knowledge when he filed his Answer, the counterclaims were omitted by mistake, inadvertence or excusable neglect and therefore the interests of justice so require that he be permitted to amend his Answer and Counterclaim, which is within this Court's sound discretion to allow. Rule 1-013(F) NMRA ("Omitted Counterclaim")

("When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.").

Here, then, Defendant/Appellant Csanyi timely moved to amend his Counterclaims and in the event that he did not, the law allows for the delay. Equitable tolling is a non-statutory tolling theory which suspends a limitations period. Gathman-Matotan Architects and Planners, Inc. v. State Dep't of Fin. & Admin., 109 N.M. 492, 494, 787 P.2d 411, 413 (1990). Equitable tolling operates to suspend the statute of limitations in situations where circumstances beyond a plaintiff's control prevented the plaintiff from filing in a timely manner. Slusser v. Vantage Builders, Inc., 2013-NMCA-073, 306 P.3d 524, 528. Due diligence is required to be conducted to ensure that the loan had TILA disclosures as required under NMSA § 58-21A-11, and without proof that the loan was in default at the time it foreclosed.

If a lender acquires a high cost loan actionable under the Home Loan Protection Act, that lender becomes liable under the act. NMSA § 58-21A-11(A). ("Notwithstanding any other provision of law, any person who purchases or is otherwise assigned a high-cost home loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original creditor of the loan; provided that this subsection shall not apply if the

purchaser or assignee demonstrates by a preponderance of the evidence that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan.").

The Order granting the Motion to Amend Counterclaim entered by the Court on July 1, 2014 states that Defendant/Counter Claimant Andres Csanyi was permitted to file Counterclaims and that such Counterclaims "shall refer back to and be dated back to the Complaint filed by Plaintiff/Counter-Defendant herein"; the answer referenced in the Order was filed on September 14, 2009, within five years of the loan origination.

An action for violation of the Home Loan Protection Act may be brought "at any time during the term of a high-cost home loan, any defense, claim or counterclaim." NMSA § 58-21A-11(B). "Notwithstanding any other law to the contrary, a borrower acting only in an individual capacity may assert against the creditor or any subsequent holder or assignee of the home loan: (1) within six years of the closing of a high-cost home loan, a violation of the Home Loan Protection Act in connection with the loan as an original action . . .."). N.M. Stat. Ann. § 58-21A-11(B).

The Home Loan Protection Act is very specific that a borrower may assert against the creditor or any subsequent holder or assignee of the home loan:

> at any time during the term of a high-cost home loan, any defense, claim or counterclaim, or action to enjoin foreclosure or to preserve

> or obtain possession of the dwelling that secures the loan, including but not limited to a violation of the Home Loan Protection Act, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become sixty days in default.

N.M. Stat. Ann. § 58-21A- 11(B)(2).

Defendant/Appellant Csyani had actionable claims that should have survived dismissal. It is clear from the Supreme Court's ruling in Bank of New York v Romero et al., 2014-NMSC-007, 320 P.3d 1, 7, that Plaintiff/Appellant Mariners Pac did not possess standing to attempt the foreclosure of the Defendant/Appellee's property, when the note attached to the complaint contains no indorsement, the originator of the loan was Alternative Money Source LLC and upon review of the Complaint there is no assignment from Alternative Money Source to Cougar Associates LLC, who purportedly assigned the note to Jaguar Associated Group, LLC. Thus, Plaintiff's representation to the Court and to the Borrower that it possessed legal right of enforcement of the subject property to initiate the lawsuit is a violation of New Mexico's Unfair Trade Practices Act by "stating that a transaction involves rights, remedies or obligations that it does not involve." See N.M. Stat. Ann. § 57-12-2(D)(15).

B. THE DISTRICT COURT ERRED BY DENYING DEFENDANT/APPELLANT CSANYI'S MOTION TO AMEND COUNTERCLAIMS TO ADD ADDITIONAL COUNTERCLAIMS, ESPECIALLY WHEN MARINERS PAC NEVER HAD STANDING.

NMRA Rule 1-013(F) provides that when "a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may, by leave of court set up the counterclaim by amendment." "Under Rule 13(F) and pursuant to this holding, a counterclaiming party must demonstrate as a condition precedent for leave to amend that 'oversight, inadvertence or excusable neglect' caused the counterclaim to be left out of the original pleading, or that 'justice requires' its addition. Morrison v. Wyrsch, 1979-NMSC-093, 93 N.M. 556, 558, 603 P.2d 295, 297.

Due to the lack of New Mexico case law establishing guidance for excusable neglect, persuasive guidance can be found federally for the similar Federal Rule 13(F) concerning excusable neglect. "Rule 13(F) is interpreted liberally, but 'it should not be construed as an open-ended mechanism for avoiding the timely filing of counterclaims arising out of a single transaction." Preferred Meal Systems v. Save More Foods, Inc., 129 F.R.D. 11, 13 (D.D.C.1990) (quoting Unispec Development v. Harwood K. Smith & Partners, 124 F.R.D. 211, 213 (D.Ariz.1988)).

Some of the relevant considerations for determining whether justice requires that the court allow the omitted counterclaim include the type of counterclaim that is sought to be added, any prejudice to the opposing party and delay of the trial for additional discovery. See Spartan Grain & Mill Company

v. Ayers, 517 F.2d 214, 220-21 (5th Cir.1975). Technographics, Inc. v. Mercer Corp., 142 F.R.D. 429, 430 (M.D. Pa. 1992). (In the case at hand, there was no scheduling order in place, there was an approximately 5 month difference between the original filed Counterclaims and the new additional Counterclaims, the Plaintiff had not initiated any discovery in those five months and cannot in good faith claim the trial would be delayed or it would otherwise be prejudiced by adding the amendment).

A motion to amend is to be addressed to the sound discretion of the district court, and where a motion to amend comes later in the proceedings and seeks to materially change theories of recovery, the court may deny such motion if the proposed "amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation, the court may deem it prejudicial." Dominguez v. Dairyland Ins. Co., 1997-NMCA-065, 123 N.M. 448, 452, 942 P.2d 191, 195.

Although Rule 1-015(A) NMRA does not have a provision that states when a motion to amend pursuant to the rule is considered timely, New Mexico courts have discussed what is considered timely pursuant to the rule. In Roark v. Farmers Grp., Inc., 2007-NMCA-074, ¶17, 142 N.M. 59, 64, 162 P.3d 896, 901, this Court found that the motion to amend was untimely because it was made seven months

after a scheduling order was entered in the case, three months after the deadline for such motions established by the scheduling order, and one month after discovery had been completed; as Defendant/Appellant Csanyi pointed out in his District Court pleadings, Roark can easily be distinguished from that situation as no Scheduling Order had been entered by the Court and there was no trial scheduled to take place in this matter.

New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put Defendant/Counter-Claimant on notice of his claims. Rule 1-008(A) NMRA; Schmitz v. Smentowski, 109 N.M. 386, 389-90, 785 P.2d 726, (1990). A complaint, when viewed under Rule 1-008 NMRA, is required to be interpreted to allow each claim to be decided on the merits as opposed to technicalities. See Biebelle v. Norero, 85 N.M. 182,184, 510 P.2d 506 (1973).

An Unfair Practice Claim contains three elements: (1) a false or misleading representation, (2) knowingly made in the Defendant/Counter-Claimant's regular course of business, (3) of the type that would tend to deceive. See Lohman v. Daimler-Chrysler Corp., 142 N.M. 437, 439 (N.M. Ct. App. 2007) (BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP violated the FDCPA, 15 U.S.C. § 1692e(2), by misrepresenting the character, amount and legal status of the Defendants/Counterclaimants debt).

The Fair Debt Collection Practices Act [15 U.S.C. § 1692e] prohibits a debt collector from the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Wallace v Washington Mu. Bank, F.A., 683 F.3d 323, 324-28 (6th Cir. 2012); (Whether a debt collector's actions are false, deceptive, or misleading under § 1692e is based on whether the least sophisticated consumer would be misled by defendant's actions) (reversing the district court's decision to dismiss the homeowners' cause of action by finding that the homeowners stated a valid cause of action under the FDCPA when they alleged that the filing of foreclosure action by the law firm claiming ownership of the mortgage by Washington Mutual constituted a "false, deceptive or misleading representation" under the Act when the bank has not established receipt a transfer of the ownership documents because the homeowners alleged that they were misled by ownership of the loan when Washington Mutual filed for foreclosure even though it only obtained rights to the note thirty-four (34) days *after* it filed for foreclosure.").

Pursuant to New Mexico's Uniform Commercial Code (UCC), the plaintiff is required to demonstrate that it had standing to bring a foreclosure action at the initiation suit. See Bank of New York v. Romero, 2014-NMSC-007, ¶ 17, 320 P.3d 1, 5; see also NMSA 1978, § 55-3-301 (1992) (defining who is entitled to enforce a negotiable interest such as a note); see also NMSA 1978, § 55-3-104(a),

(b), (e) (1992) (identifying a promissory note as a negotiable instrument); ACLU of N.M. v. City of Albuquerque, 2008-NMSC-045, ¶ 9 n. 1, 144 N.M. 471, 188 P.3d 1222 (recognizing standing as a jurisdictional prerequisite for a statutory cause of action); Lujan v. Defenders of Wildlife, 504 U.S. 555, 570-71 n. 5, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("[S]tanding is to be determined as of the commencement of suit."); accord 55 Am.Jur.2d Mortgages § 584 (2009) ("A plaintiff has no foundation in law or fact to foreclose upon a mortgage in which the plaintiff has no legal or equitable interest."). The reason for this "requirement is simple: [o]ne who is not a party to a contract cannot maintain a suit upon it. If the entity was a successor in interest to a party on the contract, it was incumbent upon it to prove this to the court." Romero, 2014-NMSC-007, ¶ 17 (internal quotation marks and citation omitted).

Plaintiff/Appellee is a third party alleging it is entitled to enforce the subject note. Sec. § 55-3-301 of the UCC provides three ways in which a third party can enforce a negotiable instrument such as a note. See NMSA 1978 § 55-3-301. Plaintiff 's arguments rest on the fact that it has possession of the Defendant's note and that it is the holder, and the Court here only needs to consider only the first category of eligibility to enforce under Section 55-3-301: a person entitled to enforce an instrument means (i) the holder of the instrument. Id. Per Romero the note must be indorsed to the purported holder at the time of

the filing of the complaint. Not only did Plaintiff/Appellee Mariners Pac fail to obtain a proper indorsement prior substituting in for the Plaintiff and pursuing the foreclosure, but the Plaintiff/Appellee did not even have a loan file and has not produced the original note. For these reasons the Plaintiff/Appellee has categorically failed to establish that it actually holds the note or is otherwise entitled to foreclosure the debt it claims the Defendant/Appellant owes. In its bare legal argument the Plaintiff/Appellee claims it's the "owner" of the note and mortgage, yet it has completely failed to meet any documentary standard to prove ownership as necessitated by the above law.

Wrongful foreclosure is a cause of action in New Mexico. See, e.g., August 27, 2013 Letter Decision from Judge Brickhouse in Dollens v. Wells Fargo Bank, N.A., D-202-CV-201105295 (finding Wells Fargo committed a wrongful foreclosure after foreclosing upon the property of a decedent wherein the default came as a result of the death of the decedent and it was advised not to pursue foreclosure while disputed amounts were pending).

"A party ought to be afforded an opportunity to test its claim on the merits, and amendment should be allowed in the absence of a showing of dilatory faith, undue delay, bad motive on the part of the movant, repeated failure to cure deficiencies by previous amendments, undue prejudice to opposing party, or futility

of the amendment." Krieger v. Wilson Corp., 2006-NMCA-034, ¶ 24,139 N.M. 274, 281, 131 P.3d 661, 668.

Therefore, for all of the above reasons Defendant/Appellant Csanyi should have been allowed to amend his Counterclaim, his motion to compel should have been granted and his case should not have been dismissed. The district court incorrectly granted judgment in Plaintiff/Appellee Mariners Pac's favor. Its decision should be overturned.

V. ORAL ARGUMENT REQUESTED

Defendant/Appellant Csanyi respectfully request oral argument. He believes that it will be helpful to explain the lengthy history of this case, how the district court's rulings were contrary to this Court's prior ruling the last time this case was on appeal, and how case law and statute affects the ruling in this case. Oral argument can also help explain the facts and issues as presented herein.

IV. CONCLUSION / STATEMENT OF RELIEF SOUGHT

WHEREFORE, Defendant/Appellant Csanyi requests that the Court, for the reasons stated above, reverse the district court's ruling at the October 13, 2015 hearing, grant judgment in Defendant/Appellant Csanyi's favor or in the alternative, remand the case to the District Court with instructions to allow Defendant/Appellant Csanyi to amend his Answer to add Counterclaims and compel further discovery responses from Plaintiff/Appellee Mariners Pac.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing *Brief in Chief* was mailed and/or emailed on January 17, 2017 via USPS First Class Mail to the following counsel and interested persons:

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