ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARINERS PAC HOLDINGS, LLC,
Plaintiff-Appellee,
v.

Ct. App. No. 35,279
Bernalillo County
D-202-CV-2009-09702

ANDRES CSANYI,
Defendant-Appellant,

On Appeal from the Second Judicial District Court
Bernalillo County, New Mexico
The Honorable Valerie Huling

ANSWER BRIEF OF MARINERS PAC HOLDINGS, LLC, APPELLEE

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Statutes and Rules:

I. INTRODUCTION

Mariners Pac Holdings, LLC ("Mariners") respectfully submits this Answer Brief to show that the court should affirm the dismissal of Appellant Andres Csanyi's counterclaim ("Counterclaim") in its entirety.

II. SUMMARY OF THE PROCEEDINGS

A. Nature of the Case.

This case started as a residential foreclosure action filed by Jaguar Associated Group, LLC ("Jaguar") on August 19, 2009. [RP 1-30] Alternative Money Source, LLC was the original lender on the loan. [RP 7] The loan has been extinguished through settlement. [Brief-In-Chief, page 22; Motion to Dismiss, filed July 25, 2016.] This appeal only concerns Csanyi's counterclaims.

B. Course of Proceedings, Facts Relevant to Issues on Appeal.

During the course of the proceedings, the loan at issue was assigned three times with a resulting substitution of plaintiff each time: 1) by Jaguar to CS Vandelay Receivables Holdings, LLC [RP 49 (Motion, July 8, 2010); RP 55 (Order, September 8, 2010)]; 2) to Mariners [RP 150, (Motion, June 22, 2011), RP 161 (Order, July 15, 2011)]; and 3) to Nestor I, LLC [RP 463 (Motion, November 12, 2014), RP 674 (Order, October 23, 2015].

There was a previous appeal (which did not address the issues in this appeal) and a remand entered May 7, 2012. [RP 325] On December 3, 2012 – over three

years after the filing of the foreclosure complaint - Csanyi filed a motion for leave to amend his answer and to assert a counterclaim against Mariners. [RP 390] That motion was granted on July 1, 2014 [RP 446], and the counterclaim was filed on September 15, 2014. [RP 451] On November 12, 2014, Mariners filed its motion to dismiss the counterclaim at issue in this appeal. ("Motion to Dismiss"). [RP 468]

On February 22, 2015, Csanyi filed a Motion for Leave to File Second Amended Counterclaim and Third Party Complaint. [RP 571] The district court denied Csanyi's request to amend his counterclaim against Mariners by order entered on June 23, 2015. [RP 645-646].

The district court granted the motion to dismiss at a hearing on October 13, 2015. Csanyi's notice of appeal concerns the rulings in Judge Hulling's October 23, 2015, order ("Order") resulting from that hearing. [RP 677-681] The order dismissed the entirety of the counterclaim with prejudice. [RP 674-675] It also: 1) substituted Mariners' successor-in-interest, Nestor I, LLC ("Nestor"), as plaintiff in the matter; and 2) noted that Mariner's other motions pending at the time were denied as moot as a result of the dismissal with prejudice. [*Id.*] The order did not concern any motions filed by Csanyi. [*Id.*]

The counterclaim contained three causes of action. Csanyi abandoned Count I for "intentional and/or negligent misrepresentation" at the hearing on October 13, 2015. [Transcript of Proceedings received by the New Mexico Court of Appeals on

March 9, 2017, Tr. 4:11-25; Tr. 5:1-3]. Counts II and III, for violation of the Home Loan Protection Act ("HLPA") and "intentional and/or negligent spoliation," respectively, were the focus of the hearing. The spoliation claim is related to the Home Loan Protection Act claim. [Tr. 4:11-14] Accordingly, the dismissal of the HLPA claim necessarily disposed of the spoliation claim.

C. Issues on Appeal.

The HLPA issues presented herein are issues of first impression. At the time of the October 13, 2015, hearing, the motion to substitute Nestor as plaintiff was pending. [RP 463] At that time, Csanyi's loan was held by Nestor. [Tr. 7:3-7.] On the morning of the October 13 hearing, Nestor filed a Notice of Non-Appearance of Party in Interest. [RP 671-672] Therein, Nestor advised the court that it had "reached a pending settlement agreement in this matter with [Csanyi], and [that it] has no remaining interest in the proceedings," and therefore would not be appearing at the hearing set for later that day. Counsel for Csanyi confirmed the settlement of the foreclosure component of the case at the hearing later that day. [Tr. 6:17-20]

The issue addressed at the hearing was what effect the settlement and resulting extinguishment of the loan had on Csanyi's claims against Mariners under the HLPA. It is Mariner's position that the relevant language in the HLPA limits a claimant's recovery to either reduction or extinguishment of the liability remaining on the subject loan. Here, there was no liability remaining because the loan had been

extinguished. The district court agreed with that reading of the HLPA and properly dismissed the counterclaim in its entirety.

On July 28, 2016, this court issued its Second Notice of Proposed Summary Disposition. Therein, the court stated the issues on appeal and proposed to: 1) affirm the portion of the district court's order dismissing Appellant's counterclaim pertaining to recovery of those amounts that would be required to reduce or extinguish Csanyi's liability on the loan; and 2) proposed to reverse the portion of the district court's order dismissing Csanyi's counterclaim pertaining to recovery of attorney fees and costs under NMSA 1978, Section 58-21A-11(C) (2003). The September 6, 2016, Third Notice of Assignment to the General Calendar does not indicate which of those issues the court will be considering on appeal. Accordingly, Mariners addresses both issues below. Csanyi does not substantively address either of those issue in his Brief-In-Chief.

Instead, Csanyi challenges the district court's denial of his second motion to amend his counterclaim and raises other issues not relevant to this appeal. The denial of his motion to amend should be affirmed because the order denying the second motion to amend has not been appealed and it was not an abuse of discretion to deny the motion regardless.

III. ARGUMENT

A. The District Court Properly Dismissed the Counterclaim in its Entirety Because the Underlying Loan no Longer Exists.

Standard of Review: Statutory interpretation is an issue of law, which courts review *de novo*. *State ex rel. Children, Youth & Families Dep't v. Maurice H. (In re Grace H.),* 2014-NMSC-034, ¶ 65, 335 P.3d 746.

Contentions of Appellee: Mariners requests that the district court's decision on this issue be affirmed.

Preservation: The district court dismissed the counterclaim based on this argument. [Tr. 26:14-22; Tr. 27: 2-7; Tr. 31:14-25; and Tr. 32:1-2.] The Court of Appeals proposed to affirm the district court's ruling on this issue in its Second Notice of Proposed Summary Disposition filed on July 28, 2016. Appellant did not substantively address this issue in his Brief-In-Chief. All issues not argued in the briefs are deemed abandoned. *State v. Clark*, 1999-NMSC-035, ¶ 3, 128 N.M. 119, 990 P.2d 793, *citing State v. Aragon*, 1990-NMCA-001, 109 N.M. 632, 634, 788 P.2d 932, 934. Furthermore, Csanyi is not permitted to raise arguments for the first time in his reply brief. *See Kersey v. Hatch*, 2010-NMSC-020, ¶ 19, 148 N.M. 381, 237 P.3d 683.

Argument on Issue A

Csanyi argues that the district court erred by dismissing the counterclaims because he had not been able to pursue his counterclaim until after receiving

discovery. [Brief-In-Chief, p. 23] He also claims that he should have been able to pursue his counterclaim because the district court, in granting the original motion to amend to assert a counterclaim, allowed the claims to relate back to the date of the foreclosure complaint. [*Id.* at p. 27] He then argues that Mariners did not have standing to pursue the foreclosure. [*Id.* at p. 28] None of those arguments are relevant as to why the district court dismissed the counterclaim.

The portion of the Home Loan Protection Act at issue in this appeal is NMSA 1978, Section 58-21A-11(C), which provides:

> In an action, claim or counterclaim brought pursuant to Subsection B of this section [(claims by a borrower against a creditor or subsequent holder)], the borrower may recover only amounts required to reduce or extinguish the borrower's liability under the home loan plus amounts required to recover costs and reasonable attorney fees.

The plain language of a statute is the primary indicator of legislative intent and courts are to give the words used in a statute their ordinary meaning. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. The statute says that a borrower may only recover amounts required to reduce or extinguish liability on a home loan. It is Mariner's position that if there is no home loan, there can be no liability to reduce or extinguish and therefore no recovery of amounts that would otherwise be used to reduce or extinguish the liability.

As the district court summarized at the hearing: "You can't reduce it if it's not there. The whole purpose [of the section] is to reduce the amount that they owe

on the loan .... And if there's no loan that they owe, no judgment would matter." [Tr. 14:5-10] As a result, Judge Huling ruled that there was "nothing left on the counterclaim" and therefore correctly dismissed it with prejudice. [Tr. 26:14-22; Tr. 31:14-25; and Tr. 32:1-2]

At page 22 of his Brief-In-Chief, Csanyi mischaracterizes the district court's analysis of this issue. He states that the district court was wrong because the dismissal of a foreclosure complaint should not have resulted in a dismissal of the counterclaim. The district court's dismissal was not merely procedural, as suggested by Csanyi. It was substantive based on a correct analysis of the HLPA. The district court's analysis and conclusions should be affirmed. There can be no recovery of any amounts required to reduce or extinguish the borrower's liability under a home loan when that loan no longer exists.

B. A Claimant Under the HLPA Should not Have an Independent Claim for Attorney Fees and Costs When Recovery to Reduce or Extinguish a Home Loan is not Available Because the Loan no Longer Exists.

Standard of Review: Statutory interpretation is an issue of law, which courts review *de novo*. *Children, Youth & Families Dep't*, 2014 NMSC-34, ¶ *65*.

Contentions of Appellee: Mariners requests that the district court's decision on this issue be affirmed. The district court correctly dismissed the claim for attorney fees and costs as part of the dismissal of the substantive portion of the counterclaim.

Preservation: The district court dismissed the counterclaim based on this argument. The New Mexico Court of Appeals proposed to reverse the district court's ruling on this issue in its Second Notice of Proposed Summary Disposition filed on July 28, 2016. Appellant did not substantively address this issue in his Brief-in-Chief. All issues not argued in the briefs are deemed abandoned. *Clark*, 1999-NMSC-035, ¶ 3, *citing Aragon*, 1990-NMCA-001. Furthermore, Csanyi is not permitted to raise arguments for the first time in his reply brief. *See Kersey*, 2010-NMSC-020, ¶ 19.

Argument on Issue B

This court previously reasoned that Section 58-21A-11(C) allows recovery of two amounts "'those amounts required to reduce or extinguish the borrower's liability under the home loan' and those 'amounts required to recover costs and reasonable attorney's fees. '" [Second Notice Proposed Summary Disposition, p. 5.] Mariners respectfully submits that that reasoning would encourage litigation of claims for which there could be no award of any compensatory damages under the statutory framework of the HLPA because the loan at issue no longer exists.

I. Legislative Intent

Csanyi's only comment related to this Issue B in his Brief-in-Chief was "the very purpose of the [HLPA] is to allow the homeowner to recover attorney's fees and costs...and to disallow an assignee of a predatory loan to 'play hot potato'..."

[Brief-In-Chief, p. 22] The issue is not whether claims can be asserted against assignees of loans, or whether fees and costs are available to a successful claimant under the HLPA. The issue is whether a claimant under the HLPA has an independent claim for attorney fees and costs when recovery to reduce or extinguish a home loan is not available because the loan at issue no longer exists.

The legislature's intent in enacting the HLPA is reflected in Section 58-21A-2 of the HLPA, where the legislature found:

> A. abusive mortgage lending has become an increasing problem in New Mexico, exacerbating the loss of equity in homes and causing the number of foreclosures to increase in recent years;
>
> B. one of the most common forms of abusive lending is the making of loans that are equity-based, rather than income-based;
>
> C. the financing of points and fees in these loans provides immediate income to the originator and encourages creditors to repeatedly refinance home loans; and
>
> D. while the marketplace appears to operate effectively for conventional mortgages, too many homeowners find themselves victims of overreaching creditors who provide loans with high costs and terms that are unnecessary to secure repayment of the loan.

None of those findings supports Csanyi's statement about the alleged purpose of the HLPA with respect to subsequent holders of loans. Nor do any of those findings concern loans that no longer exist. Despite the focus on loan origination practices in the HLPA, and bad acts by original lenders, there are limitations on remedies available against both creditors and subsequent note holders in the HLPA. *See*

Section 58-21A-11. "[T]his subsection shall not apply if the purchaser or assignee demonstrates...that a reasonable person exercising reasonable due diligence could not determine that the mortgage was a high-cost home loan;" and Section 58-21A-11 (borrower's recovery limited to amounts to reduce or extinguish liability).

The plain language of a statute is the primary indicator of legislative intent. *High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5, citing *General Motors Acceptance Corp.*, 1985-NMSC-066. And courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." *Id. citing State ex rel. Klineline v. Blackhurst*, 1988-NMSC-015. Additionally, "where several sections of a statute are involved, they must be read together so that all parts are given effect." *Id. citing Methola v. County of Eddy*, 1980 NMSC 015, 95 N.M. 329, 333, 622 P.2d 234, 238.

II. Language in the HLPA does not allow attorney fees and costs as independent "damages"

Section 58-21A-11(C) of the HLPA, addressed above, controls claims against creditors or any subsequent holder or assignee of a home loan. *Id.* But Section 58-21A-11(C) does not grant the right to recover costs and attorney fees. Rather, the provision serves as a limitation on recovery permitted under Section 58-21A-9, which provides:

> A borrower *harmed* by a violation of the Home Loan Protection Act [58-21A-1 NMSA 1978] may bring a civil action to recover:

(1) actual damages, including consequential and incidental damages;

(2) statutory damages equal to two times the finance charge paid under the loan and forfeiture of the remaining interest under the loan;

(3) punitive damages, when the violation was malicious or reckless;

(4) costs and reasonable attorney fees; and

(5) injunctive, declaratory and such other equitable relief as the court deems appropriate in an action to enforce compliance with the Home Loan Protection Act [58-21A-1 NMSA 1978].

Section 58-21A-9 concerns in part "actual damages," "consequential damages," "incidental damages," "statutory damages," "punitive damages," and "costs and reasonable attorney fees." Only a borrower who is actually harmed by a violation of the HLPA is entitled to recover any remedy, i.e., his or her damages. Thus, prevailing on the cause of action by establishing a "harm" is a pre-requisite to the recovery of any damages based on the plain language of the statute.

The question is: Are attorney fees and costs in and of themselves "damages" under the HLPA or are they instead an additional remedy to claimants who prevail on establishing damages under the HLPA, as is typical under other statutory schemes? The statute does not identify "attorney's fees and costs" as "damages" and this court should not read into the statute language that is not there. *High Ridge Hinkle Joint Venture*, 1998-NMSC-050, ¶ 5 (internal quotation and citation omitted) ("The court will not read into a statute or ordinance language which is not there[.]").

An award of attorney fees and costs under the HLPA should be deemed

supplementary to relief on the merits, just as the award of fees and costs in other matters. *See* New Mexico's Unfair Practices Act, NMSA 1978, §57-12-10(C). ("The court shall award attorney fees and costs to the party... if the party prevails."). The burden of proving the existence of injury and resulting damages with reasonable certainty is on the plaintiff who is seeking compensatory damages. *Jacobs v. Meister*, 1989-NMCA-033, ¶ 37, 108 N.M. 488, 775 P.2d 254. As a practical matter, without a separate award of compensatory damages, a court would find it difficult to award attorney fees proportionate to damages, or to otherwise determine the reasonableness of attorney fees. *In re N.M. Indirect Purchasers Microsoft Corp. Antitrust Litig.,* 2007-NMCA-007, ¶ 76, 140 N.M. 879, 149 P.3d 976 ("[R]reasonableness is the ultimate question regarding an award of attorney fees.")

Furthermore, it would be unreasonable to pursue an HLPA claim, where there can be no recovery of actual damages, solely to recoup the very costs and fees associated with prosecuting the claim. *See e.g. In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013) ("While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages."). "[T]here must be a recovery of money, or at least something of value; otherwise, the attorney's fee award cannot be described as an 'addition' to the claimant's relief." *Haubold v. Med. Carbon Research Inst., LLC*, No. 03-11-00115-CV, 2014 Tex. App. LEXIS 2863, at *20

(App. Mar. 14, 2014).

The rationale adopted by Texas is persuasive and should be adopted here as it pertains to a claim for attorney fees and costs under the HLPA when the loan at issue no longer exists. The pertinent language of the HLPA provides "the borrower may recover only amounts required to reduce or extinguish the borrower's liability under the home loan *plus* amounts required to recover costs and reasonable attorney fees." (NMSA 1978, § 58-21A-11(C) (emphasis added). If there can be no recovery of anything of value (i.e., amounts to reduce or extinguish the loan), the availability of attorney fees and costs in the HLPA cannot reasonably be described as an addition to the claimant's relief: fees and costs would be the claimant's only relief.

In Texas, attorney fees are ordinarily not recoverable as actual damages in and of themselves: nor should they be under the HLPA. *Worldwide Asset Purchasing, LLC v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 570 (Tex. Ct. App. 2009). And a party is not entitled to attorney fees incident to recovery unless the party independently recovers actual damages. *Id.*; *see also Nalle Plastics Family Ltd. P'ship*, 406 S.W.2d at 173. ("While attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages."). Mariners respectfully submits that when recovery is not available under the HLPA to reduce or extinguish the home loan, because the loan no longer exists, there can be no recovery of attorney fees and costs.

C. The Court did not Abuse its Discretion in Denying the Motion to Amend.

Standard of Review: The denial of a motion to amend will be reversed only upon a showing of clear abuse of discretion. *Slide a Ride of Las Cruces, Inc. v. Citizens Bank of Las Cruces,* 1987-NMSC-018, ¶ 18, 105 N.M. 433, 733 P.2d 1316.

Contentions of Appellee: Mariners requests that the district court's decision on this issue be affirmed. It was within the district court's discretion to deny the motion to amend. Nor did Csanyi appeal the order denying the motion to amend.

Preservation: The order denying the motion to amend has not been appealed. [RP 677]

Argument on Issue C

Csanyi's argument about why he should be permitted to file another counterclaim, almost three years after he filed his original counterclaim and over seven years after he filed is original answer, assumes that Mariners is still a holder of the note at issue. [Brief-In-Chief, p. 28] That is not the case. Standing, as to Mariners, is not relevant in this case because Mariners is not pursuing the remedy of foreclosure or any other remedy against Csanyi.

The foreclosure complaint in this matter was filed on August 19, 2009. [RP 1-30] Csanyi answered the complaint on September 14, 2009. [RP 32] On December 3, 2012 (three years after his answer), Csanyi filed a motion for leave to amend his answer and to assert a counterclaim against Mariners. [RP 390] The

counterclaim was filed on September 15, 2014 (five years after his answer). [RP 451] On November 12, 2014, Mariners filed its motion to dismiss the counterclaim. [RP 468].

On February 22, 2015, after Mariners filed the motion to dismiss and over five years after the filing of Csanyi's original answer, Csanyi filed a Motion For Leave To File Second Amended Counterclaim And Third Party Complaint. [RP 571] The alleged facts underlying his proposed second amended complaint existed at the time of the filing of Csanyi's original answer in 2009. Almost six years elapsed between Csanyi's original answer (September 14, 2009) and Csanyi's second request to amend (February 22, 2015). A motion to amend filed only two years after an original answer has been considered untimely. *Slide a Ride of Las Cruces, Inc.*, 1987-NMSC-018, ¶ 17.

Csanyi does not explain why justice would require the allowance of his second amendment so long after the filing of his original responsive pleading and after the foreclosure has been settled and dismissed, or in what manner the trial court abused its discretion in denying the request under the circumstances. "Simply alleging an abuse of discretion does not make it so." *Id.* at¶ 18. The district court properly denied Csanyi's request to amend his counterclaim against Mariners.

IV. CONCLUSION

The court should affirm the dismissal of Csanyi's counterclaim in its entirety with prejudice and affirm the denial of his second motion to amend.

V. REQUEST FOR ORAL ARGUMENT

Mariners requests oral argument in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2017, a true and correct copy of the foregoing was filed with the New Mexico Court of Appeals and delivered to the following party by First Class United States Mail and electronic mail:

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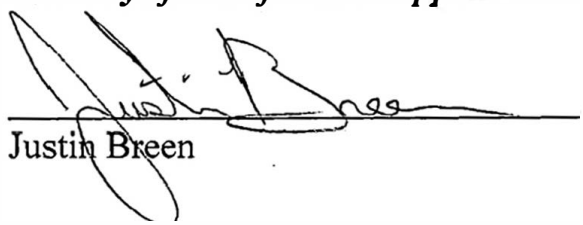

Justin Breen

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