

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

[plaintiff]RICHARD AND SUSAN CONSUMER,
Plaintiffs,

[vs]v.

[defendant]WESTERN MUTUAL BANK, FA dba WESTERN MUTUAL MORTGAGE
dba WESTERN MUTUAL; PROFESSIONAL FORECLOSURE SERVICES
Defendants.

FIRST AMENDED COMPLAINT

Come now the plaintiffs, Richard and Susan Consumer, by and through their attorneys of record, and for their First Amended Complaint against the defendants hereby complain and allege as follows:

I. PARTIES

1.1 Richard and Susan Consumer are residents of King County, Washington.

1.2 Western Mutual Bank, FA (hereafter “WMU”) does business in the state of Washington and at relevant times serviced a loan acquired by Western Mutual and ultimately by the Federal National Mortgage Association.

1.3 Professional Foreclosure Services is believed to be a Washington corporation operated from California and is in the business of conducting non-judicial foreclosures in King County, Washington.

II. FACTUAL ALLEGATIONS AND FIRST CLAIM: BREACH OF CONTRACT

2.1 On or about January 1999 the plaintiffs purchased a condominium and obtained a mortgage loan from the Lee National Mortgage Company, Bellevue, Washington in the approximate amount \$165,000.00. This mortgage loan was eventually transferred for servicing to Franklin Mortgage Company (hereafter “Franklin”). On or about June, 2001, WMU acquired Franklin and began servicing plaintiffs’ mortgage loan. The exact monthly payment varied according to property taxes and other fees paid but a typical monthly payment was \$1,295.36 including reserves for the payment of taxes and insurance.

2.2 Beginning in February 1999 and continuing until July of 2001 the plaintiffs made timely payments to Lee National Mortgage until such time as the loan was assigned to Franklin Mortgage and, thereafter, payments were made to Franklin Mortgage.

2.3 Around June of 2001 the plaintiffs were notified that Western Mutual had acquired Franklin Mortgage and payments were to be made to Western Mutual prospectively.

2.4 On or about August 1, 2001 the plaintiffs, through their personal bank, Pacific Bank, initiated an automatic bill payment service to automatically pay the Western Mutual home loan payment, which commenced on August 14, 2001. Initially, the payments were scheduled to be sent on or about the 14th day of each month in accordance with the loan agreement. Between August 14, 2001, and April 10, 2002 Pacific Bank sent automatic payments to Western Mutual for the amount of the full payment each and every month in a timely fashion.

2.5 The automatic payments were received by Western Mutual within a few days of the transmission by Pacific Bank, but not credited to their account.

2.6 Around October of 2001 the monthly statements from Western Mutual reflected that payments were not being credited. The Consumers promptly checked with Pacific Bank to ensure that the payments had been sent and then supplied the requested information about the transmission and receipt of the payments to Western Mutual. The Consumers had Pacific Bank produce canceled checks from these payments which were transmitted to Western Mutual whenever requested. In November, Western Mutual, without explanation, sent back the September payment to Pacific Bank which credited it to the Consumers' Pacific Bank account.

2.7 On December 12, 2001 Western Mutual wrote to the Consumers indicating no payments had been received since October 1. Western Mutual assessed escrow expenses and delinquency charges and threatened to foreclose on the property.

2.8 The Consumers immediately responded to this, again supplying canceled checks and proof that Western Mutual had in fact received their payments.

2.9 In early 2002, despite repeated communication from the Consumers and repeated proof of payments made, Western Mutual hired Professional Foreclosure Services to commence foreclosure. On March 6, 2002, a Notice of Default was issued by Professional Foreclosure Services and approximately 30 days later a Notice of Trustee Sale scheduling a non-judicial foreclosure for July 19, 2002, was transmitted to the Consumers.

3.0 The Consumers continued to send letters and make phone calls to Western Mutual to no avail. As a result, in April 2002 adverse credit consequences occurred to the Consumers including a cancellation of a Pacific Bank credit line and reduction of an American Express credit line.

3.1 Western Mutual and/or Professional Foreclosure Services has transmitted to various credit reporting agencies, including Equifax, false adverse information about the Consumers, causing their credit to be impaired.

3.2 In April of 2002 Western Mutual returned some of the payments and refused to take further payments made by the Consumers.

3.3 Beginning May 2002, the Consumers have made payments directly to Western Mutual payable to a bank account in a Western Mutual bank to show their good faith and intent to comply with their loan obligations.

3.4 The Consumers have contacted Professional Foreclosure Services to dispute the debt and request verification of the debt and have received no information whatsoever in violation of the Fair Debt Collection Practices Act and the Washington Collection Agency Act, as well as in breach of the duty of Good Faith and Fair Dealing implicit in contracts.

III. SECOND CLAIM: WRONGFUL FORECLOSURE

3.1 As a proximate result of the negligent or reckless conduct of Western Mutual and Professional Foreclosure Services the Consumers' credit has been impaired and they are threatened with the eminent loss of their property despite the fact that they have made all payments in accordance with the loan agreement.

3.2 Unless enjoined, the plaintiffs will suffer irreparable harm and will not have an adequate remedy at law.

3.3 As a proximate result of the negligent actions of both defendants, the Consumers have suffered consequential damage and will continue to suffer additional damage in an amount to be fully proved at the time of trial.

IV. THIRD CLAIM: SLANDER OF TITLE

4.1 The defendants have caused to be recorded various documents including a Notice of Trustee Sale which has impaired the Consumers' title which constitutes slander of title and the Consumers should be awarded resulting damages to be fully proved at the time of trial.

V. FOURTH CLAIM: VIOLATION OF THE CONSUMER PROTECTION ACT

5.1 The defendants have engaged in a pattern of unfair practices in violation of the Washington Consumer Protection Act, RCW 19.86 et seq. entitling the Consumers to damages, treble damages and reasonable attorney fees and costs pursuant to the statute.

VI. FIFTH CLAIM: SLANDER OF CREDIT

6.1 The Consumers allege that the actions and inactions of the defendants have impaired their credit causing them to lose the ability to have good credit entitling them to damages, including statutory punitive damages pursuant to state and federal law, all to be proved at the time of trial.

VII. INFLICTION OF EMOTIONAL DISTRESS

7.1 The defendants have intentionally or negligently taken actions which have caused the plaintiffs severe emotional distress.

Wherefore, having set forth various causes of action against the defendants, the plaintiffs pray for the following relief:

1. That this Court enjoin the foreclosure presently scheduled for July 19, 2002, conditioned upon the Consumers making payments as they have in the past in a timely fashion;
2. That the actions of both defendants be determined to be unfair and deceptive business practices in violation of RCW 19.86;
3. That the Consumers be awarded punitive damages provided for in RCW 19.86 including costs and attorney fees;
4. That the Consumers be awarded consequential damages to be fully proved at the time of trial;
5. That the Consumers be awarded their fees and costs pursuant to the written loan agreements which bind the defendants; and
6. That the Court grant any other relief that may be just or equitable.

Attorney for Consumers

[fnn]@1@ [Editor's Note: Citations throughout answer as in original.]

[fnn]@2@ [Editor's Note: Citations throughout discovery and requests for admissions as in original.]

[fnn]@3@ [Editor's Note: Citations throughout complaint as in original.]

[fnn]@4@ [Editor's Note: Citations throughout memorandum as in original.]

[fnn]@5@ Further, the failure of Dutch Bank to rescind the transaction within 20 days of receipt of the notice of rescission mailed to it on behalf of Plaintiff constitutes an additional violation of the Act and Regulation Z. *See, e.g.,* Gerasta v. Hibernia Nat'l Bank, 575 F.2d 580 (5th Cir. 1978); Abel v. Knickerbocker Realty Co., 846 F. Supp. 445 (D. Md. 1994); Gill v. Mid-Penn Consumer Discount, 671 F. Supp. 1021 (E.D. Pa. 1987, *aff'd mem.*, 853 F.2d 917 (3d Cir. 1988); Elliott v. ITT Corp. 764 F. Supp. 102 (N.D. Ill. 1991); Williams v. Gelt Fin. Corp. (*In re* Williams), 232 B.R. 629 (Bankr. E.D. Pa. 1999), *aff'd*, 237 B.R. 590 (E.D. Pa. 1999). Since, however, this additional violation entitles plaintiff to damages but not injunctive relief, the issue need not be decided by this court at this time.

[fnn]@6@ [Editor's Note: Citations throughout discovery as in original.]

[fnn]@7@ [Editor's Note: Citations throughout discovery as in original.]

[fnn]@8@ [Editor's Note: Citations throughout complaint as in original.]

[fnn]@9@ [Editor's Note: Citations throughout complaint as in original.]

[fnn]@10@ The Motion is filed on behalf of Defendants Hanniford & Cole, Inc. ("Hanniford & Cole"), T.J. Cox ("Cox"), George Handy ("Handy"), Steven Moore, LLC ("Steven Moore"), Warren Investment Company II, LLC ("Warren II), and Warren Investment Company I, LLC ("Warren I").

[fnn]@11@ [Editor's Note: Citations throughout response to motion to dismiss complaint as in original.]

[fnn]@12@ As alleged in the First Amended Complaint, Warren II took title to the Home, but Warren I executed the \$368,000 mortgage.

[fnn]@13@ In the unlikely event that the court were to find that this lack of consideration were not significant enough, and if that finding led to a determination that the equitable mortgage claim (or one of the Smiths' other claims) should be dismissed, the Smiths would seek leave to replead on this point. Recently, a real estate broker performed a BPO (broker's price opinion) in which she estimated that the value of the home was at least \$659,000. If need be, the Smiths could plead this fact in a Second Amended Complaint.

[fnn]@14@ This would apply, for example, to Defendants' argument, purportedly based on their Exhibit B, that the Smiths "negotiated the sale price of their home up from \$180,000 to \$200,000 to the ultimate sales price of \$230,000." Motion, p. 7.

[fnn]@15@ [Editor's Note: Citations throughout request for discovery as in original.]

[fnn]@16@ [Editor's Note: Citations throughout motion for consolidation as in original.]

[fnn]@17@ [Editor's Note: Citations throughout response to motion for use and occupancy as in original.]