

Judge hits bank with record judgment for wrongful foreclosure

By: Allyssa D. Dudley allyssa.dudley@molawyersmedia.com February 6, 2015

After nearly a year of discovery disputes, a Missouri judge threw up his hands and threw out all of the defense pleadings in a wrongful foreclosure case. As a result, the loan servicer, Wells Fargo, now owes the homeowners more than \$3.25 million.

Attorney Gregory Leyh, who represented the plaintiffs, said it may be the largest judgment in a wrongful foreclosure in Missouri's history.

The case might give other judges an example of how to handle similar cases, Leyh said. He also said the case illustrates the need for "sunshine" of discovery. Had Wells Fargo possessed the evidence to support foreclosure, Leyh alleged, it would have provided it in discovery.

For Leyh, such problematic recordkeeping prevents the case from being a one-off situation where a judge smacked down a bank's shenanigans after a decidedly one-sided bench trial.

"If you cheat, you don't get to play 'what if,'" Leyh said. "You don't get to say, 'but for our cheating, we would have won.'"

Wells Fargo said that the company is committed to keeping customers in their homes. Its spokesman, Tom Goyda, said there is "a lot more to this case than the decision reflects."

"[W]e have strong arguments to appeal the judgment and the unwarranted damages that were awarded," Goyda said in an emailed statement. He would not elaborate as to what those arguments would be.

The judgment was in the case of David and Crystal Holm, a Clinton County couple who, following a storm in 2008, fell behind on their mortgage payments. The couple attempted to bring their mortgage up to date but were foreclosed upon anyway. Their home was bought out of foreclosure by Freddie Mac, which also owned the loan prior to foreclosure.

Kozeny & McCubbin, the successor trustee and firm that represented Wells Fargo and Freddie Mac, provided the Holms with a copy of their original promissory note as proof of the amount of the debt owed, according to the judgment. However, the note was not signed by Wells Fargo or Freddie Mac.

"The undisputed facts are neither Wells Fargo nor Freddie Mac had the right to enforce the note rendering the foreclosure sale void," Clinton County Circuit Judge R. Brent Elliott wrote in his Jan. 26 judgment.

There were 29 discovery disputes pending as the January trial neared. According to findings of fact filed by a special master in the case, Wells Fargo still needed to produce items such as a loan record, emails regarding the handling of the loan, letter logs, and notes regarding the sale of the loan. In particular, the parties sparred over the whereabouts of the loan's servicing agreement.

According to transcripts from an October hearing, defense attorney Janet McKillip of Kozeny & McCubbin told the plaintiffs that the servicing agreement, which determines how Freddie Mac will conduct business with a borrower, was available on a public website but not in hard copy. Leyh responded that he and his paralegal had tried two different websites provided by the defense in an attempt to locate the servicing agreement, but it could not be found.

A representative for Freddie Mac told Leyh during a later deposition that the servicing agreement was in fact not available on the public website, but by hard copy only, according to Leyh's December filing of request for sanctions. McKillip did not return request for comment.

Elliott, who had earlier ordered the bank to produce the documents, struck Wells Fargo and Freddie Mac's pleadings, which barred the defense from presenting evidence during a two-day bench trial that commenced on Jan. 14.

"What's a judge supposed to do?" Leyh said. "It would be extremely unfair to let them get in evidence that wasn't in discovery."

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With only Leyh presenting evidence, it is not surprising that the judge awarded the Holms more than \$95,000 for the amount of the plaintiff's lost property value and repairs that they made during the foreclosure, \$200,000 in damages for emotional stress and \$2.95 million in punitive damages against Wells Fargo. In his judgment, Elliott said the plaintiffs had spent more than six years "living in limbo."

"The Court finds Defendant Wells Fargo's attitude toward Plaintiffs unfathomable," Elliott wrote. "The incredible effort made by Plaintiffs to keep the property they so clearly love should have been commended, not condemned."

Freddie Mac was found not to have title to Holms property, but it does not owe damages. It has since dropped an unlawful detainer suit filed against the family last year.

After nearly six and a half years, the Holms own their home again. It has been a long road for them, according to their attorney. In 2008, David Holm was sitting in the parking lot of a Liberty gas station when Wells Fargo told him for about \$10,000, he could save his home. Holm said he confirmed the amount with Kozeny & McCubbin, according to the judgment.

Holm sent a cashier's check for \$10,306 to the address he was told to, Leyh said, but the next day, his home was sold in a foreclosure sale, and he was not notified until a week later.

Elliott's order said Wells Fargo's decision to seek the foreclosure "arose from its own financial incentives." Citing testimony from the trial, he wrote that the bank was able to seek reimbursement of its fees at the foreclosure sale.

"In other words, in this case, a powerful financial company exerted its will over a financially distressed family in Clinton County, Missouri," Elliott wrote. "The result is predictable. Plaintiffs were severely damaged; Wells Fargo took its money and moved on, with complete disregard to the human damage left in its wake."

Leyh said that approach is counter to Freddie Mac's service agreement, which says the servicer and the trustee should do whatever it takes to keep the family in the home.

"It is a reprehensible fact, and not unique to this case," Leyh said. "They make more money foreclosing on people."

Leyh said he didn't have any idea as to what the grounds for appeal would be. Elliott's was a "model opinion," given what the judge was facing, he said.

\$3.25 million judgment

Wrongful foreclosure

Venue: Clinton County Circuit Court

Case number/date: 08CN-CV00944/Jan. 26, 2015

Judge: R. Brent Elliott

Plaintiffs' expert: Kurt V. Krueger, John Ward Economics, Prairie Village, Kansas (damages)

Allocation of fault: Wells Fargo to pay \$3,255,035.30 in damages; Freddie Mac to quiet title to home

Last pretrial demand: \$1 million and title to property

Caption: David and Crystal Holm v. Wells Fargo Home Mortgage Inc. and Federal Home Loan Mortgage Corporation (Freddie Mac)

Plaintiffs' attorney: Gregory Leyh, Gregory Leyh PC, Gladstone

Defendants' attorneys: Janet McKillip, Martin Blanchard and Andrew Jones, Kozeny & McCubbin, Fairway, Kansas

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