

May 7 2014

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

SYNOPSIS OF THE CASE

2014 MT 117, DA 13-0241: ABRAHAM B. MORROW and BETTY JEAN MORROW, Plaintiffs and Appellants, v. **BANK OF AMERICA, N.A., BAC HOME LOANS SERVICING, LP, fka COUNTRYWIDE HOMELOANS SERVICING, LP**, Defendants and Appellees.¹

The Montana Supreme Court allowed homeowners Abraham B. and Betty Jean Morrow to proceed with their lawsuit against their mortgage servicer, Bank of America. The Morrows claim Bank of America promised them over the phone that it would reduce the payments on their mortgage under the federal Home Affordable Modification Program (HAMP). The Morrows say the Bank promised to reduce their interest rate and extend the term of their loan from 15 years to 40 years. The Morrows say they made the lowered payments for over a year, only to have Bank of America reject their application for a modification and begin foreclosing on their home. Bank of America denies promising the Morrows a modification, and says they were ineligible for the program because the home was not their primary residence.

The Morrows obtained an injunction stopping the foreclosure and sued Bank of America for breach of contract, fraud, negligence, negligent misrepresentation, and violations of the Montana Consumer Protection Act (MCPA). The Lewis and Clark County District Court granted summary judgment to Bank of America. The District Court said the Morrows could not legally enforce an oral agreement to modify their loan, because it had to be in writing. The District Court also said the Morrows could not use fraud and consumer protection claims as an attempt to enforce the oral agreement. Finally, the District Court said the Bank was not negligent, because it was not the Morrows' financial adviser and owed them no legal duty.

The Supreme Court affirmed the District Court's decision on the breach of contract claim. The Morrows' loan documents were written agreements and could only be modified in writing or by proof that the oral agreement had already been fully performed. The oral agreement also would have extended the deed of trust that secured the loan for an additional 25 years. An extension of a deed of trust must be made in writing and placed in the county land records.

The Supreme Court reversed summary judgment on the Morrows' negligence claim. The Supreme Court held that, assuming the facts alleged by the Morrows to be

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true, Bank of America owed a fiduciary duty to the Morrows because it had actively advised them during the modification process. Bank of America was not required to modify the Morrows' loan, but once it accepted their application, it had a duty to process the application promptly and give them accurate information. Because it told the Morrows their application would be processed under HAMP, the Bank also had a duty to follow federal guidelines. The Morrows' allegations raised questions as to whether Bank of America had fulfilled those duties that should be resolved at a trial.

The Supreme Court also reversed summary judgment on the Morrows' claims of fraud, constructive fraud, and negligent misrepresentation. The Supreme Court held that although an oral agreement may be unenforceable as a contract, the statements can still be used as evidence for other purposes. The Court held that the rule requiring written contracts in certain cases, called the Statute of Frauds, exists to prevent fraud and should not be used as a defense by those who have allegedly committed fraud. The Morrows allege Bank of America committed fraud by telling them to intentionally miss a payment to be considered for a modification. They claim the Bank told them they had been approved for a modification when they had not, and that they should ignore notices of default.

Finally, the Supreme Court reversed summary judgment on the Morrows' MCPA claim. The Morrows claim the Bank gave them conflicting information about the status of their loan and the amount they were required to pay. The Morrows claim the Bank instructed them to make reduced payments without telling them that doing so would make them delinquent on their mortgage. The Bank took ten months to reach a decision on the Morrows' application for a modification, instead of the three months standard under HAMP. The Supreme Court held that these allegations, if proven to be true, represent practices substantially injurious to Montana consumers.

The Morrows' claims of negligence, negligent misrepresentation, actual and constructive fraud, and violations of the MCPA will now be returned to the District Court for further proceedings.

Justice McKinnon, in a separate opinion joined by Justice Rice, partially concurred and dissented from the Supreme Court's decision. The two Justices concurred with the Supreme Court's conclusions that summary judgment in favor of the Bank was proper on the Morrows' contract claims, and that summary judgment was improper on the Morrows' negligence, negligent misrepresentation, and MCPA claims. They dissented, however, from the Supreme Court's conclusion that the Morrows have alleged facts which would support a claim of constructive fraud. The dissenting Justices

maintain that the Supreme Court has not heretofore recognized a common law claim of constructive fraud and that the statutory basis for constructive fraud, upon which the Supreme Court relies in approving the Morrows' constructive fraud claim, has been neither pleaded nor argued by the parties. Moreover, to the extent a claim of constructive fraud could be maintained by the Morrows, it would require a showing that the Bank gained an unfair advantage from its allegedly false statements—an allegation which also has been neither pleaded nor argued by the Morrows.

Finally, although Justices McKinnon and Rice agree that the Morrows may pursue a claim of actual fraud, such a claim requires a showing of "intent to deceive." Since the Bank cannot be found to have made the allegedly false statements both intentionally and negligently, either the claim of actual fraud or the claim of negligent misrepresentation must fail upon a trier of fact's finding of the Bank's intent. The partial concurrence and dissent additionally addressed the procedures for determining on remand whether the facts support a finding of a fiduciary duty owed by the Bank to the Morrows on their negligence claim.