STATE OF MINNESOTA

COUNTY OF ANOKA

DISTRICT COURT

TENTH JUDICIAL DISTRICT

Sandra L. Gustafson,

Plaintiff,

vs.

Brian J. Smith,
Midwest Equity Consultants, Inc.,
Bradley R. Pederson,
Amy L. Pederson,
Lake Elmo Bank

Defendants.

Case File No. 02-CV-09-682
Case Type: Civil, Quiet Title

PLAINTIFF'S REPLY MEMORANDUM TO THE PEDERSONS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Nothing in the Pedersons' response memorandum identifies issues of material fact or otherwise creates a basis to deny Plaintiff's motion for partial summary judgment. Plaintiff moved for partial summary judgment for violations of Minnesota Statute 325N, Minnesota's anti-equity stripping law. The contract speaks for itself, and it is statutorily deficient on its face. The Pedersons opposed this motion, claiming that a purported "agency relationship" with the foreclosure consultant absolved the Pedersons of their statutory duties. While it is a novel and creative defense, it is legally wrong. As a matter of law, there was no agency relationship. And, even if there was an agency relationship, this relationship does not relieve the Pedersons from complying with a state law that clearly applies to them and creates statutory duties for them to ensure certain provisions are in the contract that they sign. The Plaintiff respectfully requests this Court grant her Motion for Partial Summary Judgment.

I. THE PEDERSONS CONCEDE THAT THEY ARE "FORECLOSURE PURCHASERS" AND THAT THEIR CONTRACT DOES NOT COMPLY WITH MINNESOTA LAW.

Nowhere in the Pedersons' response to the Plaintiff's motion for partial summary judgment do they challenge the fact that they are "foreclosure purchasers" and that the underlying contract in this matter is legally deficient. Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56 (2008). Where affidavits are submitted in support of a motion for summary judgment, the nonmoving party cannot simply rely on general statements in a complaint; the "adverse party must present specific facts showing a genuine issue for trial . . ." *Ahlm v. Rooney,* 143 N.W.2d 65, 68 (Minn. 1966).

In support of its motion, the Plaintiff needed to establish three things. First, that this was a "foreclosure reconveyance" as defined by Minn. Stat. § 325N.10. Second, that Mr. and Mrs. Pederson were "foreclosure purchasers" as defined by Minn. Stat. § 325N.10, and, third, that the foreclosure contract did not contain the requisite disclosures as proscribed by Minn. Stat. § 325N.10 to 325N.15. The Pedersons did not contest any of the underlying facts upon which the motion was brought and how these provisions were applied to the undisputed facts in this case. The Pedersons, in essence, concede that this was a foreclosure reconveyance, that they are foreclosure purchasers, and that the contract is legally deficient. There is no factual dispute, and, therefore, Plaintiff's motion for partial summary judgment should be granted.

II. THE PEDERSONS "AGENCY" DEFENSE IS WITHOUT MERIT.

The Pedersons generally assert that somehow an agency relationship absolves them of liability, which is a legal theory that is not supported by either the statute or caselaw. This assertion makes little sense, and it is irrelevant to the Pedersons' liability for violations of

Minnesota Statute Sec. 325N. There is no agency relationship, and even if there was an agency relationship between any of the parties, the Pedersons are still liable to Plaintiff. The statute creates a legal remedy only for Plaintiff, and Plaintiff has properly moved for partial summary judgment to assert that legal remedy against the foreclosure purchaser.

a. An Agency Relationship Does Not Absolve The Pedersons From Complying With State Law.

The Pedersons' responsibility to comply with Minnesota law is clear. Minnesota statute expressly states that a foreclosure purchaser is to act in compliance with the foreclosure reconveyance laws. MINN. STAT. § 325N (2007). There are no exceptions, loopholes, or gray area. *Id.* The Pedersons, as foreclosure purchasers, are liable because the documents do not contain the statutorily required disclosures. *See Memorandum in Opposition to Plaintiff's Motion For Partial Summary Judgment*, Exhibit 1, at 19-20. Under the law, the Pedersons are the party liable to the Plaintiff for these deficiencies.

The Pedersons contend that because there was an agency relationship between the Plaintiff, Midwest Equity and Smith, the Pedersons' failure to comply with state law is excused. If this legal theory was taken to its logical conclusion, a bizarre legal triangle would result. In essence, the Pedersons are asking the Court to find the Plaintiff solely and totally responsible for drafting and making sure all the property documents comport to state law. But, the law that the Pedersons failed to abide by was drafted specifically to protect homeowners in foreclosure, such as the Plaintiff. The statutory duty to comply with state law is the duty of the foreclosure purchaser, which is the Pedersons'.

Minnesota Statue 325N is nestled within Minnesota Statutes Chapter 325 – Minnesota's consumer protection laws. These chapters regulate everything from mortgage foreclosures, pawn

shops, to solicitation of sales. These chapters recognize that vulnerable Minnesotans can and are taken advantage of, especially in times of crisis. These chapters specifically mandate certain conduct by those dealing with vulnerable Minnesotans. 325N is no exception. 325N clearly states how a foreclosure consultant and a foreclosure purchaser shall act during a foreclosure reconveyance. It does not elevate the foreclosed homeowner to a status whereby that person is responsible for all parties' actions. Indeed, there is no section regulating conduct by a foreclosed homeowner, only the foreclosure consultants and foreclosure purchasers have legal responsibilities.

The Pedersons claim that because of the "business expediency" doctrine, they were reasonable in relying on Midwest Equity and Smith's statements. The business expediency theory states that "third persons should be given reasonable protection in dealing with agents." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982). The citing case gave protection to third parties, in part, because they were being defrauded by an agent. *Id.* Here, the Pedersons are not alleging they were defrauded. Furthermore, this seldom-used theory (not yet used in Minnesota) does not state that a party is excused from complying with statute.

In sum, even if there is an agency relationship, and even if the Pedersons were reasonable in their reliance on MWE and Smith, they – like every other Minnesotan – must abide by state law. The Pedersons offer no case law to support any other conclusion.

b. The Plaintiff's Relationship With Defendant Brian Smith And Defendant Midwest Equity Was Not An Agency Relationship.

As a matter of law, no agency relationship exists between the Plaintiff and MWE. "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement

3d of Agency, § 1.01 (2006). "But there is no agency without persuasive evidence to establish the elements of an agency relationship, which are: (1) a manifestation of mutual consent between a principal and an agent such that the agent will act on the principal's behalf; and (2) the right of control by the principal over the agent." *Eischen Cabinet Co. v. New Tradition Homes, Inc.*, 2006 Minn. App. Unpub. LEXIS 1332 (Minn. Ct. App. 2006) (citations omitted). The Pedersons assert no factual basis, either real or imagined, that would support such a contention.

There is no showing or facts that can be construed as Plaintiff's consent to an agency relationship with Midwest Equity. First, "the principal must be shown to have consented to the agency since one cannot be the agent of another except by consent of the latter." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). "Agency cannot be proved solely by the acts or declarations of the assumed agent -- the will of the principal must be expressed or implied from the circumstances." Jurek v. Thompson, 308 Minn. 191, 198 (Minn. 1976). The Pedersons argue that since the Plaintiff "negotiated" the contract and signed it, she was "consent[ing] to the relationship." *See Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment*, page 4.

Again, the Pedersons' analysis misses the mark. A contract---that never mentions the word agency--- is not consent to or the creation of an agency relationship. It is just a contract. The Pedersons offer no factual basis to support their assertion that the Plaintiff consented to the agency relationship through the contract or negotiated the contract.[1]

Consenting to a contractual relationship is not evidence that one is consenting to be a principal in an agency relationship. Nowhere in the contract does the Plaintiff consent to acting

[1] Mere averments in a response memorandum cannot be given any weight. *See* MINN. R. CIV. P. 56.05 ("When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denial of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial.").

as a principal in an agency relationship. *See Memorandum in Support of Plaintiff's Motion for Summary Judgment*, Bowman Affidavit, ¶ 6, Ex. D. The Pedersons point to no other objective fact to show the Plaintiff implied that she intended to be a principal in an agency relationship. The Plaintiff did not consent to be a principal in an agency relationship; thus, there is no agency.

Secondly, an agency relationship results if, but only if, there is an understanding between the parties that an agent is subject to the continuous direction of a principal. *Jurek v. Thompson*, 241 N.W.2d 788, 791 (1976). The critical element of the Plaintiff's control over Defendant Midwest Equity and Smith is lacking. The Pedersons argue that since the Plaintiff had "veto power" over the contract, she maintained control over the relationship. This is simply not true. "Veto power" and the control over the relationship are two different concepts. The Plaintiff merely had the power to cancel the contract for three days after signing. This does not create an agency relationship. If that were true, every lender in the country would be the agent of a borrower because a borrower has three days to cancel an agreement to refinance a mortgage.

Plaintiff only had the right to cancel, she did not have the right to determine who the foreclosure purchasers would be, for how much the contract for deed would be, when the closing would be, and who had legal title to the property – all essential to the relationship. The Plaintiff did not maintain control over Defendants Midwest Equity and Smith. There are no facts to suggest the Defendants proved the critical element of an agency relationship; thus there was no agency relationship because Defendant has failed to satisfy the either of the two elements of an agency relationship.

CONCLUSION

For the aforementioned reasons, the Plaintiff respectfully requests the Court grant her Motion for Partial Summary Judgment.

Dated: May 20, 2009

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ATTORNEY FOR PLAINTIFF

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Luis Patino, being first duly sworn, deposes and says on oath that on the 20th day May 2009, he served the attached:

1. Plaintiff's Reply Memorandum to the Pedersons' Opposition to Plaintiff's Motion for Partial Summary Judgement.

upon the following:

Anoka County Court Administrator
Court Administration – Civil Filing
325 East Main Street
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Jaren Johnson
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Midwest Equity Consultants, Inc.
c/o CT Corporation System Inc
100 S. 5th Street #1075
Minneapolis, MN 55402

by arranging for the deposit of a true and correct copy thereof in a sealed envelope duly addressed to the above, postage prepaid, in the United States mail at Saint Paul, Minnesota.

Luis Patino

Subscribed and sworn to me
This 20th day of May 2009

Notary Public:
My Commission Expires: