

Az Federal Judge Strikes at Heart of Nonjudicial Foreclosure, Denies OneWest Motion to Dismiss

Posted on November 13, 2014 by Neil Garfield

For further information or assistance, please call 954-495-9867 or 520-405-1688

See [OWB CASE Buffington v USBank MTD Denied incl FDCPA 28USDC AZ](#)

CAUTION: NOT ALL JURISDICTIONS ALLOW THE SAME CAUSES OF ACTION. CHECK WITH ATTORNEY WHO IS LICENSED IN THE JURISDICTION IN WHICH THE PROPERTY IS LOCATED.

A Federal Judge upheld a Complaint against OneWest on all counts except fraud. Actually the Judge was doing the homeowner a favor because the burden of proof on fraud is clear and convincing evidence whereas the burden of proof for the rest of the causes of action is only a preponderance (50% + 1) of the evidence. If it is more likely than not that the homeowner is right on the multi-count complaint that has now survived dismissal, the homeowner wins and the damages goes to the jury to jury to decide how much that should be. TRESPASS might also require a higher burden of proof. During the litigation, the homeowner will be able to inquire and potentially receive the necessary facts to support a fraud claim as well.

This is a dramatic reversal — lawsuits just like this one were previously dismissed in Az Federal Court. One of them was dismissed after 14 months of non-action by the court.

COUNT 1 UPHELD FOR NEGLIGENCE PER SE

COUNT 2 UPHELD FOR NEGLIGENT PERFORMANCE OF AN UNDERTAKING

COUNT 3 UPHELD FOR FALSE DOCUMENTS — Plaintiffs suffered false foreclosure recordings on their real property title record, additional damage to their credit reputation, and false late fees and penalties, as well as attorney fees and costs.

COUNT 4 UPHELD FOR PAYMENT/DISCHARGE/ SATISFACTION — based upon receipt of FDIC loss share payments that were intentionally withheld and therefore causing a misrepresentation to borrower as to the the existence of a default or the actual amount of the balance due to the actual creditor.

COUNT 5 UPHELD FOR BREACH OF CONTRACT

COUNT 6 UPHELD FOR BREACH OF CONTRACT

COUNT 7 DISMISSED — FRAUD

COUNT 8 UPHELD FOR TRESPASS TO REAL PROPERTY

COUNT 9 UPHELD FOR FAIR DEBT COLLECTION PRACTICES ACT

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