

DMS/785228

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THEODORA BRYANT, MARY L. WALKER,
EARNEST JACK WELCH and BARBARA JEAN
SLOCUM, individually and on behalf of all others
similarly situated,

Plaintiffs,

CASE NO. 4:99CV317-RH
CLASS REPRESENTATION

vs.

LAW OFFICES OF DAVID J STERN, P.A.,
and DAVID J. STERN, individually

Defendants.

STATEMENT OF MATERIAL FACTS

1. Plaintiffs sue for alleged violations of the Florida Consumer Practices Act, Section 559.72(9) (1997) (hereinafter the "State Act"), and of the Federal Fair Debt Collection Practices Act, 15 U.S.C. 1692a et. seq., (hereinafter the "FDCPA"). (2d Amd. Cplt., ¶¶ 1, 37)

2. Each Plaintiff borrowed money from Stern's clients to facilitate the purchase of residential real estate. These lenders required the Plaintiffs to pledge as security the real estate purchased with the loaned funds. (Copies of the notes and mortgages Plaintiffs executed are attached hereto as Composite Exhibit "A", and will be collectively referred to as the "Loan Documents")

3. In the mortgages, each Plaintiff agreed to pay for all expenses incurred to enforce the terms of the loans in the event of default, "including, but not limited to, reasonable attorneys' fees and costs of documentary evidence, abstracts and title reports". (See, e.g., Exh. A, Walker Mortgage,

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¶ 18) As a result of each Plaintiff's default, the lenders were forced to protect their rights under the Loan Documents and retain Stern to enforce their terms.

4. In each case, the subject loans were insured by Federal National Home Loan Mortgage ("Fannie Mae"), a government-sponsored corporation. 12 U.S.C. §1717. Fannie Mae has been given authority to purchase, service, sell, lend on, and otherwise deal with mortgages, pursuant to specific federal programs. 12 U.S.C. §1717(b). Congress conferred on Fannie Mae the power to prescribe, repeal, amend or modify its rules, regulations and requirements governing the manner in which its general business is to be conducted. 12 U.S.C. §1723a(a). In particular, Congress provided that Fannie Mae with the specific power to determine the appropriateness of "charges or fees" in connection with its loans. 12 U.S.C. §1719(a)(2).

5. Fannie Mae has issued guidelines for reasonable attorneys fees and title costs in foreclosures, to be followed by designated counsel. (Exh. B, Stern Dep., V. 1, pp. 71-72)

6. Designated counsel such as Stern are required to tailor their practices to efficiently and cost-effectively handle the large volume of foreclosure cases within Fannie Mae's guidelines. Consequently, the Law Firm's practice utilizes various forms, including forms pertaining to cost and fee affidavits. (Exh. B, Stern Dep., V. 1, pp. 66-68).

7. The departmentalization of the firm maximizes its efficiency while still providing its clients with quality legal services and obtaining marketable and insurable title for them through the foreclosure actions. The Stern law firm consists of approximately 266 employees and is divided into various departments, including a "Title Department" that does "title abstracting." (Exh. C, Stern Dep., V. 2, p. 7)

Title Search Service

8. The firm's Title Department performs title searches and title examinations on each property involved in a foreclosure. This process includes using a non-attorney employee called a "Title Searcher" who generates "ATIDS printouts" from computer terminals specifically dedicated for the purpose. The terminals allow on-line access of public record information provided by Attorneys' Title Insurance Fund, Inc. (the "Fund"). The ATIDS printouts list the encumbrances, judgments and other liens recorded against each property. (Exh. B, Stern Dep. V. 1, pp. 28-30)(Exh. D, Silvergate Dep., p. 11, Lns. 8-25)

9. The Fund charges the firm \$70.00 for property searches in Leon County, which are certified back to August, 1988. Since each of the Plaintiffs' mortgages that were foreclosed predated Leon County's on-line public record information, the Fund charged Stern \$25.00 for an additional search called a "chain sheet", which describes the encumbrances recorded against the property from the date of the mortgage to the date on-line information was available. Additionally, the Fund charged the firm \$15.00 for a "tax search", which indicates if there are any delinquent real estate taxes. (Exh. D, Silvergate Dep., pp. 20-22)

10. The ATIDS printouts consist of raw data, without any conclusions as to the marketability or insurability of title. Likewise the ATIDS printouts do not specify the persons who must be provided notice of the foreclosure or named as defendants. Accordingly, the ATIDS printouts must be reviewed by the Title Searchers to ascertain which documents should be ordered to confirm the specific encumbrances, judgments and other liens affecting the subject property so that a separate employee called a "Title Examiner" can review the documents to determine the status of title. Once copies of the documents are delivered, the Title Searcher verifies that the copies match

those which were ordered. The activities of the computer search and Title Searcher will be referred to as the "Title Search Service." (Exh. B, Stern Dep., V.1, pp. 28-29)

11. Stern has facilities, personnel and a room dedicated solely to perform the Title Search Service. (Exh. B, Stern Dep. V. 1, pp. 30-31)

12. Pursuant to its agreement, Stern charged its lender clients \$175.00 for the Title Search Service for which Fannie Mae reimburses the lender because it is a reasonable and customary expense of foreclosure. (Exh. C, Stern Dep. V. 2, pp. 22-23). This charge falls within the Fannie Mae guidelines of approved "reimbursable expenses" for Florida foreclosures. (Exh. E, Fannie Mae Guidelines)

Title Examination Service

13. Once the Title Search Service is fully performed, the resulting product is submitted to a Title Examiner who reviews the ATIDS printouts and hard copies of documents to determine the status of title. From this review, the Title Examiner prepares a report to the attorney responsible for the foreclosure, recommending the appropriate defendants to name in the foreclosure complaint. The purpose of this title examination is to ensure that marketable title is obtained from a judicial sale of the subject property. This activity will be referred to as the "Title Examination Service." (Exh. B, Stern Dep., V.1, p. 32, Lns. 5-14) The firm employs approximately five full-time and two part-time Title Examiners whose sole responsibility is to perform the Title Examination Services. (Exh. D, Silverglate Dep., pp. 7-8)

14. Pursuant to its agreement, Stern charged its lender clients \$150.00 for the Title Examination Service, for which Fannie Mae reimburses the lender because it is as a reasonable and

customary expense of foreclosure. This charge also falls within Fannie Mae's guidelines of approved reimbursable expenses. (Exh. C, Stern Dep. V. 2, p. 47; Exh. E, Fannie Mae Guidelines)

15. If Stern did not perform title examinations in-house, the firm would be required to utilize an outside title company to perform the same service. The cost of a title search and examination by an outside title company such as Landsafe would be \$325, the same amount charged by Stern for the identical services. (Exh. B, Stern Dep., V. 1, p. 42; Exh. F, Landsafe Invoices)

Attorney Review

16. Once the Title Examiner completes the examination and title report, the resulting product is transmitted to a legal assistant, who prepares a case summary template which is used as a reference for the duration of the case. The file, along with the title search and title examination results are then forwarded to the attorney responsible for preparing the foreclosure complaint and prosecuting the foreclosure action on behalf of Stern's client. (Exh. B, Stern Dep., V.1, pp. 36-37)

17. At this point, the foreclosure attorney reviews the title search and examination to prepare the final complaint and ensure all appropriate defendants are named and no curable title-defects were overlooked that could be addressed in the foreclosure action. This legal review is necessary in order to assure that marketable title will be obtained and delivered, as required, as a result of a judicial sale. (Exh. B, Stern Dep., V.1, pp. 36-37)(Exh. D, Silverglate Dep., pp. 26-27)

Gap Search Service

18. After commencement of a foreclosure suit, a Title Searcher performs a "title update" or "Gap Search." The Gap Search is performed for the purpose of determining if any encumbrances, judgments, or other liens were recorded against the subject property after the certification date of the initial title search and through to the date the foreclosure action was filed and *lis pendens* recorded.

This Gap Search allows the foreclosing attorney to amend the foreclosure complaint, if necessary, to add all additional junior lienholders to the action in order to extinguish their interest in the subject property, and obtain marketable title at a judicial sale. (Exh. D, Silvergate Dep., pp. 13, 43-44)

19. Pursuant to its agreement, Stern charged its lender clients \$75.00 for the Gap Search for which Fannie Mae reimburses the lender because it is a reasonable and customary expense of foreclosure. (Exh. C, Stern Dep., V. 2, pp. 11-12)

20. If Stern did not maintain facilities and personnel solely for the purpose of providing title services, an outside title company would have to be hired to perform Gap Searches. One such company, Landsafe, charges \$75 for performing Gap Searches, the same amount charged by Stern for the same service. (Exh. B, Stern Dep., V. 1, p. 43)

Professional Title & Abstract of Florida, Inc.

21. In 1994, Stern incorporated Professional Title and Abstract of Florida, Inc. ("Professional Title"). (Exh. B, Stern Dep. V. 1, p. 52) Stern, individually, is the sole stockholder, director and President of Professional Title. (Exh. B, Stern Dep. V. 1, pp. 49-50) Stern incorporated Professional Title in response to Stern's national clients' preference to utilize a title company in connection with real estate closings. (Exh. B, Stern Dep. V. 1, p. 52) Professional Title was also going to be employed to perform abstracting for Stern's foreclosures and issue title commitments and policies in the cases where the lender obtained title and resold the foreclosed property. (Exh. B, Stern Dep. V. 1, pp. 53-54)

22. Consistent with this purpose, Stern took steps necessary to become an agent of the Attorneys Title Insurance Fund. However, Stern did not follow through with staffing Professional Title (Exh. B, Stern Dep. V. 1, p. 52), but Stern maintained Professional Title's existence for

dealings with its clients relative to residential closings. In addition, one client required an invoice from a title company for Stern's abstracting services in foreclosures even though it knew Stern was performing the abstracting. (Exh. C, Stern Dep. V. 2, pp. 26-28)

23. Stern's charges for title work are consistent with those of third-party vendors such as Landsafe Title. (Exh. F, Landsafe Invoices) Thus, the plaintiffs would have paid the same amounts regardless of whether Stern performed the title work in-house, or whether he contracted with an outside title company.

24. Plaintiff Bryant was the daughter and heir of the borrower, Viola Woody, who defaulted on her loan with First Nationwide that Fannie Mae insured. (2d Amd. Cplt., ¶ 12)

25. Stern was retained to prosecute a foreclosure action against Viola Woody. (2d Amd. Cplt., ¶ 12). Bryant was represented by Claude Walker, Esquire, who is also counsel for the Plaintiffs in this action. (Exh. G, Bryant's Response to Defendants' First Request for Admissions No. 14). During the course of the foreclosure, Bryant's counsel requested payoff figures relative to the subject loan from Stern. (Exh. H, January 9, 1998 letter)

26. The Law Firm provided a payoff to Bryant's counsel on January 9, 1998. (Exh. H; January 9, 1998 letter)

27. Mr. Walker requested the invoices for the title search and title examination services, and a breakdown of the attorneys time reflected in the payoff letter, which Stern provided on January 30, 1998. (Exh. G, Bryant's Response to Defendants' First Request for Admissions No. 16; Exh. I, January 30, 1998 letter)

28. Mr. Walker filed a brief opposing Stern's attorneys' fees and costs during the course of Bryant's foreclosure, in which he argued the reasonableness and legality of those amounts under

Florida law. (Exh. J, "Objection to Plaintiff's Costs and Demand for Attorneys Fees With Memorandum in Support")

29. Ultimately, counsel for the parties negotiated a payoff amount, including attorneys fees and costs, which Bryant paid, and the case was dismissed. (Exh. K, Notice of Voluntary Dismissal)

30. Now, Bryant challenges the lawfulness of the Law Firm's agreement with its client to charge it \$175.00 for a title search, \$150.00 for a title examination, and \$75.00 for a title update, all of which were performed by Stern's Firm's title department. (2d Amd. Cplt., ¶¶ 12-17)

31. Plaintiff Walker defaulted on her loan with Colonial Mortgage Company that Fannie Mae insured. (Exh. L, Walker's Response to Defendants' First Request for Admissions, No. 4)

32. Stern was retained to prosecute a foreclosure action against Walker (2d Amd. Cplt, ¶ 18).

33. Walker failed to defend the foreclosure. She did not respond to the Complaint and she failed to appear at the summary judgment hearing. (Exh. L, Walker's Response to Defendants' First Request for Admissions, Nos. 7-12)

34. After determining all of the amounts sought to be taxed were authorized by the Loan Documents and reasonable, the state court entered a Final Judgment of Foreclosure against Walker. (Exh. M, Summary Final Judgment of Foreclosure).

35. Walker then filed a Chapter 13 bankruptcy petition, which was ultimately dismissed for failure to comply with the Chapter 13 plan of reorganization. (Exh. L, Walker's Response to Defendants' First Request for Admissions, Nos. 13-14)

36. Walker did not object in either her foreclosure or her bankruptcy to any of the charges she now seeks to challenge, which include the amounts the Stern charged its client for a title search, examination, and update. (Exh. L, Walker's Response to Defendants' First Request for Admissions Nos. 11-12, 25).

37. Welch defaulted on his loan with Countrywide Home Loans, Inc., resulting in Countrywide retaining Stern to prosecute a foreclosure action against Welch. (Exh. N, Welch's Response to Defendants' First Request for Admissions Nos. 4-6)

38. Welch failed to defend the foreclosure action. Consequently, a default was entered against him. (Exh. N, Welch's Response to Defendants' First Request for Admissions Nos. 7-11)

39. Although Welch appeared at the summary judgment hearing, he failed to avail himself of the opportunity to object to either the lender's entitlement to attorneys' fees and costs or the specific amounts requested. (Exh. N, Welch's Response to Defendants' First Request for Admissions Nos. 16-17)

40. After determining all of the amounts sought to be taxed were authorized by the Loan Documents and were reasonable, the state court entered a Final Judgment of Foreclosure in favor of Countrywide on July 13, 1998. (Exh. O, Summary Final Judgment in Foreclosure)

41. Moreover, Welch did not exercise his right of redemption prior to the foreclosure sale, and the subject property was auctioned to the highest bidder by the Clerk of the Court. (Exh. P, Notice of Foreclosure Sale)

42. In this action, Welch now challenges for the first time the Final Judgment, including the amount of attorneys time, the amounts charged for title services, and the amounts awarded for copying/postage/ faxes. (2d Amd. Cplt., ¶¶ 27, 54)

43. Slocum defaulted on her loan with Mellon Mortgage Company, and Mellon retained Stern to prosecute a foreclosure against Slocum. (2d Amd. Cplt., ¶ 28).

44. Slocum's loan was not part of the same program as the other Plaintiffs' loans, and Fannie Mae's guidelines did not govern the terms of Stern's retention by Mellon. However, Mellon agreed to pay Stern the Fannie Mae approved amounts for title services.

45. Slocum failed to defend the foreclosure, and as a result, a default was entered against her. (Exh. Q, Entry of Default) After Stern filed a Motion for Final Judgment of Foreclosure with supporting affidavit, which were served on Slocum, she requested to reinstate the subject mortgage. (Exh. R, October 7, 1998 letter)

46. After Stern sent a reinstatement letter (Exh. E), Slocum reinstated the subject mortgage on October 27, 1998. (Exh. S, October 27, 1998 letter).

47. At no time did Slocum object to payment of any of the amounts set forth in the reinstatement letter, and she does so now for the first time. Slocum objects to the amount of attorneys fees and costs paid to reimburse her lender for having to retain the Stern to prosecute the foreclosure. (2d Amd. Cplt., ¶¶ 30-33, 60)

48. Plaintiffs' Complaint and First Amended Complaint were filed against Stern for alleged violation of the FCCPA. Plaintiffs' allegations were primarily that: (a) During the foreclosure action, Stern claimed, attempted, or threatened to collect a debt which was not legitimate, or asserted the existence of some other legal right and with knowledge that the right did not exist, in violation of § 559.72(9), Florida Statutes (First Amended Complaint ¶11, p. 3); (B) Stern claimed, attempted, or threatened to collect costs in the prosecution of a mortgage foreclosure action which are in excess of the actual out-of-pocket amount expended by the Law Firm; (*Id.* ¶6, p. 2);

and (c) the obligation for which foreclosure proceedings were brought against plaintiff [secured loans for residential real estate purchases] were "consumer debts;" (*Id.* ¶10 , p. 2).

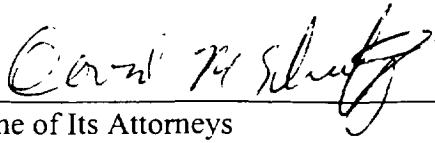
49. On May 25, 1999 in the state court proceeding, Judge Watson heard the Law Firm's Motion for Partial Summary Judgment. The state court granted this Motion as to Plaintiff Welch, determining that since the Law Firm did not perform the abstracting services at issue, Welch's claim failed as a matter of law. The state court denied the Law Firm's Motion as to the remaining two Plaintiffs. In his Order, Judge Watson stated that while the loan documents at issue authorized collection of abstracting costs, they do not authorize the collection of these costs for services not performed, or to collect twice for services performed once. (Exhibit T, May 25, 1999 Order)

50. After the state court entered its Order, Plaintiff Welch moved for leave to amend his Complaint to allege the Law Firm attempted to collect \$75.00 for a title update/gap search which had not been incurred at the time collection was attempted. Judge Watson granted Welch's Motion. The Law Firm then filed its Amended Answer and Affirmative Defenses to the Plaintiffs' First Amended Complaint.

51. Plaintiffs subsequently sought to file the Second Amended Complaint, which adds claims under the FDCPA based on the same facts as those asserted to support the State Act allegations. The case was then removed to this Court.

Respectfully submitted,

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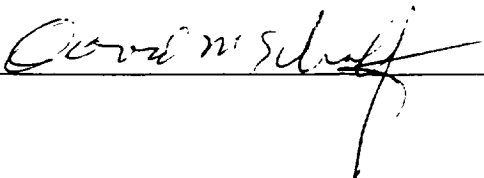
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by prepaid United States Mail to all on the attached Service List, this 4th day of January, 2000.



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