

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA

CASE NO.: 2009 CA 002215

INDEPENDENT MORTGAGE COMPANY -
CENTRAL MI,

Plaintiff,

v.

FRANK C. ZONDLO; LUZ ZONDLO; SANDESTIN
OWNERS ASSOCIATION, INC.; INSPIRATION
AT SANDESTIN CONDOMINIUM ASSOCIATION,
INC.; and INSPIRATION AT SANDESTIN
DEVELOPMENT COMPANY, LLC,

Defendants.

DEFENDANTS' MOTION TO COMPEL, MOTION TO TRANSFER ACTION,
MOTION TO AMEND AFFIRMATIVE DEFENSES

THIS CAUSE CAME ON FOR HEARING before the Honorable
Keith Brace, Circuit Judge, and was reported by Pamela S.
Dietrich, Court Reporter and Notary Public in and for the
First Judicial Circuit of the State of Florida, in the
Judge's chambers of the Walton County Courthouse,
DeFuniak Springs, Florida on the 16th day of September,
2010.

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APPEARANCES OF COUNSEL:

On Behalf of Plaintiff:

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Carver, Darden, Koretzky, Tessier, Finn,
Blossman & Areaux, LLC
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Pensacola, FL 32502

On Behalf of Defendants Frank C. and Luz Zondlo:

DANIEL W. UHLFELDER, ESQUIRE
Daniel W. Uhlfelder, P.A.
124 East County Highway 30-A
Grayton Beach, FL 32459

INDEX

	PAGE NO.
PROCEEDINGS	3
CERTIFICATE OF REPORTER	23

PROCEEDINGS

1
2 THE COURT: All right. Let the record show
3 that this is Independent Mortgage versus Zondlo and
4 others, and we have several motions to address,
5 including the motion for summary judgment, motion to
6 amended, motion to compel, motion to transfer,
7 motion to do whatever. So who's here on behalf of
8 the plaintiff?

9 MR. SANDELL: Your Honor, my name is Karl
10 Sandell. I'm here on behalf of Independent
11 Mortgage.

12 THE COURT: And it's Karl --

13 MR. SANDELL: Karl Sandell, S-A-N-D-E-L-L.

14 THE COURT: All right. And on behalf of the
15 defendants?

16 MR. UHLFELDER: Yeah. This is Daniel Uhlfelder
17 on behalf of Frank and Luz Zondlo.

18 THE COURT: All right. On behalf of the
19 plaintiff, what issues do you have in your opinion
20 set for hearing today?

21 MR. SANDELL: Well, your Honor, you know,
22 initially this was a motion for summary judgment
23 that was set. We filed our motion for summary
24 judgment in May. The hearing was set on August 20th
25 for today's date, and at that time, Mr. Uhlfelder

1 had requested this Court to allow us to have a
2 30-minute hearing on the motion. After that time,
3 he filed on behalf of his clients the motion to
4 compel, the motion to transfer action, and the
5 motion to amended. With that said, your Honor, this
6 is a straight foreclosure action on investment
7 property on a fractional interest.

8 THE COURT: Okay. I just wanted to know what
9 you had. So you've got a motion for summary
10 judgment.

11 MR. SANDELL: Yes, your Honor.

12 THE COURT: All right. Mr. Uhlfelder, what are
13 you asking the Court here today?

14 MR. UHLFELDER: We have three motions, your
15 Honor. One is the motion to transfer.

16 THE COURT: Motion to transfer where?

17 MR. UHLFELDER: To the -- if I can explain it a
18 little bit what that --

19 THE COURT: Just where?

20 MR. UHLFELDER: Where? To the circuit court,
21 to the judge who initially --

22 THE COURT: This is the circuit court.

23 MR. UHLFELDER: Well, to Judge LaPorte, who
24 initially had the case.

25 THE COURT: Why?

1 MR. UHLFELDER: Basically, what I laid out in
2 the motion to transfer --

3 THE COURT: I haven't seen the motion. I've
4 seen some of your other motions with about 15
5 affirmative defenses, all of which would indicate
6 that your client didn't have any duty at all to
7 insure that there was any value to the property
8 before he signed the documents, but we'll move on.

9 MR. UHLFELDER: Okay. The motion to transfer,
10 the copy was filed on September 7th, and basically
11 my clients' position -- and they wanted me to make
12 it clear this is nothing directed towards your
13 Honor.

14 THE COURT: I don't take anything personally.
15 I've been in this business too long to worry about
16 that kind of stuff.

17 MR. UHLFELDER: Well, they aren't sophisticated
18 litigants so they wanted me to make you aware of
19 that. And basically what the position is is that
20 there are several reasons why they believe that the
21 system that has been set up -- actually the system
22 appears to have been throughout the state as part of
23 legislature allocating certain money that set up a
24 division for foreclosure actions, and it's our
25 position that the procedure in which this was set up

1 was not in compliance with the rules and the
2 constitution.

3 And I cite cases that talks about what the
4 requirements are. The first issue is that --

5 THE COURT: You've got 30 minutes, and this
6 gentleman has half of that. So it would appear to
7 me that the way we are rambling that I need to
8 engage my stop watch.

9 MR. UHLFELDER: Okay. Well, we've laid out
10 three reasons why. The first reason, the Florida
11 Supreme Court is clear that divisions of Florida
12 courts must be established through rule and approved
13 by the supreme court. This is a division that was
14 set up that should have gone by the rule and
15 approved by the supreme court. We also believe that
16 it's unconstitutional because it violates my
17 clients' suffrage rights in that they are being
18 deprived the right of their case to be tried by
19 judges who are elected.

20 And third, we believe that this constitutes a
21 permanent assignment because of the way it's been
22 set up in terms of there's no -- it needs to stay
23 here unless extended, and the constitution says it
24 cannot set up a permanent assignment of judges in
25 this fashion in terms of senior judges being allowed

1 to hear permanent type cases. Finally, we believe
2 that the way this has been set up is established as
3 a complex case division, which we also believe
4 cannot be set up under this procedure in that --

5 THE COURT: Foreclosures are considered, in
6 your opinion, to be complex litigations?

7 MR. UHLFELDER: Yes. Well, I believe actually
8 the -- yes, I do.

9 THE COURT: And you're serious when you make
10 that statement?

11 MR. UHLFELDER: I believe, yes, the
12 foreclosure -- the way this -- a little bit of
13 history --

14 THE COURT: I don't need a history lesson here
15 today. We're not going to have time for that.

16 MR. UHLFELDER: The way in which these
17 mortgages were prepared all over the state in terms
18 of not having proper documentation, not providing
19 assignments that actually show who owns the note,
20 there's a number of defenses that could be raised.

21 THE COURT: And there are some cases that
22 involve that procedure, too. But the general 90
23 percent of the cases are just ordinary foreclosure
24 actions because of the depressed economy. Your
25 motion to transfer is denied without further

1 argument.

2 MR. UHLFELDER: Okay.

3 THE COURT: Your next motion?

4 MR. UHLFELDER: The next motion is a motion to
5 compel that we filed basically after -- well,
6 actually the second motion was the motion to
7 amended. We filed that prior to -- I'm sorry.
8 Motion to compel we filed on September 1st. After
9 this case was filed the end of last year, I was
10 brought in the middle of this year. And I filed a
11 request for production on June 21st, 2010, and after
12 giving the plaintiff extensions, they did provide
13 documents. But they withheld a number of the
14 documents, identifying those documents under a
15 number of protections, about 30 documents which they
16 withheld.

17 I believe as a matter of course we are entitled
18 to discovery. I've tried to get copies of the
19 documents. I believe those documents are relevant
20 in terms of defenses in the case and the actual
21 dispute as to how much is owed. The basic request
22 in terms of information about the note, information
23 about the loan, and they've produced 400 documents,
24 but they withheld about 50 that I have a right to
25 see.

1 I mean, I know these foreclosures are being run
2 through quickly, but it doesn't mean I can't have a
3 right to do discovery. And this is our first
4 request for production, and I just want them to
5 respond. They've asserted a number of
6 attorney-client privileges. They've not provided a
7 privilege log. I've attempted diligently to try to
8 get those documents, and I haven't been able to. So
9 we filed that on September 1st, and I believe --

10 THE COURT: Okay. Are you in a position to
11 reduce to writing the specific documents that you
12 feel that you are entitled to? And I apologize.
13 It's difficult in this -- the County here doesn't
14 index their filings, and they file them from top to
15 bottom, which I'm -- you know, it kind of takes me a
16 while to change the direction. So I'm not certain
17 specifically what it is because I see the first
18 response from the plaintiff that addressed a number
19 of issues. So are you, at this time, prepared to
20 list and provide opposing counsel with a list of the
21 documents that you want?

22 MR. UHLFELDER: Yes. And I've discussed this
23 with Mr. Sandell. In our motion, we identified in
24 Paragraph 2 the actual request numbers that they
25 particularly identified as being under this

1 proprietary or trade secret or privilege umbrella,
2 and I've identified those in my motion. There are a
3 number of them where we believe that they basically
4 asserted that they were confidential banking
5 information, proprietary trade secrets, protected
6 information.

7 THE COURT: Okay. When was -- that motion that
8 you're addressing now, what was the date of filing?

9 MR. UHLFELDER: September 1st.

10 THE COURT: Of this year?

11 MR. UHLFELDER: Yes, sir.

12 THE COURT: Okay. Well, I see the defendant's
13 motion to amend answer and affirmative defenses.
14 Was it filed at or about -- and the second amended
15 answer and affirmative defenses. Was it all filed
16 on or about the same date, or was it --

17 MR. UHLFELDER: We filed the motion to compel
18 on -- I have a docketed document that says September
19 1st and motion to amended was filed September 3rd
20 according to the clerk's docketing.

21 THE COURT: Okay. So, Mr. Sandell, the
22 plaintiff's response to the first request for
23 production of documents does not address the motion
24 that is now before the Court, or does it? I mean,
25 obviously I have not engaged real depth in looking

1 at this file is the reason I ask the question.

2 MR. SANDELL: Yes, your Honor. We filed a
3 response to that motion at the beginning of this
4 week which responded specifically to his motion to
5 compel.

6 THE COURT: This is the memorandum from the
7 plaintiff. So it may well be in here then. They
8 may have not yet been appended by the -- no. This
9 is the summary judgment packet here which includes
10 the mortgage and the final judgment. All that is
11 is the summary judgment packet. So apparently
12 they're in the process of being docketed by the
13 clerk. So do you have a list -- my question is do
14 you have a list specifically of the items that you
15 are requesting that plaintiff produce?

16 MR. UHLFELDER: Yes. And I've identified those
17 in my motion.

18 THE COURT: Okay. Well, I apologize, but I
19 don't have the motion, and the motion is not in the
20 file. Sometimes we have a delay in docketing. They
21 send the files up.

22 MR. UHLFELDER: If you want a copy, I brought
23 one.

24 THE COURT: Actually that is here. I do have
25 that. All right. Now, the plaintiff has filed a

1 memorandum of law that addresses most of these
2 issues. Has the defense prepared their memorandum
3 in support of any of your motions?

4 MR. UHLFELDER: On the motion to compel?

5 THE COURT: Yes.

6 MR. UHLFELDER: We filed our motion to compel
7 on September 1st.

8 THE COURT: Okay. All right. Proceed then
9 with your argument.

10 MR. UHLFELDER: Yes. As I was saying, we
11 served our first request for production on June
12 21st. We gave them an extension for them to
13 respond. They did respond and produced a number of
14 documents. But in their response, they withheld, as
15 I've identified in the motion under Paragraph 5,
16 about 35 pages of documents that they identified as
17 containing confidential banking information,
18 proprietary trade secrets, protected information,
19 and they also identified as attorney-client
20 privilege. It's our position that those documents
21 should not be withheld.

22 They produced other documents that I believe
23 are -- could be considered, I guess, confidential or
24 banking information, and by doing so, they can't
25 selectively withhold other documents. So I believe

1 that they -- I don't know what they say. You know,
2 their response, they've apparently covered our
3 request for production, but we would like to see
4 them.

5 They also asserted attorney-client privilege on
6 a number of their responses, but they did not
7 provide a privilege log, which is required as part
8 of a standard procedure why you are objecting. They
9 objected to a number of other requests on other
10 bases other than there being proprietary
11 information, and we've identified the numbers on
12 Paragraph 2, the request numbers that were objected
13 to and not produced. And we believe that those are
14 all relevant questions that we believe we're
15 entitled to see. I've tried to work through this
16 with Mr. Sandell and have not been able to.

17 THE COURT: Okay. What other motion do you
18 have that you want heard here this morning? Motion
19 to amended?

20 MR. UHLFELDER: Yes, sir. We filed a motion to
21 amend on --

22 THE COURT: That's your second amendment?

23 MR. UHLFELDER: Well, what happened was the
24 initial counsel filed an answer, and the answer did
25 not include both parties. So there was an amended

1 answer that technically cured the fact that it
2 applied to both defendants. So this is the first
3 substantive amendment, but it is technically the
4 second amended answer.

5 THE COURT: Okay. Let me hear the plaintiff's
6 position relative to the motion to amended. Is
7 there --

8 MR. SANDELL: Well, your Honor --

9 THE COURT: Other than the fact that you want
10 to proceed on your summary judgment, what argument
11 do you have as it relates to being against the
12 motion to amended?

13 MR. SANDELL: Your Honor, beside the fact the
14 timing, we would argue that the defendant should be
15 just estopped from making this amendment. Those 16
16 affirmative defenses that were raised are, your
17 Honor, merely pleading conclusions of law. They're
18 not supported by ultimate facts. The case law that
19 we cited in terms of sufficient pleadings with
20 specificity was not done. For that reason, we would
21 argue that those affirmative defenses are legally
22 insufficient and so should be stricken from the
23 record. If this Court is going to grant the motion
24 to amend, which there's case law out there that says
25 the Courts allow a liberal policy, we would still

1 say that those affirmative defenses should be
2 stricken from the record and we move forward with
3 the motion for summary judgment.

4 THE COURT: Okay. All right. What is your
5 position relative to the motion to compel? From a
6 legal argument now, not just stating that you want
7 to move forward on your summary judgment action.

8 MR. SANDELL: Yes, your Honor. Defendant cited
9 several requests, but, your Honor, this really boils
10 down to seven documents as we noted in our response.
11 I realize, your Honor -- I don't know if you've
12 located our response that we filed to the motion.

13 THE COURT: Is this the memorandum?

14 MR. SANDELL: Yeah. Defendants' Motion to
15 Compel, plaintiff's opposition to the motion. It
16 may be our memorandum opposing the -- responding to
17 their opposition for the summary judgment, but we
18 filed an opposition. I've got a Number 2 written on
19 this, but I can provide this copy to your Honor.

20 THE COURT: Okay. Thank you.

21 MR. SANDELL: In our response, your Honor,
22 you'll see that we cited essentially the seven
23 documents that Mr. Uhlfelder has stated that we
24 withheld. And as was identified in our response to
25 the request to produce, those documents were

1 identified by name, the pages, the dates, and we
2 objected to disclosing them because, for one, they
3 contain confidential and proprietary information
4 related to the loan, related to the underwriting.
5 They're underwriting documents.

6 Your Honor, those are not even relevant to
7 issues that frame the pleadings. We are suing on a
8 note and suing on the mortgage for foreclosure
9 action. It hasn't been brought before this Court,
10 but the parole evidence wouldn't allow any other
11 evidence to come in to contradict the contract that
12 we are suing on. For that reason, we would dispute
13 and would ask this Court to deny the motion to
14 compel.

15 The other reasons that were cited in terms of
16 Independent cited the requests were overly broad and
17 unduly burdensome. An example was where they ask
18 for all copies of checks for all payments. They
19 also ask for a loan history. We've provided the
20 loan history. The loan history shows that all the
21 payments were made by debit. To get electronic
22 confirmation of all the debits, we've already
23 responded. The bottom line, your Honor, is
24 discovery is complete. We provided 466 pages, a
25 copy of our file, Independent's file, and withheld

1 eight documents. There are 17 instances of them,
2 but we withheld the documents for the reasons
3 stated.

4 THE COURT: All right. Anything in rebuttal on
5 the motion to compel?

6 MR. UHLFELDER: Yes. I think to interject with
7 relevance, as we all know, the relevance for
8 discovery is very broad. They're saying there's
9 only eight documents not produced, but I've
10 identified 35 particular documents. He's saying
11 there are eight documents. There are actually 36.
12 I don't know what's in them. If he wants to enter
13 into some sort of protective order, I don't have a
14 problem with that. I mean, we don't want to divulge
15 anything that would be considered problematic. I
16 told that to Mr. Sandell. But I think we have a
17 right to see those.

18 THE COURT: Well, I'm not so sure that you do.
19 I think one approach the Court could take would be
20 conduct an in camera inspection of the documents to
21 determine whether or not there was proprietary
22 interest that shouldn't be revealed, and I may or
23 may not take that approach depending on -- but I
24 think that's probably the preferred avenue rather
25 than to submit the documents to opposing counsel for

1 inspection and let you determine whether or not you
2 think there's any proprietary or protected interest.
3 I think it's more appropriate that the Court do
4 that. But such things as -- why do you need
5 verification of electronic transfers of funds?

6 MR. UHLFELDER: Because it's their burden to
7 show the amount that is owed and has been paid.

8 THE COURT: Okay. But it's also, you know,
9 your client's best interest to keep his own records.

10 MR. UHLFELDER: My client is the defendant.

11 THE COURT: I understand he's the defendant,
12 but we're not going to make this proceeding
13 overburdensome on the plaintiff to where they have
14 to spend more money in producing documents than they
15 do in affecting the judgment on the note and
16 mortgage.

17 MR. UHLFELDER: I'm suggesting if they keep --
18 it doesn't seem to me that it would be that
19 difficult for the plaintiff to simply put together
20 and compile what records that show payments. If it
21 was done -- if they can't to that, I don't see how
22 it's our burden to show, going back four or five
23 years, all my client's checks or transfers. I mean,
24 they're the ones who are suing to collect the money.
25 I mean, if they can't come up with -- and that goes

1 to part of our opposition to summary judgment is
2 that it's their burden. It's not our burden to show
3 what we've paid. Sure, I guess my client can go
4 back and look for five years, but they're the ones
5 suing. I mean, they're the ones who are trying --
6 it's their burden. All we are asking for is --
7 you're saying my people didn't pay this amount.
8 Well, if I sue for a breach of contract and somebody
9 paid me, it's my burden to prove what they paid me.

10 THE COURT: I understand that.

11 MR. UHLFELDER: So that's all we are asking
12 for. That's one of the questions to prove -- what
13 proof do you have in the records? He's saying in
14 summary judgment opposition, well, they don't even
15 keep these records. I mean, that goes to --

16 THE COURT: And that may well be true.

17 MR. UHLFELDER: Well, then, how have they met
18 their burden of proving that the money is owed. I
19 mean, if they're going to say this client owes
20 \$155,000, I think it's pretty basic law that you
21 have to prove what is owed. I mean, it's not my
22 client's duty. He's not the one suing. They need
23 to show what's owed. And, I mean, if they can't do
24 that, I don't know how they can foreclose. I mean,
25 if they can't keep those records straight, that's

1 not my fault.

2 THE COURT: All right.

3 MR. SANDELL: Your Honor, if I may just quickly
4 respond to that?

5 THE COURT: Yes, please.

6 MR. SANDELL: Independent has provided a loan
7 history. We are talking about ACH debits,
8 electronic debits for the payments since the initial
9 history. You have a history of the loan that shows
10 the payments made. What we are saying is to produce
11 it was burdensome -- overly burdensome to try to
12 produce the electronic digital information that
13 showed those debits and credits. You have a loan
14 history that shows up to this date what the amount
15 is that's owed, and before this Court, there's been
16 no shred of evidence contesting or disputing what
17 was put in our affidavit of indebtedness as to that
18 amount or that some payment or other payment was
19 made or not received. We would say we've answered
20 that.

21 MR. UHLFELDER: I'm getting to that.

22 THE COURT: Well, when are we going to do that?
23 I mean, you know, the Court, at this time, is going
24 to deny the motion to compel, as well. I'm going to
25 permit the amended answer to be filed. I'm going to

1 give you an opportunity to respond in writing to the
2 affirmative defenses, which I think you may have
3 already done somewhat, and let you submit a
4 memorandum to support why the affirmative defenses
5 should be permitted. Have you adequately, from your
6 standpoint, addressed the affirmative defenses in
7 the written memorandum, or do you want the
8 opportunity to further elaborate on that?

9 MR. SANDELL: Your Honor, we've elaborated in
10 our response in terms of why those are legally
11 insufficient.

12 THE COURT: Okay. I'm going to wait and get
13 your written response to the plaintiff's memorandum
14 and then I'll rule on the affirmative defenses and
15 then we will proceed accordingly, and after I've
16 done that, then if it's appropriate to reschedule
17 the matter for summary judgment, we will do that.
18 All right?

19 Mr. Uhlfelder, you can prepare an order
20 consistent with the Court's ruling here today and
21 run it by Mr. Sandell to make certain that he's in
22 agreement with it and submit it to the Court.

23 MR. UHLFELDER: Yes, sir.

24 MR. SANDELL: Your Honor, if I may just for
25 clarification?

1 THE COURT: Sure.

2 MR. SANDELL: Time frame for submission of his
3 response?

4 THE COURT: Is 15 days adequate?

5 MR. UHLFELDER: Yes, sir. That's fine.

6 THE COURT: Okay. All right. Thank you.

7 MR. SANDELL: Thank you, your Honor.

8 (Hearing adjourned.)

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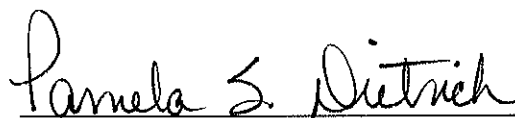
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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF WALTON)

I, Pamela S. Dietrich, certify that I was authorized and did stenographically report the foregoing proceedings and that the transcript, pages 1 through 23, inclusive, is a true and complete record of my stenographic notes.

WITNESS MY HAND this 26th day of September, 2010.



PAMELA S. DIETRICH
COURT REPORTER