Case No. C070642
Nevada County Case No. 77829

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

McMenamy, et al

Plaintiffs and Appellants

v.

Colonial First Lending Group, Inc.

Defendants and Respondents.

Appeal from the Superior Court for Nevada County
Sean P. Dowling, Judge

APPELLANTS' REPLY BRIEF

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I. Reply Argument

A. *There Is No Disagreement About The Applicable Law*

Respondent's Opposition Brief ("ROB") does not argue against any of the applicable law raised in Appellant's Opening Brief ("AOB"). Indeed, Respondents concur that *Pavlovich v. Superior Court* (2001) 29 Cal. 4th 262 is the primary authority setting out the rules for extending personal jurisdiction over an out of state person. ROB at p. 11-13.

Even more telling, the Respondents completely ignore the legal doctrine that the "purpose availment" prong of the *three part Pavlovich* analysis is satisfied when there is specific legislative regulation of an activity in the forum state to protect its residents from a non-resident that engages in such regulated activity. *Healthmarkets, Inc. v. Superior Court* (2009) 171 Cal. App. 4th 1160; *Bresler v. Stavros* (1983) 141 Cal. App. 3d 365. By failing to address this rule, Respondent's tacitly admit that the mortgage origination industry is specially regulated because the California legislature and Department of Real Estate have found that the citizens of California are vulnerable to out of state loan originators such as themselves.

Further, Respondents never address the judicial authority that the specifically regulated rule applies to *even a single transaction*. Appellants' cited to the holding on this point in *Healthmarkets*. In addition, Appellants' cited and discussed *Quattrone v. Superior Court* (1975) 44 Cal. App. 3d 296, which applied the specifically regulated rule to a single instance of activity *even though the act complained of occurred outside of California*.

In short, the Respondents rely solely upon a factual argument that is inaccurate, incomplete, and misleading. Appellants apologize to the Court for the length of their reply, but this appeal is a *de novo* review of the evidence, *Healthmarkets* at 1168, and considerable evidential rebuttal is required.

B. The Facts Prove Intentional And Extensive Contact With California

Appellant go through Respondents' false evidential assertions one by one, showing that the facts weight heavily in favor of extending jurisdiction.

1. The Loan Origination

The primary fact that this court must find is whether Respondents acted as the loan originator. If this is found to be true, then "purposeful availment", especially under the "specially regulated" rule, would be established.

Respondents understand the crucial nature of the loan origination issue and they try to argue in the ROB that it was Flagship Financial, not Jones or Colonial, that was the loan originator. ROB, p. 5. The purported facts that they argue in support of these assertions are set out at ROB, pp. 6-11, nos. 1-15.

Respondents' Purported Facts Nos. 1-10

All of the Respondents' "purported" facts in Items nos. 1 through 10 on pages 6-9 of the ROB are taken from declarations made in September 2011, when the motion to quash was first filed. No discovery had yet been taken at that time.

In contrast, Appellants offered the extensive evidence from the depositions of Devin Jones and Adam Erickson taken in January 2012. These later depositions tell a very different story. See the AOB, pp 8-12, where Devin Jones testified at his deposition that he made a "cold call" from Utah to the Appellants in California after obtaining their name from a credit check lead list for possible loans being sought in California. Jones further testified that he remembered the Appellants needing a loan to buy a new residence in California, that the amount of monthly payment they could afford on this loan was $1,800, and that he could get the down payment for the California loan from a re-finance of the Appellant's property in Idaho.

Appellants then offered the deposition testimony of Heather Hodge that she was employed by Flagship Financial solely as a loan processor and that she never originated loans and would receive the completed (originated) loan files from Devin Jones at Colonial. Hodge never spoke to borrowers. Hodge further testified that Colonial was the originator of the loan. AOB, p 10-11.

Respondents' Purported Fact No. 11

Respondents next argue in their ROB, Item no 11, p. 9, that the July 2, 2008, letter from Devin Jones to the Appellants' California real estate broker shows that Jones and Colonial were the mortgage broker for the Idaho re-finance loan to provide the cash down payment for the California loan. Respondents, by admitting that they were the mortgage broker for the Idaho loan, are attempting, *ipso facto*, to argue that they couldn't also be the mortgage loan originator for the California loan.

Appellants offered the deposition testimony of Heather Hodge in which she testified that in similar situations, where an Idaho loan was the source of funds for a California loan, the underwriter would require complete financial information for both loans before approving the California loan. AOB, p. 12. Combined with her previous deposition testimony that she never originated any loan and that it was Devin Jones and Colonial that sent her the loan origination file for the Appellants, the evidence clearly establishes that Respondents acted as the loan originator for both the Idaho and the California loans.

Respondents' Purported Fact No. 12

Respondents next argue in their ROB, Item no 12, p. 9, that one week after the Appellants closed the refinance of their Idaho home, the Appellants closed the purchase of the California home. This is not a contested fact and it does not have any evidential bearing on the issues on appeal.

Respondents' Purported Fact No. 13

Respondents next argue in their ROB, Item no 13, p. 9, that the

California Settlement Statement name Flagship Financial as the mortgage broker and that neither Devin Jones nor Colonial First are mentioned.

Appellants offered extensive deposition testimony in the AOP, pp. 12-15, about the scheme whereby Colonial (and Jones) would originate a loan that they were not licensed to do, then use Flagship as the "cover" to appear on the closing statement. Then once the loan was closed, the mortgage broker fees would be split about 65/35 with Colonial and Jones getting the lion's share. Respondents' argument that the settlement statement absolves them of personal jurisdiction is without any merit, and in fact, when combined with the deposition testimony of Heather Hodge that she never originated any loans while working at Flagship, only proves the defalcation of the Respondents.

Respondents' Purported Fact No. 14

Next, Respondents offer in their ROB, Item no 14, p. 9-10, deposition testimony of Heather Hodge to the effect that Flagship Financial would act as the mortgage broker. Respondents attempt use this snippet of testimony by Ms. Hodge to argue that Flagship Financial acted as the loan originator for Appellants. However, a careful review of the testimony of Ms. Hodge reveals that her testimony was just the opposite.

Appellants presented in the AOP, p 12, the deposition testimony of Heather Hodge that she remembered receiving the Appellants' completed loan application. Ms. Hodge then testified that it was the responsibility of the loan officer (the "LO"), not her, to obtain the loan application from the borrower. Ms. Hodge further testified that she would never go out to the borrower to originate the loan information.

Appellants *repeatedly asked Ms. Hodge, on direct examination, about her capacity at Flagship during her deposition. Each time she was asked about her role she was adamant about the fact that she was only a loan processor, and that she never originated loans, she never talked to borrowers,*

and the loan applications from Colonial were completed by Colonial. See, e.g., excerpts from the Hodge deposition at CT 241, lines 6-19; CT 246, lines 6-15; CT 247, lines 4-13; CT 248, lines 1 through CT 249, line 1; CT 251, line 16 through CT 253, line 5; CT 254, line 15 through CT 255, line 17.

Indeed, Hodge testified that, to her knowledge, the wives of the owners of Colonial owned Flagship Financial. Hodge further testified that she personally knew the owners of Colonial. When asked if they were there at her deposition that day, she said yes and pointed to Mr. McOmie and Mr. Erickson. CT 243, line 1 through CT 244, line 25.

Further, when asked about her memory of the McMenamy loan, Hodge testified that she did not remember the refinancing aspect in Idaho and she only remembered the California loan. When asked, hypothetically, if there had been a refinancing in Idaho to make the down payment for the California loan would she have needed the loan origination information about both loans for the underwriter, she testified yes. Hodge then testified that if such origination information was not complete that she would have gone over to see Adam Erickson to "get the blanks filled in." CT 259, line 6 through CT 260, line 11.

Next, it is important to carefully observe two things about the seemingly contradictory testimony of Heather Hodge. First, the quotation from Ms. Hodge used by the Respondents was made on examination by counsel for Respondents ***after*** counsel for Appellants had completed direct examination. The examination by Respondents' counsel also came ***after*** a break in the deposition during which Ms. Hodge talked with her former colleagues and friends, Mr. McOmbie and Mr. Erickson. See the index to the Hodge Deposition at CT 239-240. Ms. Hodge was only asked by Respondents about her role at Flagship once, ***whereas Appellants had already asked her at least six times on direct and she was steadfast and adamant in her testimony that she did not do loan origination***.

Second, carefully read the question posed by Respondents' counsel to Ms. Hodge. It asks: "On instances where Colonial First ***referred a loan*** to Flagship Financial, Flagship Financial was actually the mortgage broker on that loan; is that correct? (Emphasis added) There is a big difference between Colonial and Jones sending an already originated, completed loan file over to Ms. Hodge for loan processing and Colonial referring an entire loan (from its inception) to Flagship Financial. The deposition testimony of Adam Erickson is very revealing of the truth. Appellants asked Mr. Erickson to explain how Colonial First did marketing. CT 217, line 10, through CT 218, line 16. Mr. Erickson answered that:

> [t]he lending sources we worked with were nationwide lenders for the most part. They may not have been licensed in every state either. A lot of states – or a lot of large lending companies chose not to do business in Louisiana, Hawaii, various other states. I can't – I couldn't tell you why they chose to do business in those states or not. But I know when their wholesale representatives came into our office, they said we're obviously looking to funds [sic] loans, as many as we can; can you assist in that? ***We were mortgage brokers***. *We were in the business of generating loans, selling loans.*

From the repeated testimony of Heather Hodge that she was only a loan processor (not originator), including the McMenamy loan, plus the direct admission of Mr. Erickson that Respondent Colonial was a "mortgage broker" in the "business of generating loans", the repeated testimony of Ms. Hodge on direct examination by Appellants counsel (hostile direct) ***is far more credible*** than the carefully worded answer she gave to Respondents' counsel (friendly direct) that followed a break in the deposition and a discussion with Mr. McOmbie and Mr. Erickson.

Indeed, the credibility and equivocation of Ms. Hodge's testimony after the break is brought into sharp focus when counsel for Appellants was following up with Ms. Hodge about the declaration of Mr. Jones after the break.

She was again asked by Appellants' counsel about the loan origination as sworn to by Mr. Jones in his earlier declaration. Ms. Hodge was equivocal, so counsel for Appellants bore down: "Well, I thought you testified earlier that you didn't originate loans, you processed loans that were referred to you." Ms. Hodge answered: "I didn't originate them, nor am I saying I'm originating them." CT 296, pg. 97 of the Hodge deposition, lines 5-12.

Appellants are quite certain that this Court will find that Ms. Hodge was telling the truth when she testified at least seven times that she did not originate loans, but was only a loan processor that never talked to borrowers and received loan applications from Colonial to process.

Respondents' Purported Fact No. 15

Last, Respondents assert in their ROB, Item no 15, p. 11, that the McMenamys had to have known that Flagship was the mortgage broker on the California loan because over a year after the California loan had closed, there is a document that appears to be part of a loan application by the Appellants for a refinance of their California home.

First of all, this is nothing other than an irrelevant, red-herring that is a classic example of *post a hoc ergo propter hoc* argument. What happened well over a year after the loan closed proves nothing about how the California loan was originated. Second, the real story is that it was Colonial that solicited the Appellants about doing a refinance a year later without inquiry by Appellants. Colonial filled out these documents and then contacted the Appellants. Knowing that this was irrelevant to the personal jurisdiction issue, Appellants did not make a clear enough record about this fact.

2. **The McMenamy's Physical Location At The Time Of Jones' Cold Call To The Appellants Is Not Relevant**

The Respondents try in their ROP, pp. 13-14, to make a big "splash" and turn the Court's attention to where the McMenamys were physically located

at the time of the initial telephone calls about the California loan. This is simply irrelevant. Assuming, *arguendo*, that Appellants were not in California for the initial calls (e.g., they were in Europe), it would not have mattered. What is relevant is what the phone calls were about and the record clearly establishes that the phone calls were about Respondents *soliciting the Appellants' California loan, discussing the structure and terms of the loan, and collecting the information to complete a loan application on behalf of the Appellants*.

Jones admitted in his deposition that he made a cold call to the McMenemy's for the purpose of soliciting the Appellant's California loan business. CT 204, lines 13-25. After the Appellants expressed interest in having Jones and Colonial broker the California loan, Jones and Colonial admitted that they obtained the information for the loan application from the Appellants. CT 205, line 22, through CT 207, line 22. On top of this, Colonial and Jones spoke to the Appellants about the amount of loan payment they could afford ($1,800) and that the Appellants could structure a refinance of the Idaho property to obtain the cash needed for the down payment on the California house. CT 206, line 24, through CT 207, line 3; CT 204 lines 13-25.

Making the solicitation for the California loan, plus gathering all of the information for the loan application and then completing the loan application for the Appellants, *is the primary act of loan origination*. It is these acts that are regulated by California and that require a California license. See the Declaration of Appellants' expert Stanley Oparowski, CT 285-286.

3. **Respondents Were Paid For The Loan Origination**

Respondents try in their ROP, pp. 17-18, to argue that they were not paid for originating the California loan. The Respondents, however, completely ignore the extensive and detailed deposition testimony and paper trail presented by the Appellants in the AOB, pp. 12-15, which is unassailable and need not be repeated here.

4. The Correspondence With The Appellants' California Realtor

Respondents try and fail to explain the extensive written communications with the Appellants' realtor and title company. If Flagship was the mortgage broker, these communications would have been between Flagship and the Appellants' realtor and title company. Its just that simple and obvious.

C. The Controversy Is Entirely Related To Respondents' Contacts With California

Respondents in their ROB, p.18-19 argue that there is insufficient nexus between their activities and California to meet the substantial connection test, citing to *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal. 4th 1054, 1067-68.

Respondents completely ignore the Appellants' extensive legal and factual argument in the AOB, p. 25-27, about purposefully entering California and availing themselves of economic benefit from the Appellants. As the evidence proves, Respondents had extensive contact with California regarding the Appellants' California loan. All that the law requires is a *single transaction*. See *Healthmarkets at 1170-1171*. Moreover, that single instance of activity can occur outside of California and only has to have an effect in California and harm California residents. See *Quattrone at* 306-309.

D. California Has a Special Regulatory Role in Exercising Jurisdiction

More importantly, the Respondents do not respond at all to the long established legal principal that the purposeful availment test is satisfied when there is specific legislative regulation of the activity that is the basis for personal jurisdiction. As pointed out in AOB, p. 27-30, this case involves mortgage loan

origination that is a licensed and regulated industry in California. The facts of this case demonstrate exactly why there is specific legislation and regulations governing the conduct of mortgage brokers originating loans for California properties and residents. Respondents were not licensed in California to originate loans, so, in a wrongful attempt to circumvent this law, they set up an undisclosed and fraudulent scheme whereby they would originate the loan and then have an affiliated company with a license appear on the settlement statement, collect both the loan origination and loan processing fees, and then "kick back" the loan origination fees to Respondents. When the Appellants finally discovered over a year later (when the property tax and home insurance impound account went "dry") that the real monthly payment was not $1,800 as promised by Respondents, but approximately $2,250 a month, the Appellants were left in extremis.

E. The Exercise Of Jurisdiction Is Fair And Reasonable

The Respondents' final argument in the ROB, p. 19-20, is that it would not be fair to exercise jurisdiction over them. The Respondents fail to argue against any of the legal precedents cited by Appellants on this issue. Instead, they once again return to the misleading factual arguments that have already been discussed above and need not be repeated.

The Appellants presented a clear and definitive legal and factual analysis of this issue in the AOB, p. 30-31. The facts of this case present all of the grounds for the "fair" exercise of personal jurisdiction required under *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472. Indeed, the facts demonstrate that exercise of jurisdiction is more than "fair" when compared to the factual circumstances in *Quattrone* which found extended personal jurisdiction.

II. Conclusion

Appellants have established an irrefutable body of evidence proving the Respondents' origination of the Appellant's California loan and the scheme whereby they avoided, through an affiliated third party company, California's strict regulatory law that is designed to protect California mortgage loan consumers from exactly this type of fraud.

The respondents contacts with California are extensive and more than sufficient for jurisdiction. But what makes the exercise of personal jurisdiction over Respondents compelling is the purposeful intent of the Respondents to evade California's regulatory scheme so that a fraud could be perpetrated against the Appellants.

Respectfully Submitted,

Dated: October 25, 2012

Patrick H. Dwyer,
Attorney for Appellants

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through II) is 3,180.

Patrick H. Dwyer,
Attorney for Appellants

Date: October 25, 2012

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Appellants' Reply Brief in the matter of McMenamy v. Colonial First Lending Group, Inc., Case No. 73278, appeal No C070642 was served via U.S. First Class mail upon the following:

1. Counsel for Appellants and Respondents addressed as follows:

   Steven Spiller, Spiller & McProud, 505 Coyote Street, Suite A, Nevada City, CA 95959 (one copy);

2. The Superior Court for the County of Nevada, Department 6, 201 Church Street, Nevada City, California 95959 (one copy);

3. The California Supreme Court, 350 McAllister Street, San Francisco, California 94102 (four copies).

4. The Court of Appeal, Third Appellate District, 621 Capitol Mall, 10th floor, Sacramento, California 95814-4719 (original and four copies).

Signature

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Date: October 25, 2012