

NO. S-03-001257

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IN THE NEBRASKA SUPREME COURT

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IVAN EICHER and DELORES EICHER, PATRICK SWEENEY and LOIS SWEENEY,  
EMMETT GULLEY, STEVEN W. STARMAN, WILLIAM STREET, DAVID WELTON,  
DON NOVACHICH, JERRY GILLS, RENEE RICHTER, LORI HILL  
and JENNIFER FRANS GRIESS

Plaintiffs/Appellees,

vs.

MID AMERICA FINANCIAL INVESTMENT CORPORATION, SCOTT  
W. BLOEMER, and ELENA [sic] HOLLINGSHEAD,

Defendants/Appellants.

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APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA  
Honorable Peter C. Bataillon

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REPLY BRIEF OF APPELLANTS MID AMERICA FINANCIAL INVESTMENT  
CORPORATION SCOTT W. BLOEMER, and ELENA [sic] HOLLINGSHEAD  
AND ANSWER TO BRIEF ON CROSS-APPEAL

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**REPLY BRIEF OF APPELLANTS**  
**TABLE OF CONTENTS**

PROPOSITIONS OF LAW ..... 28

**I.** ..... 28

STATEMENT OF FACTS ..... 28

ARGUMENT ..... 29

**I. SEVERANCE AND PRETRIAL PROCEDURE** ..... 29

CONCLUSION ..... 30

TABLE OF AUTHORITIES

**Cases**

*Grayson v. K Mart Corp.*, 849 F.Supp. 785 (N.D. Ga. 1994)..... 28, 29

## PROPOSITIONS OF LAW

### I.

Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to focus the jury's attention on the merits of each individual plaintiff's case that counsels against proceeding with these cases in one consolidated trial. **There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims.** Contrary to plaintiffs' arguments, they are not "prejudiced" by having to prove defendant's liability to each plaintiff individually. The ADEA does not provide a right for one plaintiff to recover because a defendant may have discriminated against another plaintiff of like age.

*Grayson v. K Mart Corp.*, 849 F.Supp. 785 (N.D. Ga. 1994)

### STATEMENT OF FACTS

Dan Hurd worked for Mid-America for approximately one and one-half months. (1024:17-18). His job was to view homes which might be suitable for foreclosure assistance, take photographs and contact the occupants to offer Mid-America's services. (1025:1-5). If the occupants asked about the nature of the services, Mr. Hurd was instructed to tell them that there were different programs and they needed to talk to Mr. Bloemer and Ms. Hollingshead. (1039:14-17). Mr. Hurd was present on two occasions when foreclosure assistance clients signed paperwork at the offices of Mid-America. (1039:21-25; 1040:1-3). The first was the Bixlers and the second was the Zitzlspergers. (1040:4-10; 1045:16-25; 1046:1-9). While at the time of his trial testimony Mr. Hurd did not recall if there was discussion of the purpose of the paperwork signed by the Bixlers, Mr. Hurd, at the time of his deposition, testified that the

rationale for each document signed by the Bixlers was explained. (1041:15-25; 1042:19-25; 1043:1-5). As to the Zitzlsperger party, Mr. Hurd testified at trial that when the paperwork was signed he recalled no discussion about them signing a deed or turning over title of their property to Mid-America, but at his deposition, Mr. Hurd testified that he did not recall if there was any discussion about the Zitzlspergers deeding their house to Mid-America. (1048:11-25).

David Zitzlsperger testified at trial. Mid-America personnel fully explained, and he understood, that he was signing over his house in order to stop the pending foreclosure. (1533:17-24; 1538:4-15). Steven Bixler also testified at trial. Mid-America personnel fully explained, and Mr. Bixler understood, that he was signing over his house in order to stop the pending foreclosure. (1641:1-25; 1641:1-5; 1643:18-25; 1644:1-5, 25; 1645:1-7; 1646:3-10; 1663:25; 1664:1-6).

Marcia Deuel was employed as a bookkeeper for Mid-America for less than one year. (1326:23-24; 1327:16-17). Of the partial conversations she heard with foreclosure assistance clients in the Mid-America offices, she cannot remember the names of any of the clients and is unaware if there were other conversations with the clients and does not know what documents the clients signed. (1374:13-25; 1375:1-12; 1375:21-25; 1376:1-25; 1377:1-8). Ms. Deuel was involved in other tasks, including talking on the phone at the time of the meetings. (1375:13-20).

## ARGUMENT

### I. SEVERANCE AND PRETRIAL PROCEDURE

As previously noted, on the issue of prejudice the court in *Grayson v. K Mart Corp.*, 849 F.Supp. 785 (N.D. Ga. 1994) noted:

Each plaintiff must prove liability on the part of the defendant with respect to the adverse action defendant took with respect to him. It is precisely this need to

focus the jury's attention on the merits of each individual plaintiff's case that counsels against proceeding with these cases in one consolidated trial. **There is a tremendous danger that one or two plaintiff's unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims.** Contrary to plaintiffs' arguments, they are not "prejudiced" by having to prove defendant's liability to each plaintiff individually. The ADEA does not provide a right for one plaintiff to recover because a defendant may have discriminated against another plaintiff of like age.

849 F.Supp. at 791 (emphasis added).

As the appeal brief of the Plaintiffs demonstrates (Pages 8-10), the foregoing is exactly what the Plaintiffs exploited and continue to exploit in this case. Although the circumstance of each Plaintiff as to home equity, mortgage payment amount and history, amount required to stop foreclosure, and level of education and sophistication are different, the Plaintiffs utilize the, allegedly, most egregious scenario in each category to make their point.

#### CONCLUSION

For the foregoing reasons, in addition to those already asserted, the Defendants request that the judgments in favor of the Plaintiffs be reversed and the matter remanded with directions to dismiss.

ANSWER TO BRIEF ON CROSS-APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

PROPOSITIONS OF LAW ..... 31

    I. .... 31

    II. .... 31

    III. .... 31

    IV. .... 32

    V. .... 32

STATEMENT OF FACTS ..... 32

ARGUMENT ..... 35

**I. STREET BANKRUPTCY**..... 35

        A. Collateral Estoppel..... 35

        B. Res Judicata..... 36

**II. WELTON CLAIM**..... 37

**III. NEBRASKA DECEPTIVE TRADE PRACTICES ACT THEORY OF RECOVERY**  
        ..... 38

CONCLUSION..... 38

AFFIDAVIT OF SERVICE..... 39

TABLE OF AUTHORITIES

**Statutes**

11 U.S.C. Section 548..... 32  
Nebraska Revised Statute Section 36-704 ..... 32

**Cases**

*Al'Amin v. McDonalds Corp.*, 2001 U.S. Dist. LEXIS 14274 (D.Neb. 2001) ..... 32, 38  
*GHMC, Inc. v. Brandywine Const. & Management, Inc.*, 16 Fed.Appx. 549 (8th Cir. 2001) .....  
..... 35, 36, 37  
*Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995) ..... 31, 36  
*Jaramillo v. Burkhart*, 999 F.2d 1241 (8th Cir. 1993)..... 35  
*Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995)..... 31, 36  
*Luscher v. Empky*, 206 Neb.572, 293 N.W.2d 866 (1980)..... 32, 37  
*Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740  
(1997)..... 32, 38  
*Stewart v. Hechtman*, 254 Neb. 992, 581 N.W.2d 416 (1998) ..... 31, 35  
*Vann v. Norwest Bank Neb.*, 256 Neb. 623, 591 N.W.2d 574 (1999) ..... 36

**Other Authorities**

NJI 2<sup>nd</sup> Ed Civil 9.01 ..... 37

## PROPOSITIONS OF LAW

### I.

Nebraska's collateral estoppel law bars a party from re-litigating an issue if: (1) the identical issue was decided in a prior action; (2) there was a final judgment on the merits; (3) the party against whom the rule is applied was a party to the prior action, or is in privity with a party; and (4) there was a full and fair opportunity to litigate the issue in the prior action.

*Stewart v. Hechtman*, 254 Neb. 992, 581 N.W.2d 416 (1998)

### II.

Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not.

*Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995)

### III.

The doctrine of res judicata bars the re-litigation of a matter that has been directly addressed or necessarily included in a former adjudication if: (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

*Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995)

IV.

False representations must be the proximate cause of the damage before a party may recover.

*Luscher v. Emphy*, 206 Neb.572, 293 N.W.2d 866 (1980)

V.

The Nebraska Deceptive Trade Practices Act only provides for equitable relief. *Al'Amin v. McDonalds Corp.*, 2001 U.S. Dist. LEXIS 14274 (D.Neb. 2001); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997)

STATEMENT OF FACTS

In August of 1998, William and Rhonda Street filed their petition pursuant to Chapter 13 of the Bankruptcy Code. (419:15-16). An adversary proceeding was initiated by the Streets within the bankruptcy proceeding. (E401,1:2356, Vol. 14). The Complaint for the adversary proceeding alleged, inter alia, that the transfer of the property at 21206 Palomino Road, Elkhorn, Nebraska "for the sum of \$48,468.48 was for less than a reasonable equivalent value for the property transferred. Furthermore, the Trust Deed Sale was not conducted in compliance with Nebraska Law. Based upon the foregoing such transfer was fraudulent pursuant to 11 U.S.C. Section 548." (434:13-20) (E401,1:2356, Vol. 14). These allegations were repeated in the Third Amended Complaint filed on or about December 14, 1998. (E407,1:2356, Vol. 14). In addition, the Third Amended Complaint alleged that "the value of the property on the date of the transfer of the property as described herein was \$70,000.00. Since the property was transferred for \$48,468.45 the transfer was fraudulent pursuant to Nebraska Revised Statute Section 36-704" and "On the date of the proposed sale, Plaintiffs, were handed paperwork and signed it. It was

only later that the Plaintiffs came to understand the real nature of the events that occurred on May 27, 1998.” (E407,2:2356, Vol. 14).

The Defendant in the bankruptcy adversary proceeding, Mid-America Financial Investment Corporation, filed a Motion for Summary Judgment. (E403,1:2356, Vol. 14). Various affidavits and documents were presented in connection with Mid-America’s Motion for Summary Judgment including the affidavits of William and Rhonda Street. (427:7-13) (E404,1:2356, Vol. 14; E405,1:2356, Vol. 14). The affidavits of both of the Streets assert:

3. That prior to the filing of the bankruptcy s/he had spoken with Mid-America Financial Investment Corporation regarding the foreclosure against the home residence. However, s/he is not aware of what documents s/he may have signed in regard to the foreclosure nor did s/he realize that s/he may have transferred the real property to Mid-America Financial Investment Corporation.

4. That on the date of the sale of the real property s/he met with a representative of Mid-America Financial Investment Corporation who told her/him that they would stop the foreclosure regarding the house, the payments would be made to Mid-America Financial Investment Corporation, that the payment due in June of 1998 would be paid at the end of the loan and that a July payment would be payable only if William Street obtained employment.

5. That Affiant has no records regarding these events and must therefore rely upon her/his recollection of what actually occurred at the time of the sale of her/his real property. The amount of the payments in the amount of \$800.00 due to Mid-America Financial Investment Corporation is based upon the amounts that

the Debtors were paying regarding a first and second mortgage in the real property.

6. At the time of the sale, the Debtors were handed paperwork and told to sign it. S/he had no choice regarding signing the paperwork nor was the paperwork explained to her/him. Also, the Debtors have never received any copies of the paperwork except for the pleadings filed in the United States Bankruptcy Court.

(E404,1:2356, Vol. 14; E405,1:2356, Vol. 14).

On or about January 27, 1999, the Bankruptcy Court found that:

The debtors owned real property which was subject to a first lien represented by a deed of trust, a second lien represented by a deed of trust and a judgment. A creditor, secured by one or both of the deeds of trust, served the appropriate Notice of Default under Nebraska law, published notice of sale and was prepared to sell the real property on May 27, 1998. On that day, the debtors entered into a sale and purchase agreement with defendant. Defendant agreed to purchase the property from the debtors, cure the delinquency on the first deed of trust, assume all liabilities under the first and second deeds of trust, pay the judgment lien, rent the property back to the debtors for a particular sum per month and give the debtors the opportunity to re-purchase the property if another party made an offer. The debtors, on May 27, 1998, in consideration for the above, executed a warranty deed conveying the property to the defendant.

(E28,3:2356, Vol. 14).

The Bankruptcy Court further found that the conveyance was not fraudulent. (E28,5:2356, Vol. 14).

## ARGUMENT

### I. STREET BANKRUPTCY

The Streets are barred from proceeding in this case by both the doctrines of collateral estoppel and res judicata.

#### A. Collateral Estoppel

Collateral estoppel bars the re-litigation of issues decided in previous cases. *Jaramillo v. Burkhardt*, 999 F.2d 1241 (8th Cir. 1993). Nebraska's collateral estoppel law bars a party from re-litigating an issue if: (1) the identical issue was decided in a prior action; (2) there was a final judgment on the merits; (3) the party against whom the rule is applied was a party to the prior action, or is in privity with a party; and (4) there was a full and fair opportunity to litigate the issue in the prior action. *Stewart v. Hechtman*, 254 Neb. 992, 581 N.W.2d 416 (1998). Pursuant to the doctrine of collateral estoppel the court in *GHMC, Inc. v. Brandywine Const. & Management, Inc.*, 16 Fed.Appx. 549 (8th Cir. 2001) found:

GHMC's damage claims are barred by collateral estoppel. First, GHMC's damage claims in this case are identical to the damage claims ruled upon by the arbitrator in the first action. Second, despite GHMC's theory, its appeal of the state court's decision confirming the arbitration award does not affect the conclusive effects of that decision. [citation omitted].

Third, because collateral estoppel precludes a plaintiff from simply "switching adversaries," [citation omitted]. GHMC cannot avoid the

preclusive effects of the fact that it was the losing party in both cases.

Fourth, GHMC clearly had a full and fair opportunity to litigate its identical damage claims before the arbitrator.

16 Fed.Appx. at 551.

**B. Res Judicata**

Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. *Lincoln Lumber Co. v. Fowler*, 248 Neb. 221, 533 N.W.2d 898 (1995); *Hangman v. Bruening*, 247 Neb. 769, 530 N.W.2d 247 (1995). Under Nebraska law, “any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment and cannot again be litigated by the parties and privies.” *Vann v. Norwest Bank Neb.*, 256 Neb. 623, 591 N.W.2d 574 (1999). The doctrine of res judicata bars the re-litigation of a matter that has been directly addressed or necessarily included in a former adjudication if: (1) the former judgment was rendered by a court of competent jurisdiction; (2) the former judgment was a final judgment; (3) the former judgment was on the merits; and (4) the same parties or their privies were involved in both actions. *Lincoln Lumber*, 248 Neb. at 221, 533 N.W.2d at 898; *Hangman*, 247 Neb. at 769, 530 N.W.2d at 247.

Pursuant to the doctrine of res judicata the court in *GHMC, Inc. v. Brandywine Const. & Management, Inc.*, 16 Fed.Appx. 549 (8th Cir. 2001), found:

Here, GHMC recasts its causes of action from contract law to tort law, and changes, in form, its adversary by replacing Harney Associates with the present defendants. Because GHMC's claims for tortious interference with contract, business relations, and business expectancy could have been raised in the state court case alongside the contract law claims, GHMC is barred from raising them in this case. [citation omitted]. Moreover, the named defendants in this case were in privity with Harney Associates, which had no employees, and relied on the defendants as its agents to represent its interests.

16 Fed.Appx. at 551.

The nature of the transaction, that is, whether it was a purchase or a loan, was litigated and decided by the Bankruptcy Court. Likewise, the Bankruptcy Court found the conveyance was not fraudulent. Any other issues relating to the Street-Mid America transaction could have been raised in the Bankruptcy Court adversary proceeding. The Streets are barred from raising them here.

## **II. WELTON CLAIM**

In order to prevail on a claim for fraud, a plaintiff must prove that the fraud was a proximate cause of some damage to the plaintiff; and the nature and extent of that damage. NJI 2<sup>nd</sup> Ed Civil 9.01. "False representations must be the proximate cause of the damage before a party may recover." *Luscher v. Emphy*, 206 Neb.572, 293 N.W.2d 866 (1980). Subsequent to the transaction with Mid-America, this Plaintiff lost his home because the mortgage company,

WMC, instituted foreclosure proceedings and ultimately sold his home. (E145,44:2-13; 58:19-25; 59:1-2; 60:13-25; 61:1-25; 63:14-24; 64:17-20:510, Vol. 12). It was the actions of the mortgage company, WMC, which caused Mr. Welton to lose his home not any misrepresentations of the Defendants.

### III. NEBRASKA DECEPTIVE TRADE PRACTICES ACT THEORY OF RECOVERY

The Nebraska Deceptive Trade Practices Act only provides for equitable relief. *Al'Amin v. McDonalds Corp.*, 2001 U.S. Dist. LEXIS 14274 (D.Neb. 2001); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997). Since the Plaintiffs were not entitled to equitable relief (injunctions), their claim for recovery under this Act was properly denied. (T55-56).

### CONCLUSION

For the foregoing reasons, the Defendants request that the trial court's rulings on the Street claim, the Welton claim and on the Deceptive Trade Practices Act theory of recovery be affirmed.

Respectfully submitted,

MID AMERICA FINANCIAL INVESTMENT  
CORPORATION, SCOTT W. BLOEMER and ELENA  
[sic] HOLLINGHEAD, Defendants/Appellants,

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AFFIDAVIT OF SERVICE

STATE OF NEBRASKA )  
 ) ss.  
COUNTY OF DOUGLAS )

BETTY L. EGAN, being first duly sworn on oath, states as follows:

1. That she is one of the attorneys for the Defendants/Appellants Mid America Financial Investment Corporation, Scott W. Bloemer and Elena [sic] Hollingshead in the above-captioned matter.

2. That on October 28, 2004, she caused two copies of Brief of Appellants to be sent by regular mail to the following attorneys of record:

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FURTHER AFFIANT SAYETH NOT.

Betty L. Egan  
Betty L. Egan

SUBSCRIBED AND SWORN to before me this 28<sup>th</sup> day of October, 2004.

Julie Meinzer  
Notary Public

