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Fraudulent Transfer
Usury
Truth in Lending Act (TILA)
Avoidance of Foreclosure Sale
Mortgage Broker Liability

Wurst v. Scharff et al. 00-6184-fra
In re Deborah Tabor 600-61436-fra7

5/18/01 Alley Unpublished

The Debtor obtained a loan through a mortgage broker from the defendant Scharff in order to stop a foreclosure sale of her real property and to make certain improvements. The Debtor signed a note evidencing the terms of the loan and granted the beneficial interest in a deed of trust on the two parcels of real property owned by her to Scharff to secure his interest. The Debtor was unable to maintain payments on the loan and Scharff filed a notice of foreclosure. At the foreclosure sale, Scharff obtained the property with a credit bid for the amount of the outstanding loan. The Debtor thereafter filed bankruptcy under Chapter 7 and the Plaintiff was appointed as trustee.

The Trustee brought this action primarily to avoid the effect of the foreclosure sale so that the property would be subject to liquidation by the Trustee as property of the estate. The Trustee argued that the Scharff loan was usurious, violated provisions of the Truth in Lending Act, and that the foreclosure sale was subject to being set aside on a number of equitable grounds. The Trustee also had claims for avoidance of the sale as a fraudulent transfer under 11 U.S.C. § 548 and for damages under state law against the mortgage broker and against Scharff. The Trustee filed a motion for summary judgment on all issues other than Code § 548 avoidance and Defendants filed cross-motions on all claims.

The court held that the foreclosure sale could not be set aside. The foreclosure sale cut off the right to rescind the loan agreement under TILA and could not be set aside on equitable grounds or because the loan was usurious or violated TILA. The Debtor's remedy was to obtain injunctive relief in state court prior to the foreclosure sale. The foreclosure sale terminated the Debtor's interest in the property. Because the foreclosure sale was regularly conducted under state law, the claim under Code § 548 failed under the holding of BFP v. Resolution Trust Corp. As the facts regarding mortgage broker liability were ambiguous, that issue would be reserved for trial as against the broker only.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE)	
)	
DEBORAH JEAN TABOR,)	Case No. 600-61436-fra7
)	
_____ Debtor.)	
)	
DAVID F. WURST, TRUSTEE)	Adv. Proc. No. 00-6184-fra
)	
Plaintiff,)	
)	
v.)	
)	
PETER M. SCHARFF,)	
CHRISTOPHER E. THOMPSON, dba)	
Southern Oregon Financial)	
Group/Capital Express of Ore.,)	
SOUTHERN OREGON FINANCIAL)	
GROUP, INC.,)	
)	MEMORANDUM OPINION
_____ Defendants.)	

BACKGROUND

Debtor was the owner of two contiguous parcels of real property located in Jackson County - the Independence School Road property (18 acres on which was Debtor's principal residence), and the Pioneer Road Lot (vacant land of approximately 5.5

1 acres). In June 1998, she submitted a loan application to
2 defendants Southern Oregon Financial Group, Inc. (SOFG) and
3 Thompson, its principal. At all material times Thompson was
4 licensed in Oregon as a mortgage broker. Thompson contacted
5 Scharff, who agreed to make the loan to the Debtor. On June 29,
6 1998, the Debtor approved and initialed a Loan Summary, prepared
7 by Thompson, which specified that her intended use of the funds
8 was to cure a delinquent note secured by a first trust deed on
9 her property, thus avoiding a threatened foreclosure, to pay
10 delinquent property taxes, and improve the property.
11 Specifically, the document said that "Ms Tabor is going to
12 improve her property to Foster Care Standards. To take in three
13 foster care disabled adults. She also breeds horses and is
14 expanding that business." The summary described the terms as
15 follows:

16 **LOAN REQUEST: \$55,000 Gross Blanket 2d T.D.**
17 **\$41,000 Net**

17 * * *

18 LOAN TERM: Six months.

18 **LOAN RATE:** the Lender, Peter Scharff charges a total
19 discount of \$14,000. The discount includes six months
20 prepaid interest which is all earned at the close of
21 escrow. For disclosure purposes only, the interest
22 rate is 15% and the lender discount is \$9,875.

21 LOAN PAYMENT: No periodic payment is required. The note,
22 which includes the prepaid interest, is all due 2/1/99
23 [six months after the loan was made]

22 LATE CHARGE: Not applicable

23 DEFAULT RATE: 18%

23 * * *

24 NOTES: 1) The repayment of this loan comes from the
25 sale of parcel #2. If the sale of Parcel #2 is not
26 completed prior to 2/1/99, a foreclosure on both
27 parcels will occur, *unless note paid off with other
28 funds by that time.*

26 [Bold type in original. The italicized portion was written

1 in by hand and initialed by debtor]

2
3 The Debtor signed a note containing the terms described in
4 the summary, and a Deed of Trust to both parcels. The loan was
5 closed in escrow on July 7, 1998. Of the amount disbursed,
6 \$14,664 was paid to Scharff for the "Loan Discount." Of the
7 remaining balance: \$8,920 was paid to Thompson and SOFG, as a
8 loan origination fee, and over \$23,000 was paid to several
9 creditors to satisfy mortgage arrearages, delinquent real
10 property taxes, and judgment liens. The Debtor received \$6,539
11 cash on closing.

12 The Debtor did not pay the Note by the February 1, 1999 due
13 date. The due date was extended on condition the Debtor pay
14 monthly interest payments and continue her efforts to sell the
15 Pioneer Road lot. By November 10, 1999, Debtor still had not
16 sold the lot and paid the Note. Scharff filed a Notice of
17 Default and Election to Sell with respect to the Trust Deed. See
18 ORS 86.735 et seq. The foreclosure sale was held on March 17,
19 2000. Scharff purchased the property with a credit bid of
20 \$88,646. The Debtor filed for relief under Chapter 7 of the
21 Bankruptcy Code on March 20, 2000 and the Plaintiff was
22 thereafter designated Trustee.

23 Plaintiff filed this adversary proceeding on July 10, 2000
24 with seven claims for relief:

25 1. Usury

26 Plaintiff alleges the loan amount should be calculated by

1 reducing \$55,000 by the "loan discount" of \$14,664 and the loan
2 origination fee of \$8,920 paid to SOFG at closing. Because the
3 loan thus calculated was for less than \$50,000, it would be
4 subject to the state usury law at ORS 82.010. Scharff would
5 therefore not be entitled to collect any interest on the loan and
6 the Debtor's obligation would be not more than \$31,415 minus any
7 payments made on the loan.

8 2. Home Ownership and Equity Protection Act of 1994 (HOEPA)

9 Plaintiff argues that the loan is subject to HOEPA¹ because
10 it was intended primarily for personal, family, or household
11 purposes, the loan is a consumer credit transaction as defined in
12 the Act, the loan is secured by the Debtor's principal dwelling,
13 and because the loan is a high rate mortgage as defined by the
14 Act. Plaintiff alleges that the loan violated the Act by 1)
15 including a balloon payment provision, 2) providing for a higher
16 rate of interest after default, and 3) failing to provide certain
17 disclosures required by the Act. Plaintiff seeks to rescind the
18 loan transaction pursuant to 15 U.S.C. § 1635.²

19 // // //

20 // // //

21
22 ¹HOEPA is part of the Truth-in-Lending Act (15 U.S.C. §1601 et seq.)
23 which is found at 15 U.S.C. § 1639 and 12 C.F.R. §§ 226.31 and 226.32.

24 ²Respecting the applicable statute of limitations, Plaintiff argues that
25 the limitations period for bringing the claim under HOEPA should either begin
26 on the date the agreement was modified (the extension of time allowed with
interest payments) or that it should be equitably tolled because extending the
due date effectively prevented the Debtor from discovering the violations of
HOEPA prior to November 1999, the date of the foreclosure.

1 3. Liability of Mortgage Brokers

2 Plaintiff alleges that Thompson and SOFG, as mortgage
3 brokers, violated provisions of ORS 59.955 and 59.925. Ocwen
4 Federal Bank, the first lienholder on the Independence Road
5 Property, had commenced nonjudicial foreclosure proceedings, and
6 scheduled a foreclosure sale for February 22, 2000. On February
7 17, 2000 Debtor informed Thompson that she was going to file for
8 bankruptcy because she could not find the money to pay Ocwen and
9 that there was no other way to save her home. Thompson informed
10 her that he had money in an account from Scharff and that Scharff
11 would pay the arrearage and that he and Scharff would assist the
12 Debtor in obtaining refinancing. Thompson also said he would ask
13 Scharff's attorney to contact the holder of the lien against the
14 Pioneer Road lot about removing the lien in order to facilitate
15 the sale of the lot. Plaintiff alleges that Thompson's conduct
16 and statements were false representations intended to lead her to
17 believe that, if she kept Thompson informed of her efforts to
18 obtain financing and to complete the sale of the Pioneer Road
19 lot, Scharff would not foreclose on March 17, 2000. Plaintiff
20 alleges that this was false, and that Scharff intended all the
21 time to foreclose and that the false representation caused the
22 Debtor to lose her property. Under ORS 59.925, Plaintiff seeks
23 damages and attorneys fees from Thompson and SOFG. In addition,
24 Plaintiff claims that Scharff is likewise liable as Thompson's
25 principal.

1 4. Set Aside Foreclosure Sale

2 Plaintiff argues the foreclosure sale should be set aside
3 because 1) the balloon-payment provision of the underlying loan
4 is unenforceable as it violates federal law, 2) the underlying
5 loan is usurious, 3) Scharff was equitably estopped from
6 conducting the foreclosure sale, 4) the notice of default does
7 not comply with ORS 86.745 because it overstates the true legal
8 principal amount owed to Scharff, and 5) Scharff's \$88,646 credit
9 bid does not comply with Oregon law because it overstates the
10 true legal consideration for the conveyance.

11 5. Fraudulent Transfer - 11 U.S.C. § 548

12 Plaintiff alleges that the foreclosure sale was a transfer
13 of the Debtor's interest in the property made within one year of
14 the petition date, Debtor received less than a reasonably
15 equivalent value in exchange for the transfer and was insolvent
16 on the date of the transfer, or became insolvent thereby.

17 6. Recovery of Property - 11 U.S.C. § 550

18 Plaintiff seeks recovery of the property after avoiding the
19 foreclosure of the property as a fraudulent transfer.

20 7. Attorney Fees

21 Plaintiff alleges he is entitled to attorney fees on his 1st
22 and 4th Claims for Relief under ORS 20.096, is entitled to
23 attorney fees on his 2nd Claim for Relief under 15 U.S.C. §
24 1640(a)(3), and is entitled to attorney fees on its 3rd Claim for
25 Relief under ORS 59.925(7).

26 Plaintiff filed a motion for partial summary judgment and

1 Defendants filed cross-motions for summary judgment on all
2 claims. A hearing was held on March 1, 2001 and the matter was
3 taken under advisement.

4 SUMMARY JUDGMENT

5 Summary judgment is appropriate when the pleadings,
6 depositions, answers to interrogatories, admissions, and
7 affidavits, if any, show that there is no genuine issue of
8 material fact and the moving party is entitled to judgment as a
9 matter of law. Fed. R. Civ. P. 56, made applicable by Fed. R.
10 Bankr. P. 7056. The movant has the burden of establishing that
11 there is no genuine issue of material fact. Celotex Corp. v.
12 Catrett, 477 U.S. 317, 323 (1986). The primary inquiry is
13 whether the evidence presents a sufficient disagreement to
14 require a trial, or whether it is so one-sided that one party
15 must prevail as a matter of law. Anderson v. Liberty Lobby,
16 Inc., 477 U.S. 242, 247 (1986).

17 A party opposing a properly supported motion for summary
18 judgment must present affirmative evidence of a disputed material
19 fact from which a fact finder might return a verdict in its
20 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257
21 (1986). Fed. R. Bankr. P. 7056, which incorporates Federal Rule
22 of Civil Procedure 56(e), provides that the nonmoving party may
23 not rest upon mere allegations or denials in the pleadings, but
24 must respond with specific facts showing there is a genuine issue
25 of material fact for trial. Absent such response, summary
26 judgment shall be granted if appropriate. See Celotex Corp. v.

1 Catrett, 477 U.S. 317, 326-27 (1986).

2 Several motions have been filed by each party, which may be
3 summarized as follows:

4 ●Plaintiff's First Claim (Usury)

5 Plaintiff: Moves for Summary Judgment as to liability (that
6 the loan is usurious and that Scharff is not entitled to collect
7 any interest on the loan).

8 Thompson and SOFG: Move for Summary Judgment as the loan
9 does not come under the usury statutes as it was for an amount
10 over \$50,000. Even if reduced by the loan discount, the
11 additional advance made in the amount of \$17,626 (to pay the
12 first lienholder) would put the loan over the \$50,000 amount.

13 Scharff: Moves for Summary Judgment.

14 ●Plaintiff's Second Claim (HOEPA and TILA)

15 Plaintiff: Moves for Summary Judgment that the Plaintiff is
16 entitled to rescission.

17 Thompson and SOFG: Move for Summary Judgment. Plaintiff
18 cannot rescind the loan agreement because the loan was made for
19 business and agricultural purposes. Even if TILA and HOEPA
20 applied in the present case, the claim for rescission is barred
21 by the foreclosure sale.

22 Scharff: Defendant moves for Summary Judgment.

23 ●Plaintiff's Third Claim (Liability of Mortgage Brokers)

24 Plaintiff: Moves for Summary Judgment as to liability.

25 Thompson and SOFG: Defendants move for Summary Judgment as
26 there is no evidence that brokers violated any regulatory scheme.

1 Thompson did not violate TILA or HOEPA. State statutory grounds
2 for imposing liability on a broker are at ORS 59.925(2)(b) and
3 essentially allow a private cause of action against the broker if
4 the broker defrauds a customer. There are no facts indicating
5 that Thompson made any misrepresentations to the Debtor. Debtor
6 has admitted that she was aware of all material loan items, that
7 the documents were reviewed by her lawyer who recommended against
8 the loan because the interest was too high. Because there were
9 no misrepresentations made at the time the loan was made,
10 Defendants entitled to Summary Judgment.

11 Scharff: Defendant moves for Summary Judgment as to
12 Defendant Scharff as he is not subject to ORS Chapter 59.

13 ●Plaintiff's Fourth Claim (Set Aside Foreclosure Sale)

14 Plaintiff: Moves for Summary Judgment to set aside the
15 foreclosure sale.

16 Thompson and SOFG: Defendants move for Summary Judgment.
17 ORS 86.770 provides that a trustee's sale is final as to all
18 persons who received notice. The Debtor received notice and does
19 not claim otherwise. Because borrower had notice of the sale,
20 she had a fair and ample opportunity to raise the issues
21 complained of prior to the foreclosure sale and could have got an
22 injunction in state court to raise those issues. The bankruptcy
23 trustee steps into the shoes of the debtor and has no greater
24 powers in this regard than does she.

25 The lender did not overstate the amount of indebtedness
26 because the loan was not subject to the usury law. Moreover,

1 before the trustee should be able to set aside the foreclosure
2 sale on the grounds that the Notice overstated the amount owing,
3 he should be required to show that but for the overstatement,
4 someone would have bid in an amount sufficient to pay off the
5 liens and pay the Debtor the equity she apparently claims she had
6 in the property. Absent such evidence, the Debtor can show no
7 loss and is not entitled to equitable relief. Defendants cite to
8 Semlek v. National Bank of Alaska, 458 P.2d 1003, 1006-1007
9 (Alaska 1969).

10 Plaintiff argues that there was no default by the Debtor
11 because the balloon payment violated HOEPA. Even if the loan
12 came under HOEPA, Debtor was in default on the 1st liens on both
13 parcels and thus the loan balance could have been accelerated
14 without the balloon payment.

15 Finally, if in hindsight an overbid occurred, the Trustee
16 does not have standing to assert the claim. The remedy for an
17 overbid is to pay the surplus to the parties with a subordinate
18 lien to lenders. ORS 86.765. Anything remaining would be paid
19 to Debtor as part of her homestead exemption. The Trustee has
20 failed to establish that there would be any funds remaining after
21 these payments to pay to unsecured creditors.

22 Scharff: Defendant moves for Summary Judgment. The
23 foreclosure sale is a final adjudication of all matters relating
24 to a Debtor's obligation. Equitable relief is available prior to
25 the foreclosure sale if debtor chooses to avail herself of it in
26 state court.

1 ● Plaintiff's Fifth Claim (Fraudulent Transfer -\$ 548)

2 Plaintiff: Summary Judgment not requested.

3 Thompson and SOFG: Defendants move for summary judgment.

4 Amount bid at the foreclosure sale constitutes "reasonably
5 equivalent value" pursuant to BFP v. Resolution Trust Corp.

6 Scharff: Defendant moves for Summary Judgment.

7 ● Plaintiff's sixth Claim (Recovery for Estate - \$ 550)

8 Plaintiff: Summary Judgment not requested.

9 Thompson and SOFG: Defendants move for Summary Judgment. See
10 above.

11 Scharff: Defendant moves for Summary Judgment.

12 ● Plaintiff's Seventh Claim (Attorney Fees)

13 Plaintiff: Moves for Summary Judgment.

14 Thompson and SOFG: Defendants do not move for summary
15 judgment.

16 Scharff: Moves for summary judgment.

17 DISCUSSION

18 1. Usury

19 While the Complaint alleges that the loan at issue was
20 usurious and that Scharff is not entitled to interest on the loan
21 under state law, it contains no prayer for damages³, other than
22 for attorney fees, and is basically set out as a predicate to
23

24 ³It does not appear that a claim for damages would lie under Oregon law
25 in any case, as case law provides that a borrower who makes payments
26 voluntarily upon a usurious contract cannot recover the sums paid. See
Crisman v. Corbin, 169 Or. 332, 128 P.2d 959 (1942).

1 Plaintiff's Fourth Claim for Relief seeking to set aside the
2 foreclosure sale. I will defer my analysis of this issue to the
3 discussion of Claim #4.

4 2. Home Ownership and Equity Protection Act of 1994 (HOEPA)

5 HOEPA and the Truth-in-Lending Act (TILA) apply to consumer
6 credit transactions, which are defined as loans where "money,
7 property, or services which are the subject of the transaction
8 are primarily for personal, family, or household purposes." 15
9 U.S.C. § 1602(h). The Acts do not apply to "[c]redit
10 transactions involving extensions of credit primarily for
11 business, commercial, or agricultural purposes" 15
12 U.S.C. § 1603(1). Among other things, HOEPA prohibits inclusion
13 in qualifying mortgages of balloon payments, enhanced interest
14 rates after default, and prepayment penalties. 15 U.S.C. § 1639.
15 Also prohibited is any extension of credit to a consumer (as the
16 term is defined in the act) based on the collateral and without
17 regard to the borrower's ability to repay. 15 U.S.C. § 1639(h).

18 The Complaint contains no prayer for monetary damages aside
19 from attorney fees for this cause of action. The direct remedy
20 sought by the Plaintiff is rescission of the loan contract
21 pursuant to 15 U.S.C. § 1635. This section provides for a right
22 to rescission in certain instances where the provisions of HOEPA
23 and/or TILA are violated. However, 15 U.S.C. § 1635(f) provides
24 that the right to rescind expires upon the earlier of three years
25 from the consummation of the transaction or sale of the property.

1 Plaintiff acknowledges that the foreclosure sale of the property
2 cuts off the borrower's right to rescind, citing Brown v.
3 Financial Enterprises Corp. (In re Hall), 188 B.R. 476, 484
4 (Bankr. D. Mass. 1995), but argues that setting aside the
5 foreclosure sale "reawakens" this right. Rescission under the
6 Plaintiff's theory depends on setting aside the foreclosure sale
7 under Plaintiff's fourth claim, discussed below.

8 3. Mortgage Broker Liability

9 O.R.S. 59.955 provides that "prior to closing . . . the
10 mortgage broker shall supply the borrower with a disclosure as
11 required by the real estate lending provisions of 15 U.S.C. §
12 1601 et seq. and Regulation Z, 12 CFR Part 226." The effect of
13 this provision is to require brokers to ensure compliance with
14 the Truth in Lending Act. The phrase "supply the borrower with a
15 disclosure as required" incorporates the TILA standards
16 determining (1) the contents of the disclosure, and (2) whether
17 the disclosure required by the Act has been made for purposes of
18 the Act. The TILA states that, where a loan subject to the Act
19 contains certain prohibited provisions, the mandatory disclosures
20 will be deemed not to have been made. 15 U.S.C. § 1639(j).

21 It is undisputed that there are prohibited provisions, as
22 defined at 15 U.S.C. § 1639, in the loan at issue here (e.g. the
23 loan provides for a balloon payment⁴, and provides for a default

24
25 ⁴15 U.S.C. §1639(e) provides that a mortgage subject to the Act which
26 has a term of less than five years "may not include terms under which the
aggregate amount of the regular periodic payments would not fully amortize

1 interest rate). Resolution of the matter turns on whether the
2 TILA is applicable to this loan. Case law requires courts to
3 view all surrounding circumstances in determining whether a loan
4 is a consumer transaction for TILA purposes. See e.g. Slenk v.
5 Transworld Systems, Inc., 236 F.3d 1072, 1075 (9th Cir.
6 2001) (citing Bloom v. I.C. System, Inc., 972 F.2d 1067, 1068 (9th
7 Cir. 1992)). Substance is to be elevated over form: "We must
8 therefore 'look to the substance of the transaction and the
9 borrower's purpose in obtaining the loan, rather than the form
10 alone'." Id (citing Riviere, et al. v. Banner Chevrolet, Inc.,
11 184 F.3d 457, 462 (5th Cir. 1999)). The facts presented in the
12 cross-motions for summary judgment appear to conflict in some
13 respects, and are certainly capable of providing conflicting
14 inferences. For example:

15 (1) The loan summary (Garrick Declaration, Exh. 3) states
16 after "use of funds": "cure foreclosure, pay delinquent taxes,
17 improve property."

18 (2) The borrower's closing statement shows disbursement to
19 various personal obligations and judgment liens.

20 (3) Paragraph 13 of the promissory note (Thompson's Concise
21 Statement of Facts - Exh. 4) states that "Maker is engaging in
22 this loan transaction exclusively for business or commercial
23 purposes and not for any personal, family, or household
24 purposes."

25 _____
26 the outstanding principal balance."

1 (4) Mr. Thompson testifies in his supporting affidavit that,
2 in preliminary discussions between the Debtor and Thompson, the
3 Debtor told him the purpose of the loan was to make the
4 improvements necessary to obtain her foster care license and take
5 in three clients and to expand her horse breeding and/or boarding
6 operation. (Thompson affidavit ¶ 7).

7 (5) Thompson's affidavit notes that the "good faith
8 estimate" that he prepared in consultation with the Debtor showed
9 that she would receive less than \$5,000 in cash from the loan,
10 although, as it turned out, she received in excess of \$5,000.
11 (Thompson affidavit § 6). Given that, Thompson must have been
12 aware of how the proceeds of the loan were to be used.

13 Because of the ambiguity of the evidence regarding the
14 purpose of the loan, Plaintiff's motion and Defendant Thompson's
15 and SOFG's cross-motion for summary judgment will be denied. The
16 issues of liability under TILA and Oregon Chapter 59, as well as
17 allegations regarding misrepresentations made by Thompson to the
18 Debtor, must be determined at trial.

19 Defendant Scharff's liability: ORS Chapter 59 regulates
20 mortgage brokers, and not their clients. Violation of a
21 regulatory scheme by a professional is not imputed to his or her
22 client, when it is the professional's and not the clients'
23 behavior which is subject to regulation. For that reason, any
24 liability of Thompson cannot be imputed to Scharff. Moreover,
25 there is no provision in Chapter 59 or case law interpreting the
26

1 Chapter which would create liability in a party other than a
2 mortgage broker. Scharff's motion for summary judgment for this
3 claim is therefore granted.

4 4. Claim to Set Aside Foreclosure Sale

5 Plaintiff cites to two opinions which he argues indicate
6 that equitable relief is available to undue or set aside a
7 foreclosure sale: Harper v. Interstate Brewery, 168 Or. 26, 120
8 P.2d 757 (1942) and Option One Mortgage v. Wall, 159 Or.App. 354,
9 977 P.2d 408 (1999).

10 a) Harper involved allegations that the defendant mortgagee
11 sold the property at foreclosure, but discouraged potential
12 buyers in order to purchase the property at a low price for
13 itself. The action was brought in tort seeking damages. The
14 plaintiff in Harper did not, it must be noted, seek to overturn
15 the foreclosure sale. The Plaintiff here relies on a statement
16 from the court that a private foreclosure sale is "subjected to
17 equitable supervision and constitutes, at best, a harsh remedy."
18 The court goes on to say that a mortgagee exercising a power of
19 sale is often described as a trustee for the benefit of the
20 mortgagor and that "equity has often taken jurisdiction to set
21 aside sales when the power has been improperly exercised."

22 Defendants correctly point out that this case was decided before
23 enactment of the trust deed statutes, ORS 86.735 et seq.

24 Moreover, in In re Cardinal Enterprises, 68 B.R. 460, 462-463
25 (BAP 9th Cir. 1986) the Bankruptcy Appellate Panel for the Ninth
26

1 Circuit points out that subsequent Oregon cases have held that
2 Harper is limited to its facts, and that the duty of a
3 foreclosing creditor described in Harper does not extend to
4 beneficiaries under trust deeds.

5 b) Option One involved an eviction action in state District
6 Court. Option One was the beneficiary under a trust deed which
7 was foreclosed and purchaser of the subject property at the
8 foreclosure sale held under the power of sale conferred by the
9 trust deed. It then brought an action in district court to oust
10 the prior owners. The District Court held that Option One was
11 entitled to possession. The Court of Appeals held that notice of
12 the foreclosure sale was inadequate, even though the debtors
13 eventually obtained notice when a follow up notice was mailed to
14 their home. In light of the procedural error, the Court ruled
15 that Option One was not entitled to possession as purchaser. The
16 court stated that the trust deed statute requires that notice
17 "shall" be made according to ORCP 7 D(2) and D(3) and makes no
18 allowance for the reasonable notice standard set out in ORCP 7
19 D(1). While making no determination as to title to the property,
20 the Court of Appeals ruled that Option One was not entitled to
21 possession.

22 Option One stands for the proposition that the procedural
23 requirements of the trust deed statutes must be strictly complied
24 with. It does not, as the Plaintiff argues, provide a basis for
25 overturning a foreclosure sale on equitable grounds or because
26

1 some aspect of the underlying contract was in violation of one or
2 more laws. Consider the treatment of judgments obtained by
3 default: a default judgment may be collaterally attacked as void
4 if the court's jurisdiction was lacking due to defective service.
5 However, the judgment may not be attacked solely on the grounds
6 that the claim stated in the complaint was incorrect. The same
7 principle applies to sales under Oregon Trust Deed statutes. If
8 the underlying contract was usurious or violated some other law,
9 or the Debtor had other equitable grounds with respect to the
10 foreclosure, the appropriate remedy was to seek injunctive relief
11 prior to the sale. Once the sale takes place, the debtor's
12 interest in the property is terminated. ORS 86.770(1).

13 As the Plaintiff has not alleged that the procedural
14 requirements of the trust deed statutes or the foreclosure sale
15 were deficient in any way (e.g. notice was properly served, sale
16 was properly conducted), Plaintiff's claim to overturn the
17 foreclosure sale must fail. Because Claims 1 and 2 for
18 violations of the state usury statute and federal HOEPA,
19 respectively, are tied to Claim 4, they too must fail.
20 Plaintiff's motion for summary judgment as to Claims 1, 2, and 4
21 will therefore be denied and Defendants' cross-motions granted.

22 5. Fraudulent Transfer - 11 U.S.C. § 548

23 6. Recovery of Property - 11 U.S.C. § 550

24 11 U.S.C. § 548 states in relevant part:

25 (a) The trustee may avoid any transfer of an
26 interest of the debtor in property . . . that
was made or incurred on or within one year

1 before the date of the filing of the
2 petition, if the debtor voluntarily or
involuntarily--

3 . . .

4 (2) (A) received less than a reasonably equivalent value
in exchange for such transfer . . .; and

5 (B) (i) was insolvent on the date that such transfer was
6 made . . ., or became insolvent as a result of such
transfer . . .;⁵

7
8 Plaintiff must establish that the debtor received "less than
9 a reasonably equivalent value in exchange for such transfer."

10 BFP v. Resolution Trust Corp., 114 S.Ct. 1757,1760 (1994).

11 The BFP Court rejected the proposition that "reasonably
12 equivalent value" is the equivalent of fair market value.⁶ It
13 held, rather, that "reasonably equivalent value" for property
14 foreclosed upon "is the price in fact received at the foreclosure
15 sale, so long as all the requirements of the State's foreclosure
16 law have been complied with." BFP, 114 S.Ct. at 1765. The
17 Court stated that its holding was limited to "mortgage
18 foreclosures" of real estate. BFP, 114 S.Ct. at 1761 n.3.
19 "Mortgage foreclosures" in this context also encompasses trust

20
21 ⁵ "Transfer" is defined under the Bankruptcy Code as "every mode, direct
22 or indirect, absolute or conditional, voluntary or involuntary, of disposing
23 of or parting with property or with an interest in property, including
retention of title as a security interest and foreclosure of the debtor's
equity of redemption." 11 U.S.C. § 101(54). The last phrase was added in 1984
clarifying that foreclosure sales fall within this definition.

24 ⁶ Fair market value is defined as "[t]he amount at which property would
25 change hands between a willing buyer and a willing seller, neither being under
26 any compulsion to buy or sell and both having reasonable knowledge of the
relevant facts." BLACK'S LAW DICTIONARY 537 (5th ed. 1979).

1 deed foreclosures because the property at issue in BFP was
2 encumbered by a deed of trust rather than a mortgage.

3 The Plaintiff has not established that the foreclosure sale
4 in the instant case was not regularly conducted or that state
5 foreclosure law was not complied with. As with respect to
6 Plaintiff's Fourth Claim, the distinction between the merits of
7 the claim and the regularity of the procedure is crucial. As
8 long as the sale was conducted in the manner prescribed by law,
9 BFP requires the court to find that the amount received by the
10 Debtor at the foreclosure sale constituted "reasonably equivalent
11 value" for purposes of 11 U.S.C. § 548. Defendants' cross-
12 motions are granted.

13 7. Attorney Fees

14 The allowance and amount of any attorneys fees in this
15 matter is reserved for trial.

16 CONCLUSION

17 For the foregoing reasons, the following disposition of the
18 parties' cross-motions for summary judgment will be made:

19 1. Usury: Plaintiff's motion is denied, and Defendants' motions
20 are granted.

21 2. HOEPA: Plaintiff's motion is denied; Defendants' motions are
22 granted.

23 3. Mortgage Broker Liability: Plaintiff's motion is denied,
24 Thompson and SOFG's motion is denied, and Scharff's motion is
25 granted.

1 4. Set Aside Foreclosure Sale: Plaintiff's motion denied, and
2 Defendants' motions are granted.

3 5 and 6. Fraudulent Transfer and Recovery under §§ 548 and 550:
4 Defendants' motions are granted.

5 7. Attorney fees: Plaintiff's motion is denied; Scharff's motion
6 is denied.

7 This Memorandum Opinion contains the court's findings of
8 fact and conclusions of law. An order will be entered consistent
9 with the foregoing.

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13 FRANK R. ALLEY, III
14 Bankruptcy Judge
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