

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bradley R. Thayer and Judith N. Thayer,

Debtors.

Chapter 7 Bankruptcy

Bky 04-32735 (GFK)

In re:

American Residential Mortgage, LP

Plaintiff

Adv 04-3338

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS**

1. American Residential Mortgage, LP ("ARM") the Plaintiff in this adversary proceeding, files this Reply to Defendant's Memorandum of Law in Opposition to Motion to Dismiss ("Memorandum") and states as follows:

2. ARM brought a Motion to Dismiss Defendants' counterclaims on the following bases:

- Defendants cannot, as a matter of law, contend both that the Cancelled Loan was rescinded and that the proceeds of that rescinded loan paid an earlier loan in full;
- Mere tender of funds to a bankruptcy trustee does not operate as an assignment of property of the estate to the party tendering such funds;

- An objection to sale of estate property is not properly asserted by bringing a claim in an adversary proceeding against the buyer of the claims;
- ARM's standing to sue on assigned claims is irrelevant to the question of whether those claims were assigned to ARM; and
- Defendants lack standing to assert TILA claims against ARM as Defendants do not own the rights to the claims.

3. Nowhere in Defendants' Memorandum in Response to ARM's Motion to Dismiss have the Defendants responded to ARM's assertions that:

- Mere tender of funds to a bankruptcy trustee does not operate as an assignment of property of the estate to the party tendering such funds;
- An objection to sale of estate property is not properly asserted by bringing a claim in an adversary proceeding against the buyer of the claims;
- ARM's standing to sue on assigned Claims is irrelevant to the question of whether those claims were assigned to ARM; and
- Defendants lack standing to assert TILA claims against ARM as Defendants do not own the rights to the claims.

4. All of these points relate to Counts III and IV of Defendants' Counterclaims. Because Defendants have not even attempted to refute several of the grounds for dismissal of those counts, Counts III and IV of Defendants' counterclaims should be dismissed.

5. With respect to Counts I and II of Defendants' counterclaims, which turn on the restoration of the TCF Note, ARM reiterates its position as set forth in its Complaint, its Motion to Dismiss, and its Objection to Defendants' Motion for Summary Judgment. The Defendants' willingly rescinded the Cancelled Loan and are estopped from complaining that as a result of

such rescission they were restored, whether by action of law or actions taken by others, to the position they held before entering into the Cancelled Loan. Therefore, Counts I and II of Defendants' counterclaims should be dismissed.

6. With respect to Count III of their counterclaims, regarding whether the TILA claims could be assigned to ARM, Defendants have cited a number of cases addressing whether assignees of claims have standing to bring suit on such claims. ARM does not deny that should it wish to bring suit on the assigned claims, it may lack standing to do so; however, the issue of standing to bring such claims is not before this Court. ARM has made no attempt to sue to recover on such claims and does not intend to do so. ARM's intent in purchasing the claims was entirely related to removing the claims from the estate and from the Defendants for the express purpose of preventing Defendants from bringing the claims. Thus, the assignment in this case acted as a settlement of the claims assigned. The question of ARM's standing to bring the claims is irrelevant to whether it did purchase those rights, as worthless as they may be in ARM's hands.

7. Moreover, Defendants' suggestion that there was something inequitable in the fact that ARM could pay and was willing to pay more for the claims than Defendants misses the point of the bankruptcy processes regarding administration of estate assets. A chapter 7 trustee is required to "collect and reduce to money the property of the estate for which such trustee serves . . ." 11 U.S.C. § 704(1). The trustee is under no obligation to resell estate assets to the debtor, particularly if the debtor does not submit the best bid for the assets. The assets of the estate are administered for the benefit of the *estate*, not the debtors. Had the Trustee believed the claims to be viable and valuable (or had ARM) it is possible that the Trustee could have demanded an even higher price. As it happened, the chapter 7 trustee in this case was able to obtain cash for claims

that ARM believes to be worthless, and the debtors should not be heard to complain that it is inequitable that the claims were not sold to them for a lower price.

8. The Defendants have not refuted several of the bases for the dismissal of Count III of their counterclaims. The refutation that they *have* attempted ignores not only the procedural posture of this case but some of the fundamental principles upon which bankruptcy is based. Therefore, Count III of the Defendants' counterclaims should be dismissed.

9. With respect to Count IV, the TILA claims, in the time since the filing of ARM's Motion to Dismiss, the Bankruptcy Appellate Panel for the Eighth Circuit has issued an opinion directly on point. This opinion reiterates that debtors do not have standing to bring actions that belong to the estate and that such proceedings must be dismissed. *Harrison v. Singer Asset Fin. Co. (In re Harrison)*, 314 B.R. 751 (8th Cir. B.A.P. 2004). In this case, the parties agree that the Trustee administered the TILA claims by selling them to the highest bidder-- ARM. While the parties may dispute whether such sale was possible, it is undisputed that the prevailing bidder was *not* the Defendants and that the chapter 7 trustee has *not*, through any word, deed or court action, assigned or abandoned the claims to the Defendants. Therefore, the Defendants have no standing to assert TILA claims against ARM, and any count predicated on TILA claims must be dismissed. Therefore, Count IV of the Defendants' counterclaims should be dismissed.

WHEREFORE, ARM moves the Court for an order dismissing all of Defendants' counterclaims and granting such other relief as the Court deems just and equitable.

Date: October 22, 2004

/e/ Heather B. Thayer
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CERTIFICATE OF SERVICE

Heather B. Thayer, under penalty of perjury, states that on October 22, 2004, she caused to be served the following:

1. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion to Dismiss; and
2. Certificate of Service.

by sending via Messenger true and correct copies thereof to:

Karl Oliver
The Oliver Group, PLC
1935 W. County Road B2, Suite 415
Saint Paul, Minnesota 55113

Dated: October 22, 2004

/e/ Heather B. Thayer
Heather B. Thayer

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