

ST. LOUIS COUNTY CIRCUIT COURT
STATE OF MISSOURI

Service Addressed

11 SL-CC04435
MIMI FOWLER, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

GMAC MORTGAGE, LLC,
SOUTH & ASSOCIATES, P.C.,
and SOUTH LENDERS 1-100,

Defendants.

Cause No.

Division

3

*GMAC Mortgage
c/o CSC-Lawyers Inc.
Registered Agent
2nd Floor
Justice Center
St. Louis, MO 63101*

FILED

NOV - 4 2011

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

*South & Associates
c/o Daniel A. West
Registered Agent
800 Market St. Suite 1600
St. Louis, MO 63101*

PETITION FOR INDIVIDUAL AND CLASS ACTION RELIEF

Plaintiff Mimi Fowler, individually and on behalf of all others similarly situated ("Borrower"), states:

INTRODUCTION

1. Defendant GMAC Mortgage, LLC and South Lenders 1-100, defined below, ("Lenders") are in the business of making, purchasing or participating in home loans in the State of Missouri. Each home loan is evidenced by a promissory note and secured by a deed of trust (or mortgage) on the borrower's residence.

2. At all relevant times, Lenders are represented by defendant South & Associates, P.C., as outside counsel.

3. Each deed of trust allows for appointment of a successor trustee. As a general business practice, Lenders appoint South & Associates, P.C. ("Trustee"), as successor trustee under their deeds of trust.

4. As a general business practice, each Lender and the Trustee, as agent for such Lender, charge the borrower with the attorney's fees for Trustee's legal services

incurred in initiating foreclosure on the deed of trust ("Attorney's Fees") and the costs for filing the appointment of successor trustee ("Filing Costs"). As a general business practice, Trustee on behalf of each Lender provides borrowers with a Reinstatement Quote that requires the Borrower to pay Attorney's Fees and Filing Costs to avoid foreclosure and reinstate Borrower's mortgage with Lender.

5. Trustee, as outside counsel, represents numerous mortgage lenders doing business in the State of Missouri, in addition to GMAC Mortgage, LLC, who appoint South & Associates, P.C., as successor trustee. ("South Lenders 1-100").

6. This action is brought by Borrower against Trustee and Lenders to recover for herself and for all others similarly situated (hereinafter, the "Plaintiffs' Class") all Attorney's Fees and Filing Costs paid by Borrower and members of the Plaintiffs' Class to Trustee and Lenders. Borrower contends that it is unlawful for Lenders and Trustee, as attorney and agent for Lenders, to (1) charge or collect from Borrower and members of the Plaintiffs' Class any compensation for Trustee's services in foreclosure in excess of the statutory commission permitted under Missouri law or (2) charge or collect from Borrower and members of the Plaintiffs' Class any filing costs not permitted under the promissory note or deed of trust. Borrower further contends that Trustee and Lenders are legally obliged to refund to Borrowers, and to the other members of the Plaintiffs' Class, all Attorney's Fees and Filing Costs charged and collected by Trustee and Lenders on foreclosures initiated within the State of Missouri in excess of the trustee's fees set by statute and the Filing Costs authorized by the promissory note and deed of trust, and to pay in addition statutory double damages,

the attorney's fees incurred by Borrower herein, costs, pre-judgment interest, post-judgment interest, and punitive damages.

7. For the reasons stated in detail below, this case is properly brought as a class action on behalf of the Plaintiffs' Class represented by Borrower.

8. This paragraph relates to the foreclosure on the mortgage loan between Borrower and defendant GMAC Mortgage, LLC as noteholder and/or lender. In or around the Fall, 2009, GMAC Mortgage, LLC, appointed South & Associates, P.C., successor trustee under the deed of trust signed by Borrower. On or about October 21, 2009, Trustee published a Notice of Foreclosure Sale of Borrower's property located at 817 Tiffin, St. Louis County, Missouri. On or about November 4, 2009, Trustee on behalf of GMAC Mortgage, LLC, sent Borrower a Reinstatement Quote charging her and requiring payment of Attorney's Fees of \$650 and Filing Costs of \$37 to reinstate her mortgage. On or about November 9, 2009, Borrower paid \$4,548.57, including the Attorney's Fees and Filing Costs to avoid a foreclosure sale of her property.

JURISDICTION AND VENUE

9. This Court has jurisdiction over each of the defendants because each transacts business within Missouri, enters into contracts within Missouri and has committed the acts which are the basis for each defendant's liability within Missouri.

10. Venue is proper in St. Louis County because:

- a. this lawsuit alleges a tort in which plaintiff was first injured in Missouri, and St. Louis is the County where plaintiff was first injured; and
- b. this lawsuit asserts claims under Chapter 407, and the complained of transactions took place in St. Louis County.

CLASS ACTION ALLEGATIONS

11. A trustee's compensation for services in connection with a foreclosure is limited under § 443.360, RSMo. Under Missouri law, an attorney who serves as trustee may not charge the borrower in foreclosure and collect attorney's fees for legal work done in connection with the foreclosure. Additionally, nothing in the standard form promissory notes and deeds of trust signed by Borrower and members of the Plaintiffs' Class permit Lenders and Trustees to charge them with Filing Costs.

12. Borrower proposes to represent a Plaintiffs' Class consisting of all persons residing in Missouri and not represented by counsel who paid Attorney's Fees and Filing Costs in foreclosure proceedings related to Missouri real estate.

13. The Plaintiffs' Class consists of thousands of individuals. The members of the Plaintiffs' Class are so numerous that it is impractical to bring all of them before the Court in this action or separate actions. The amount of damages suffered by any individual member of the Plaintiffs' Class is so small as to make individual suit for its recovery economically unfeasible.

14. Borrower is similarly situated to the members of the Plaintiffs' Class and will fairly and adequately represent all of the Plaintiffs' Class members.

15. There are common questions of law and fact applicable to the claims asserted on behalf of the Plaintiffs' Class. These questions include the following:

- a. Whether the Lenders and Trustee charged Borrower and members of the Plaintiffs' Class Attorney's Fees and Filing Costs in connection with foreclosures;

- b. Whether the Attorney's Fees and Filing Costs constitute trustee compensation;
- c. Whether the Lenders and Trustee are bound by, and subject to, the provisions of § 443.370, RSMo.;
- d. Whether the Trustee simultaneously served as counsel to the Lenders and as successor trustee in foreclosures;
- e. Whether Lenders and Trustee are permitted to charge Filing Costs under the standard form deeds of trust and promissory notes;
- f. Whether the members of Plaintiffs' Class have a right to recover the Attorneys' Fees and Filing Costs paid to Lenders and Trustee; and
- g. Whether, for each defendant, that defendant acted with the malice necessary to impose punitive damages.

16. Proposed lead counsel for the Plaintiffs' Class, Green Jacobson, P.C., is experienced and knowledgeable concerning class action, consumer, and lender litigation, and will fairly and adequately represent the interests of the proposed Plaintiffs' Class.

17. The questions of law and fact common to the members of the Plaintiffs' Class predominate over any issue affecting any individual member of the Plaintiffs' Class, and a class action is superior to other available methods for the fair and efficient resolution of this controversy. No unusual difficulties are anticipated in the management of this case as a class action.

18. This action is maintainable as a plaintiffs' class action pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure and pursuant to § 407.025.3, RSMo.

Count I: Damages for Violation of § 443.360, RSMo.

For her first claim, Borrower, individually and on behalf of the Plaintiffs' Class, states:

19. Borrower incorporates by reference the preceding allegations as though fully restated herein.

20. At all relevant times, Trustee was the outside counsel, agent and representative of defendants GMAC Mortgage, LLC and South Lenders 1-100.

21. At all relevant times, defendants GMAC Mortgage, LLC and South Lenders appointed South & Associates, P.C., as successor trustee.

22. Trustee and Lenders are prohibited from charging Borrower and members of the Plaintiffs' Class with attorney's fees for legal work performed in connection with Borrowers' foreclosures.

23. Compensation for a trustee's services in foreclosure is limited by § 443.360, RSMo., to a commission on the amount of sale. The fee schedule set by the statute is 2% of the first \$1,000, 1% of the next \$4,000, and ½% on any amount over \$5,000. Section 443.370, RSMo., provides that any person taking compensation exceeding the amount permitted by § 443.360 is liable to any party interested in the promissory note or deed of trust in an amount twice the amount taken for such services.

24. Borrower and members of the Plaintiffs' Class are parties interested in the promissory notes and deeds of trust foreclosed by Trustee.

25. Trustee is prohibited from receiving compensation for its services in a foreclosure in an amount greater than the commission permitted by § 443.360.

26. Lenders and Trustees charge the Borrower and members of the Plaintiffs' Class with Attorney's Fees and Filing Costs as compensation for the Trustee's services.

27. By charging and collecting Attorney's Fees and Filing Costs when South & Associates, P.C., also served as outside counsel for GMAC Mortgage, LLC, and South Lenders 1-100, GMAC Mortgage, LLC, South Lenders 1-100, and South & Associates, P.C., received compensation prohibited by Missouri law.

28. Because they charged and accepted such prohibited compensation, GMAC Mortgage, LLC, South Lenders 1-100, and Trustee are liable for damages to each borrower to whom they charged Attorney's Fees and Filing Costs. Furthermore, where such prohibited compensation exceeds the charges permitted under Missouri law, GMAC Mortgage, LLC, South Lenders 1-100, and Trustee are liable for double damages to Borrower and each member of the Plaintiffs' Class to whom they charged such Attorney's Fees and Filing Costs.

29. Borrower and each member of the Plaintiffs' Class have thereby been damaged.

Count II: Breach of Fiduciary Duty and Constructive Fraud

For her second claim, Borrower, individually and on behalf of the Plaintiffs' Class, states:

30. Borrower incorporates by reference the preceding allegations as though fully restated herein.

31. As successor trustee under deeds of trust, Trustee, as a matter of law, is a fiduciary towards Borrower and members of the Plaintiffs' Class, and must act with impartiality toward Borrower and members of the Plaintiffs' Class.

32. Because Trustee is counsel for Lenders when Trustee deals with Borrower and members of the Plaintiffs' Class not represented by counsel, Trustee is prohibited under the Missouri Rules of Professional Conduct from stating or implying that Trustee is disinterested or impartial.

33. Trustee's dual role as Lenders' counsel and as successor trustee under the deeds gives rise to a conflict of interest. Trustee failed to disclose to Borrower and members of the Plaintiffs' Class that in connection with each foreclosure Trustee was simultaneously acting as trustee under the deed of trust and as Lenders' counsel and failed to obtain a written waiver of conflict from Borrower and each member of the Plaintiffs' Class.

34. Trustee and Lenders, at all relevant times, knew or should have known that:

- a. Trustee, as a matter of law, owed fiduciary duties to Borrower and members of the Plaintiffs' Class with respect to each such person's real property and deed of trust;
- b. Trustee, as Lenders' counsel, was prohibited under Missouri law from charging Borrower and members of the Plaintiffs' Class with legal fees for work performed by the Trustee in connection with the foreclosure;
- c. Compensation for Trustee's services in foreclosures was limited under Missouri law; and

- d. The Attorney's Fees and Filing Costs that Trustee and Lender charged to Borrower and members of the Plaintiffs' Class as compensation for such services exceeded the amount permitted to be charged under Missouri law.

35. Notwithstanding the foregoing, Trustee and Lenders:

- a. Charged Borrower and members of the Plaintiffs' Class legal fees for work performed by the Trustee in connection with the foreclosure; and
- b. Charged Borrower and members of the Plaintiffs' Class compensation for Trustee's services in amounts that exceeded the maximum fee permitted under Missouri law.

36. After Lenders appointed Trustee as successor trustees under a deed of trust, each Lender retained and continued to retain Trustee as outside counsel, agent, and representative, despite knowing that Trustee owed fiduciary duties to Borrower and members of the Plaintiffs' Class.

37. Trustee breached the fiduciary duty it owed to Borrower and members of the Plaintiffs' Class by:

- a. Failing to disclose to Borrower and members of the Plaintiffs' Class Trustee's dual role as trustee under the deeds of trust and counsel for Lenders;
- b. Failing to disclose to Borrower and members of the Plaintiffs' Class the nature, extent, and implications of the conflict of interest arising from Trustee's dual role as successor trustee under the deeds of trust and Lenders' counsel;
- c. Failing to obtain a waiver from Borrower and members of the Plaintiffs' Class permitting Trustee to act in dual role as successor trustee under the deeds of trust and counsel for Lenders;
- d. Charging Borrower and members of the Plaintiffs' Class for the legal work performed by Trustee in connection with the foreclosure;

- e. Charging Borrower and members of the Plaintiffs' Class as compensation for Trustee's services an amount greater than the amount permitted under Missouri law; and
- f. Charging Borrower and members of the Plaintiffs' Class the Filing Costs.

38. Borrower and each member of the proposed Plaintiffs' Class have thereby been damaged.

39. The conduct of Trustee and Lenders was malicious, corrupt, and either intentional or reckless to a degree sufficient to support an award of punitive damages against Trustee and each Lender.

Count III: Damages for Violation of § 407.010, et seq., RSMo.

For her third claim, Borrower, individually and on behalf of the Plaintiffs' Class, states:

40. Borrower incorporates by reference the preceding allegations as though fully restated herein.

41. This count is directed against Trustee, GMAC Mortgage, LLC, and South Lenders 1-100 not under the direction and supervision of the Director of the Missouri Division of Finance, the Director of the Missouri Department of Insurance or the Director of the Missouri Division of Credit Unions.

42. The charging of Attorneys' Fees and Filing Costs as compensation for Trustee's services as practiced by these defendants is a deceptive and unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, et seq., RSMo.

43. The charging of the Attorney's Fees and Filing Costs as compensation for the Trustee's services when the Trustee is attorney for the lender is a deceptive and an unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

44. The charging of Attorneys' Fees and Filing Costs as compensation for Trustee's services in an amount greater than the maximum fee permitted under Missouri law is a deceptive and unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

45. The charging of Filing Costs when such charges are not authorized by a Promissory Note or Deed of Trust is a deceptive and unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

46. Defendants' failure to disclose Trustee's dual role as trustee under the deeds of trust and Lenders' counsel is a deceptive and unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

47. Defendants' failure to disclose to Borrower and members of the Plaintiffs' Class the nature, extent, and implications of the conflict of interest arising from Trustee's dual role as trustee under the deeds of trust and Lenders' counsel is a deceptive and unfair practice in connection with the sale of merchandise in trade or

commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

48. Defendants' failure to obtain a written waiver of conflict from Borrower and members of the Plaintiffs' Class permitting Trustee to act in dual roles as successor trustee under the deeds of trust and Lenders' counsel under the circumstances is a deceptive and unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

49. Defendants' failure to disclose that, under Missouri law, Trustee, as attorney and Lenders' counsel, is prohibited from charging Borrower and members of the Plaintiffs' Class with legal fees for work performed in connection with the foreclosure is a deceptive and unfair practice in connection with the sale of merchandise in trade or commerce, as those terms are used and defined in the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

50. By and through their conduct, Trustee and Lenders violated the Merchandising Practices Act, § 407.010, *et seq.*, RSMo.

51. Borrower and each member of the Plaintiffs' Class who paid the Trustees' Attorney's Fees and Filing Costs, whether through sums deducted from foreclosure proceeds or otherwise, have been damaged.

52. The conduct of Trustee and Lenders was malicious, corrupt, and either intentional or reckless to a degree sufficient to support an award of punitive damages against Trustee and each Lender.

Prayer for Relief

WHEREFORE, plaintiff Mimi Fowler, individually and on behalf of the members of the Plaintiffs' Class, prays that the Court grant the following relief:

a. Enter an order certifying this action as a plaintiffs' class action, and appointing plaintiff class representative;

b. Enter an order appointing Green Jacobson, P.C., lead counsel for Plaintiffs' Class;

c. Enter judgment in favor of plaintiff Mimi Fowler and the Plaintiffs' Class against defendants South & Associates, P.C. and GMAC Mortgage, LLC, jointly and severally, as well as against South & Associates, P.C., and each of the South Lenders 1-100, jointly and severally, for actual damages in the sum of the Attorney's Fees and Filing Costs they charged to Borrower and each member of Plaintiffs' Class and for double damages in the sum of two times the Attorney's Fees and Filing Costs charged to plaintiff and each member of Plaintiffs' Class where such compensation exceeded the amount permitted under § 443.360, RSMo.;

d. Enter judgment awarding class counsel and associate class counsel reasonable attorneys' fees as a percentage of the funds received for plaintiff and the class, ordering defendants to pay all expenses of this action, and ordering defendants to pay the costs and expenses of all required class notices and claim administration;

e. Enter an award of punitive damages against each defendant South & Associates, P.C., and GMAC Mortgage, LLC, jointly and severally, as well as against

each of the South Lenders 1–100, jointly and severally with South & Associates, P.C., in the total amount of \$3,000 per class member; and

f. Award plaintiffs and members of the Plaintiffs' Class prejudgment interest, post-judgment interest, court costs, and such further and additional relief as to which they may be entitled.

Respectfully Submitted,

GREEN JACOBSON, P.C.

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