

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

No. 31970

FEFE S. GORDON and  
JEFFREY GORDON,

Plaintiffs,

v.

FIRST REPUBLIC MORTGAGE  
CORPORATION, INC. d/b/a FIRST  
SECURITY MORTGAGE CORP., et al.,

Defendants,

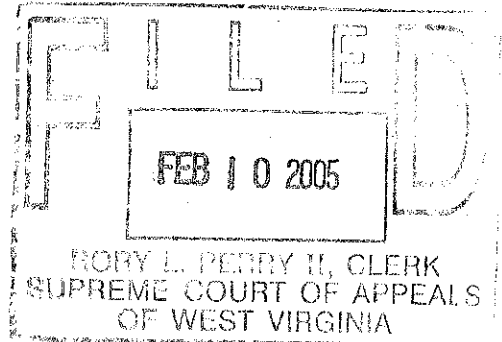
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FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 02-C-2275  
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**BRIEF OF APPELLEES**

**FEBRUARY 9, 2004**

1. KIND OF PROCEEDING AND NATURE OF RULING

The appeal rises out of a case filed in the Circuit Court of Kanawha County, that was filed against a loan broker, lender and appraiser. The pleadings of the case allege various state law claims in connection with a home equity loan. The Plaintiffs in the case settled with the lender, while the loan broker defaulted and did not appear to defend the action, and the Plaintiffs proceeded to trial against the broker on the issue of damages on



Counts I, II, V, and VII and against the appraiser, Larry M. McDaniel, on Counts V, VI, VII and XI.

Prior to commencement of trial, the Circuit Court excluded the testimony of Plaintiffs' witness, Timothy Alfred. The Plaintiffs claim that the testimony of witness Felecia Spencer and Plaintiffs expert, Sean Andrews were limited in their testimony, but such claims are without factual basis and will be examined hereinafter in full detail.

Prior to the close of the case, the Circuit Court granted the Defendants judgment as a matter of law, on Plaintiffs' joint venture and conspiracy claims. These issues, as shown in the transcript of the trial, were not proven by the Plaintiffs and the Court was correct in entering its judgment. As discussed more fully below, this Court should affirm the rulings of the Circuit Court, as the Gordons have failed to demonstrate that there were any errors in the rulings of the Court, as are suggested in Brief of Appellants.

## **II. Statement of Facts**

In an effort to persuade this court to find the rulings of the Circuit Court in error, the Gordons attempt to attack the validity of the Circuit Courts rulings by utilizing numerous ploys, the most obvious of which is their characterization of the civil action as a "predatory lending case." First, there is no cause of action recognized in either federal or state court law for predatory lending. Second, the use of the inflammatory term

"predatory lending" is made for the sole purpose of trying to garner sympathy for the Gordons.

The statement of facts, as contained in the Plaintiffs brief, are nothing more than a repeat of the allegations contained in the original pleadings in this case, and are not based on factual matters proven in court during the trial. The defendant is a well known and respected member of the appraisal profession in West Virginia and was a former member of the West Virginia Real Estate Appraiser Licensing and Certification Board where he had served as Chairman of the Board, Chairman of the Up-grades Committee and Chairman and later as a member of the Standards Committee, whose purpose it is to discipline appraisers who have violated the Uniform Standards of Professional Appraisal Practice.

On July 23, 1999, the Defendant along with his then associate, Jack G. Weaver, Jr., did perform an appraisal on the property at 507 Postlewait Street in Parkersburg, Wood County, West Virginia, having received an order to do so by their client, First Security Mortgage Corp, a subsidiary of First Republic Mortgage Corporation, Inc., named defendants in this case. The appraisal was completed and sent to the lender who then transmitted it for underwriting by one or more of their national lenders. No stipulations to closing the loan in regard to the appraisal were made by the lender, after their underwriting and review of the appraisal report. The current market value of the home as of July 23, 1999, was

estimated to be \$46,000 by Mr. McDaniel.

There was no written or oral agreement between McDaniel, his appraisers and First Security to do anything other than provide full and complete appraisal services to First Security, upon written authorization by them, and in full and complete compliance with the Uniform Standards of Professional Appraisal Practice.

The jury heard from Felicia Spencer, who worked for McDaniel's appraisal company from November, 1999 until May 15, 2000. She testified in a suppression hearing before the Court ruled that she could testify in the trial, motion having been made by the defense to exclude or suppress her testimony. In the suppression hearing the Court ruled (TR159-12-24) that she could testify but that she would not be allowed to testify what she was told when she couldn't identify from whom it came; "that is pure hearsay". The only limitation the court placed on Ms. Spencer's testimony is that she could not testify as to "hearsay", which is certainly a long established matter of law in any court. Plaintiff, on page two of their Brief, states that the "Circuit Court . . . .and limited the testimony of witness Felicia Spencer....." There was no limitation.

She testified that she was working in Wheeling, WV for another company on April 28, 1999, the date when Mr. McDaniel appraised the Gordon Home (TR197-19-22). She further testified that she was not privy to any kind of business relationship or otherwise that PM Services had with First Security (TR198-3-5 and 198-19-22). She further testified (TR200-201 – all) that First Security was a separate and distinct business and that Mr. McDaniel did not

have any input into how First Security conducted their business. She further testified that she was dishonest (TR210-7-22) .

At no point in her testimony, either on direct or cross, does Ms. Spencer state that she knew firsthand of the "existence of an agreement between the broker, First Security, and McDaniel's appraisal company to inflate appraisals" Rather she testified that First Security would provide on their order form, the value that the owner had indicated they felt would be appropriate and that every effort was made to attain that value when possible. However, Ms. Spencer further testified that (TR185-2-24 and 186-1-8) that while she attempted to meet the figure set forth in the order form, that there were times that the appraisal did not support those indications and the only time she provided appraisals that met their owner's indicated value was when there were comparable sales that could prove that value.

Fefe Gordon testified that she never did know what her home had appraised for until eight months prior to the trial (TR78-2). Therefore there was simply no way that Mr. McDaniel's appraisal had induced her into the loan with First Security. She further testified (TR82-9) that when she learned the loan amount she was "thrilled". At no point after learning of the interest rate and the loan amount did Ms. Gordon attempt to stop the loan process. In fact she took cash out of the new loan in the amount of \$13,581.96 as shown on Plaintiff's exhibit #1. In regard to the assertion in the brief that they could not refinance and could not sell the home, there was no evidence presented that there ever was any effort on their behalf to market or sell the home. The only evidence on

their lack of ability to re-finance the home came from (TR83-2-5) her testimony that she had "called a couple of different places" and they drove up to the house and told her there was no way they could get it refinanced for the amount that was owed on the property. No subsequent appraisals, letters of rejection or other documents were brought forth in the trial that supports her testimony on this issue.

### III. ASSIGNMENTS OF ERROR & DISCUSSIONS OF LAW

The Appellants have listed five areas where they believe the Circuit Court has error in its rulings and/or failing to overturn the action of the jury in the case.

Issue 1 deals with the exclusion of Timothy Alfred, a proposed witness for the plaintiff's. The court did not commit error by excluding the testimony of Timothy Alfred as it was entirely within the sound discretion of the Court to preclude Alfred from testifying. It was undisputed that Alfred had nothing to do with the appraisal of the Gordon home on or about July 23, 1999. Moreover, Alfred had no personal knowledge of any of the facts and circumstances surrounding the appraisal of the Gordon home on or about July 23, 1999.

It was also undisputed that Mr. Alfred was not associated with P. M Services and Mr. McDaniel in the process of providing appraisal services. While he was a member/owner and employee of another mortgage company, wherein Mr. McDaniel was also a co-owner, he was having extreme problems on the job. When Mr. McDaniel confronted

him, or asked him about these problems, Mr. Alfred resigned from his employment and dissolved his portion of the membership and left as a disgruntled former member, who obviously has an ax to grind against Mr. McDaniel

Rule 602 of the *West Virginia Rules of Evidence* provides, in pertinent part, that:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge of the matter may, but not need to, consist of witness' own testimony.

The plaintiff's intended to use Alfred in an attempt to establish an alleged pattern or practice on the part of Mr. McDaniel of artificially inflating appraisals. Since the jury in the instant case found that Mr. McDaniel did not artificially inflate the value of the Gordon's home on July 23, 1999, Mr. Alfred's testimony, if believed by the jury, was irrelevant to any issue in this case, and would have served only to improperly prejudice and inflame the jury against Mr. McDaniel.

Alfred's anticipated testimony did not have any tendency to make the existence of any fact that was of consequence to the determination of whether or not McDaniel negligently appraised the Gordon home, or whether McDaniel engaged in a joint venture, conspiracy or agency relationship in regard to McDaniel's July 23, 1999, appraisal of the Gordon home, more probable or less probable than it would be without the evidence.

Rule 401 of the *West Virginia Rules of Evidence* defines relevant evidence as:

.....evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Even if Alfred's anticipated testimony were deemed somehow to be relevant to any pending issue in this action, Rule 403 of the *West Virginia Rules of Evidence* provides that "(a)lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Issue two deals with the allegation that the Circuit Court improperly granted the Defendant judgment as a matter of law on Plaintiff's joint venture and conspiracy claims.

The Court did not commit error by granting McDaniel judgment as a matter of law on the plaintiff's joint venture and conspiracy claims. Summary judgment is appropriate where the plaintiff has failed to come forward with substantial evidence of a joint venture. Armour 207 W.Va. 672, 535 S.E. 2<sup>nd</sup> 737 (affirming grant of a summary judgment on joint venture claim.)

The plaintiff's had every opportunity to present evidence supporting their claim of a joint venture. No such evidence was presented by the plaintiffs. The plaintiffs did not call any alleged co-joint venturers as witnesses. A "joint venture" is an association of two or more persons to carry out a single business enterprise for profit, for which purposes they combine their property,

money, effects, skill and knowledge. A joint venture arises out of a contractual relationship between the parties. No evidence was presented that McDaniel combined any of his property, money, effects, skills and knowledge in association with any other person or entity, to carry out the appraisal of the Gordon home for profit. Syl pt 2. Price v Halstead , 177 W.Va. 592, 355 S.E. 2<sup>nd</sup> 380 (1987). Felicia Spencer was unable to testify about this issue. Tim Alfred would not have been able to testify about this issue. There was no evidence presented by the plaintiffs that McDaniel "profited" from his appraisal of the Gordon home.

Moreover, the plaintiffs failed to establish the existence of a contractual relationship between McDaniel and any other person or entity to carry out the appraisal of the Gordon home on July 23, 1999, for profit. No witness testified as to the existence of an alleged "secret agreement" between Larry M. McDaniel and any other person or entity. As such, the evidence at trial failed to prove that Larry McDaniel was involved in a joint venture with any other person or entity concerning the appraisal of the plaintiffs' residence.

The Court likewise did not commit error by granting McDaniel judgment as a matter of law on the plaintiffs' civil conspiracy claims. The plaintiffs had every opportunity to present evidence supporting their claims of a civil conspiracy. No such evidence was presented by the plaintiffs. The plaintiffs did not call any alleged co-conspirators as witnesses.

A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. *Kessel v. Leavitt*, 204 W. Va. 95, 511 S. E. 2<sup>nd</sup> 720 (1998). The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff. To prevail on their claim of conspiracy, Fefe and Jeff Gordon had to prove that McDaniel and the Broker committed some wrongful act or had committed a lawful act in an unlawful manner to the injury of the Gordons. The plaintiffs failed to carry their burden of proof on this claim.

Issue Three deals with exclusion of a third appraisal, prepared by Jon Bango, a Real Estate Appraiser.

The Court did not commit error by prohibiting plaintiffs expert appraiser, Sean Andrews, from testifying in regard to an appraisal report prepared by appraiser Jon Bango concerning the plaintiff's house. The Bango appraisal was of very limited value given that it had been performed on July 17, 2003, while the appraisal in this case done by Mr. McDaniel had been conducted almost four years earlier on July 23, 1999. The Bango appraisal was so remote in time from the McDaniel appraisal that it was of no probative value.

The value of a home can change drastically in a period of four years (or much less time) depending on how well the home is, or is not, cared for and maintained. Moreover, plaintiffs' expert, Sean Andrews, having made his appraisal of the property on April 28, 1999, and offering no subsequent appraisal report in his testimony, could not have relied upon the Bango

appraisal in arriving at his conclusion of value. It is an established matter of law that experts may use the work product of others who, in the normal course of the appraisal practice provide information and data to the appraiser in order to aid him in arriving at his value conclusion. Mr. Bango, having never seen the Gordon home until July 17, 2003, could not have provided information to Andrews for use in the preparation of his April 28, 1999 report.

While Rule 703 permits experts to testify as to facts that would not otherwise be admissible, if relied upon by experts in the field. See W.Va.R. Evid. 703. At no point in his testimony did Andrews indicate that he had relied upon the Bango report in any way for his determination of value of the Gordon home on April 28, 1999. Therefore the Bango report is inadmissible.

The effort by the Plaintiffs to get Mr. Bango's appraisal report into evidence, is a smoke screen set to cover Plaintiffs lack of pre-trial disclosure of Mr. Bango as a witness, the lack of making Mr. Bangos' report available to the defense during discovery periods, not making Mr. Bango available to the defendants for deposition purposes, and finally, not having Mr. Bango appear in court to be cross-examined by the Defendants and exposed to the Jury for their judgment on the credibility of lack of credibility of his testimony.

Mr. Andrews had his own appraisal of the plaintiff's home, which was conducted within months of the McDaniel appraisal, upon which to rely at trial.

Therefore, there was no prejudice to the plaintiffs by the Court's ruling in this regard as well as there was no basis in law for use of another expert's report without the expert being present for examination in court, when no reliance

upon the second report was made by the expert, in this case, Mr. Andrews.

Issue Four in the Assignment of Error list deals with the failure of the jury to award any damages against the Defendant First Security.

The Court indicated at the end of the trial (TR346-7-11) that the Court would address the issue of damages to be awarded against First Security Mortgage Corp., at a future date and time. Subsequently the Court has over-turned the jury verdict in regard to damages against First Security Mortgage Corp., and has made an award in favor of the Plaintiffs. Therefore this issue has been resolved by the Court.

Issue Five in the Assignment of Error list deals with the jury verdict.

The plaintiffs incorrectly assert that "(t)he jury returned a verdict for the Defendants which was against the clear weight of the evidence." It is the Defendant's position that the jury returned a proper and carefully considered verdict based upon all of the evidence presented. It is apparent that the jury, as is their prerogative, did not believe some of the testimony of the plaintiffs' witnesses, and further did not believe the plaintiffs proved each legally required element of each claim they were making against Mr. McDaniel.

The jury understood clearly that the plaintiffs had the burden of proving their fraud and misrepresentation claims against McDaniel by *clear and convincing evidence*. There was no evidence presented that Mr. McDaniel induced the plaintiffs to do anything.

The plaintiffs also had the burden of proving their remaining claims by a preponderance of the evidence. Again, the jury, who is the sole judge of facts, recognized that the plaintiffs failed to establish each and every element of each remaining cause of action asserted against Mr. McDaniel.

## VI. CONCLUSION

The Court did not error in any of the issues brought forth by the Appellants and therefore, the appeal should be denied and the action of the Circuit Court and the resulting Jury Verdict should be affirmed.

Respectfully submitted:



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CERTIFICATE OF SERVICE

The undersigned Defendant, Larry M. McDaniel does hereby certify that he has served a true and exact copy of the foregoing "**BRIEF OF APPELLEE'S**", upon counsel of record as listed below, via United States Mail, postage prepaid, on this 9th day of February, 2005, addressed as follows:

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