



FILED
 By Judicial Administrative Assistant
 Division 28

2006 JUL 10 2006

Circuit Court Of Jackson County Mo.
 By *Charism Wilson*

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
 AT INDEPENDENCE**

David C. McLean, et al.,

Plaintiffs,

vs.

**First Horizon Home Loan Association
 (f.k.a. McGuire Mortgage Company),**

Defendant.

Case Number: 00GV228530

Division 28

7/10/06

**SPECIAL MASTER'S REPORT ON DEFENDANT'S MOTION FOR
 SUMMARY JUDGMENT BASED ON STATUTE OF LIMITATIONS**

In accordance with the Order Appointing Special Master, I issue my report on Defendant's Motion for Summary Judgment Based on Statute of Limitations. Before drafting this report, I have considered the following:

- Defendant's Motion and Suggestions in Support
- Plaintiffs' Response
- Defendant's Reply Suggestions
- Defendant's Response to Plaintiffs' Additional Facts
- Letter Briefs from both Defendant and Plaintiffs.

I have also studied the exhibits submitted by counsel. In addition, I have researched and reviewed the applicable law

DISCUSSION

In this motion for summary judgment, Defendant asserts that the three-year statute of limitations,¹ rather than the six-year limitation,² governs Plaintiffs' class action under the Missouri Second Mortgage Loan Act (MSMLA). The facts are

¹ Section 516.130(2) RSMo 2000 provides: "Within three years: . . . An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state[.]"

² Section 516.420 RSMo 2000 provides: "None of the provisions of sections 516.380 to 516.420 shall apply to suits against moneyed corporations or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery by the aggrieved party of the facts upon which such penalty or forfeiture attached, or by which such liability was created."

uncontroverted; a recent appellate court opinion dispels Defendant's assertion as a matter of law.

In this class action lawsuit, Plaintiffs allege that Defendant violated the MSMLA by charging prohibited fees on second mortgage loans. The December 2002 class certification order applied the three-year statute of limitations in defining the Plaintiff Class. Under that definition, the class included all individuals who obtained second mortgage loans from Defendant and who were charged illegal fees on or after November 16, 1997. In March 2003, an amended class certification order expanded the limitations period to six years. As a result of that amendment, the class action included MSMLA claims dating from November 16, 1994. In applying the six-year statute of limitations in § 516.420, the trial court determined that Defendant was a "moneyed corporation" and that Plaintiffs sought recovery of a "penalty or forfeiture" from a "moneyed corporation."

In *Schwartz v. Bann-Cor Mortgage*³ decided May 9, 2006, the Missouri Court of Appeals reversed the application of the three-year statute of limitations in § 516.130(2) to a class action brought under the MSMLA. The appeals court concluded that the six-year limitation in § 516.420 prevailed because the facts of the case fit within its statutory language: The plaintiff borrowers brought MSMLA claims for a "penalty or forfeiture" and to "enforce any liability created by . . . any other law" against the respondent second-mortgage lenders who were "moneyed corporations." As further support, the appeals court noted that § 516.420 is the more specific statute because it deals with claims against "moneyed corporations."

³ *Schwartz v. Bann-Cor Mortgage*, No. WD65187, slip. op. (Mo. App. W.D. May 9, 2006, modified June 27, 2006). The modified opinion issued on the court's own motion adds a footnote. On June 27, 2006, the Missouri Court of Appeals denied Bann-Cor's motion for rehearing. Bann-Cor has applied for transfer to the Missouri Supreme Court.

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Defendant's motion for summary judgment presents the identical legal question decided by the holding of *Schwartz v. Bann-Cor Mortgage*—that the six-year statute of limitations in § 516.420 governs a MSMLA action brought against a company engaged in the business of making second mortgage loans. Consequently, that holding dispels Defendant's claim for summary judgment as a matter of law.

RECOMMENDATION

As special master, I recommend denial of Defendant's Motion for Summary Judgment Based on Statute of Limitations.

7/6/06
Date

William F. Mauer
The Honorable William F. Mauer
Special Master

On _____, 2006, this Special Master's Report was submitted to

The Honorable Vernon E. Scoville, III
Associate Circuit Judge
Division 28
Independence Courthouse Annex

On _____, 2006 copies were provided to:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on July 11, 2006, a true and correct copy of the above was:

placed in the United States mail, first class, postage prepaid and addressed as follows:
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