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NO. A07-1832

State of Minnesota

IN SUPREME COURT

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APPELLATE COURTS
AUG 17 2009
FILED

The Business Bank,

vs.

Kevin C. Hanson, et al.,

Option One Mortgage Corporation,

The United States of America,

THE BUSINESS BANK'S RESPONSE TO OPTION ONE MORTGAGE CORPORATION'S PETITION FOR REHEARING

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Option One Mortgage Corporation ("Option One") hereby petitions for rehearing with respect to the Court's July 30, 2009 Opinion (the "Opinion"). Option One does not seek rehearing with respect to the holding of that decision. Rather, Option One seeks rehearing with respect to the issue which was discussed in footnote 7 of the Opinion but which was not decided by the Court: specifically, whether the mortgage at issue, the effect of which has now been determined to be limited to $200,000, may still be foreclosed when more than $200,000 has been paid on the underlying debt.

Option One states the following in support of its petition for rehearing.

1. In the Opinion, the Court held that the mortgage of The Business Bank ("Business Bank") was not invalid under Minn. Stat. § 287.03 because the mortgage disclosed that the amount of debt that is secured by the mortgage is no more than $200,000. (Opinion 7–8.)

2. This holding was based on the Court's conclusion that the mortgage was governed by Minn. Stat. § 287.05 subd. 1a(a), which the Court found "dispositive." (Opinion 8.) That statute provides that when a mortgage "is intended to secure only a portion of a debt amount recited or referred to in the mortgage, the mortgage may contain the following statement, or its equivalent, on the first page: 'Notwithstanding anything to the contrary herein, enforcement of this mortgage is limited to a debt amount of $... under Chapter 287 of Minnesota Statutes.'" When such a statement is included, the statute provides "the effect of the mortgage… as evidence in any court in this state, or as notice for any purpose in this state, shall be

limited to the amount contained in the statement..." In addition, under the statute, the mortgage registration tax is imposed "based only on the amount of debt so stated to be secured by real property." The Court found that the Business Bank mortgage had such a statement and that thus "the effect of the mortgage is limited to no more than $200,000, the amount stated on the first page." (Opinion 9.)

3. Prior to its reply brief to this Court, Business Bank had never argued—not to the trial court, not to the Court of Appeals, and not to this Court—that its mortgage was subject to Minn. Stat. § 287.05, subd. 1a(a), presumably because it has already been paid more than $200,000 on the underlying debt and thus did not want the effect of its mortgage to be limited to $200,000. Amicus Minnesota State Bar Association Real Property Law Section also did not make this argument.

4. In its brief to this Court, Option One noted that Business Bank had never argued that its mortgage was subject to Minn. Stat. § 287.05 subd. 1a(a). Nonetheless, Option One argued that if it were so subject, "it would no longer have any effect as more than $200,000 has already been paid." (Option One Br. note 4.)

5. In footnote 7 of the Opinion, the Court specifically acknowledged this argument but declined to address it further, instead limiting its decision to determining that the mortgage was valid under Minn. Stat. § 287.03.

6. Option One respectfully requests that the Court grant rehearing in order to

decide this issue, specifically:

> Where pursuant to Minn. Stat. § 287.05, subd. 1a(a), a mortgage secures only $200,000 of a larger debt and thus the effect of the mortgage "as evidence in any court in this state, or as notice for any purpose in this state" is limited to $200,000, can the mortgagee refuse to satisfy the mortgage and seek to foreclose it after having accepted payment of more than $200,000 on the debt?

7. It is Option One's position that in light of the undisputed evidence that Business Bank has been paid more than $200,000 on the underlying debt, Business Bank cannot refuse to satisfy the mortgage, and the mortgage is no longer of any effect, because Business Bank cannot present evidence in any court in this state or otherwise establish that more than $200,000 needs to be paid before the mortgage is to be satisfied.

8. This is a purely legal issue as it is undisputed Business Bank has already been paid more than $200,000 on the underlying debt. (Opinion 4.) Requiring the parties to litigate this legal issue in the trial court and possibly then in the Court of Appeals and then in this Court would be inefficient and a waste of judicial and the parties' resources.

9. To the extent Business Bank and Amicus are correct that there are numerous mortgages similar to the one at issue and that the law applicable to such mortgages must be clarified in order to eliminate uncertainty and reduce litigation, these goals will not be accomplished until this Court finally resolves this remaining issue.

Accordingly, for the foregoing reasons, Option One respectfully requests that the Court grant rehearing.

Dated: August 10, 2009.

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STATE OF MINNESOTA)
) ss:
COUNTY OF HENNEPIN)

AFFIDAVIT OF SERVICE BY U.S. MAIL

Brenda K. Rowe, of the City of Waconia, County of Carver, in the State of Minnesota, being duly sworn, states that on the 10th day of August, 2009, she caused two true and correct copies of **Option One Mortgage Corporation's Petition for Rehearing** to be served on Counsel of Record:

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by United States First Class Mail, enclosed in an envelope, postage prepaid, directed to said counsel at the address set forth above, and by deposited said package into a U.S. Mail receptacle at Minneapolis, Minnesota.

Brenda K. Rowe

Subscribed and sworn to before me this 10th day of August, 2009.

Notary Public

JOAN J. DIGGS
Notary Public
Minnesota
My Commission Expires January 31, 2010

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