

COLORADO COURT OF APPEALS

Colorado State Judicial Building
2 East Fourteenth Avenue
Denver, Colorado 80203

DISTRICT COURT, JEFFERSON COUNTY

The Honorable R. Brooke Jackson
Civil Action No. 2003cv3356

COURT OF APPEALS
STATE OF COLORADO

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COURT OF APPEALS
 COURT USE ONLY

Plaintiffs-Appellants:

STEVEN E. DEHERRERA and
DONNA M. LEWIS

v.

Defendants-Appellees:

EQUITYLINK, LLC, a Colorado limited liability
company;
EQUITYLINK I, INC., a Colorado corporation;
**RESIDENTIAL MORTGAGE ACQUISITION
CORPORATION**; a Colorado corporation;
**RESIDENTIAL PROPERTY MANAGEMENT
SPECIALISTS, INC.**, a Colorado
corporation;
WILLIAM J. TURNER;
JAMES B. ELDER; and
JOHN B. HAMNER

Case No. 08CA0717

Attorneys for Plaintiffs-Appellants:

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APPELLANTS' REPLY BRIEF

ARGUMENT

There is but one issue before the Court and that is whether the HomeSaver transactions amounted to a first mortgage or deed of trust on the homeowner's respective property. If they were, then the supervised lending provisions of the Colorado Uniform Consumer Credit Code would not apply. If, on the other hand, the HomeSaver transactions were junior to other encumbrances of record, then the supervised lending provisions of the Colorado Uniform Consumer Credit Code would apply.

The Trial Court found that the HomeSaver transactions were disguised loans. That issue has been settled and is not before the Court.

The Trial Court found that the effective rate of interest under the HomeSaver transactions was more than 12% per annum. That issue has been settled and is not before the Court.

The Trial Court found that the HomeSaver transactions were secured by an interest in real estate. That issue has been settled and is not before the Court.

But the issue of whether the HomeSaver transaction is tantamount to a first deed of trust or mortgage ought to be settled by what appears of record against the title. In 27 pages of discourse in the Appellees' Answer Brief, Appellees could not point to anything in the record on appeal which would support the idea that the HomeSaver transactions amounted to a first mortgage or first deed of trust. And there

is nothing in the Trial Court's decision, which is the subject matter of this appeal, which would provide a reasoned basis for the finding that is at issue.

Indeed, all of the facts are contrary to the Trial Court's finding and the Appellees' arguments. When the conveyance was made by the homeowner to EquityLink, a bridge lender loaned money to finance the transaction, which loan was secured by a first deed of trust against the property transferred. When the property was conveyed to one of EquityLink's investors, a mortgage lender loaned money to finance that transaction, which loan was secured by a first deed of trust against the property. And to make sure that these lenders always had first deeds of trust to secure their respective loans, EquityLink had the homeowners sign an instrument which contained a subordination clause expressly providing that whatever rights the homeowner had were subordinate to the first deeds of trust held by the lenders.

CONCLUSION

The finding that the equitable liens in favor of DeHerrera and Lewis, and members of the class, were, in effect, liens having a first priority was an error of law. The deeds of trust in favor of the bridge lenders and the permanent lenders, coupled with subordination agreements, were in every instance first liens on the homes which DeHerrera and Lewis, and members of the class, had lost. As equitable liens always subordinate to the bridge and permanent lenders, the HomeSaver transactions were subject to the supervised lending provisions of the Colorado Uniform Consumer

Credit Code and the Trial Court was in error to have held otherwise. The judgment of the Trial Court in dismissing the First Claim for Relief should be reversed and the case should be remanded for further proceedings.

Dated January 6, 2009.

Respectfully Submitted,

HEAD & ASSOCIATES, P.C.

By: 

John F. Head

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 6, 2009 a true and correct copy of the foregoing was deposited in the U.S. Mail, postage prepaid, properly addressed to:

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