IN THE UTAH COURT OF APPEALS

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McKay Dee Credit Union, Plaintiff and Appellant, v. Federal Home Loan Mortgage Corporation and GMAC Mortgage Corporation, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070399-CA F I L E D (May 8, 2008) 2008 UT App 167

Second District, Ogden Department, 040903250
The Honorable Ernest W. Jones

Attorneys: M. Darin Hammond and R. Blake Hamilton, Ogden, for Appellant
J. Scott Lundberg, Salt Lake City, for Appellees

Before Judges Greenwood, Billings, and Davis.

DAVIS, Judge:

McKay Dee Credit Union (McKay Dee) alleges that the district court erred in determining that relief was not available under an unjust enrichment claim because McKay Dee conferred no benefit on Federal Home Loan Mortgage Corporation (FHLM). "[T]he district court should be granted broad discretion in applying the law to the facts in cases involving claims of unjust enrichment." Desert Miriah, Inc. v. B&L Auto, Inc., 2000 UT 83, ¶ 10, 12 P.3d 580 (citing Jeffs v. Stubbs, 970 P.2d 1234, 1245 (Utah 1998)). Although McKay Dee argues that "unjust enrichment is equitable in nature and should be broadly construed," it also recognizes that a successful unjust enrichment claim requires certain elements.

> First, there must be a benefit conferred on one person by another. Second, the conferee must appreciate or have knowledge of the benefit. Finally, there must be "the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value."

Id. ¶ 13 (citations omitted) (quoting Berrett v. Stevens, 690 P.2d 553, 557 (Utah 1994)).

We agree with the district court that McKay Dee's unjust enrichment claim does not meet the first requirement. McKay Dee's failure to attend the foreclosure sale does not amount to the conferring of a benefit on the eventual high bidder at the sale, who was able to turn around and sell the property for a profit. The tenuous nature of McKay Dee's argument is evidenced by its inability to articulate what benefit was actually conferred. McKay Dee first claims that it "conferred a benefit upon [FHLM] by not attending the trustee's sale." McKay Dee then argues that "the benefit conferred upon [FHLM] was the profit of $86,555.39 that [FHLM] received in selling the Property." Both characterizations of the "benefit" are unavailing. If the benefit is considered to be the profit FHLM realized from the later sale of the property, this benefit was not conferred by McKay Dee but by the purchasing party. If the benefit is considered to be the failure to appear at the auction, such was not a willingly conferred benefit but, rather, an accidental happening.[1] We see no cases, and McKay Dee directs us to none,

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1. The district court determined that McKay Dee had not met its burden of proof on any claims that were based on its having been given the wrong foreclosure sale date. The court found that it was not clear that the vice-president of McKay Dee, Cameron Shirra, had been provided with an incorrect date as opposed to simply having written down the incorrect date. The only evidence before the district court on this matter was Shirra's testimony. Shirra testified that when he called the number on the notice of trustee's sale, he was told that the foreclosure sale had been moved to May 18. But Shirra also admitted on cross-examination that it was possible that he had written down an incorrect date. McKay Dee argues that when comparing the two aspects of Shirra's testimony, "the better conclusion is that which is contained in his direct examination." Such determinations, however, are for the aptly-named "fact finder." See Utah R. Civ. P. 52(a); State v. Pena, 869 P.2d 932, 936 (Utah 1994) ("[We are] highly deferential to the trial court because it is before that court that the witnesses and parties appear and the evidence is adduced. The judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record."). The court determined that where Shirra said he had been told the incorrect date but then admitted that he could have been mistaken, the court was not convinced that he had in fact been given the incorrect date. Such a finding is not clearly erroneous. See id. at 935-36 ("For a reviewing court to find clear error, it must decide that the factual findings made by the trial court are not adequately supported by the record, resolving (continued...)

that take unjust enrichment to this extreme. The situation where a party's unintentional inaction is in some way connected to a benefit realized by another party who was unaware of such inaction is not the situation for which the unjust enrichment doctrine was developed, i.e., a case that "'merit[s] judicial intervention,'" see id. ¶ 12 (quoting Jeffs, 970 P.2d at 1245).[2]

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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Pamela T. Greenwood,
Presiding Judge

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Judith M. Billings, Judge

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1. (...continued)
all disputes in the evidence in a light most favorable to the trial court's determination."). McKay Dee argues that the court essentially ignored additional evidence that Shirra had been given the wrong date, including evidence that Shirra had written on the notice that the foreclosure sale date was May 18 and that he had had a check prepared and had actually showed up ready to bid on May 18. But these pieces of evidence speak only to Shirra's perception of the date of the foreclosure sale being May 18--which the district court did not doubt--but they do not shed light on whether Shirra was actually given that date or whether he misunderstood and wrote down an incorrect date.

2. Nor is this case one "'that d[oes] not fit within a particular legal standard,'" see Desert Miriah, Inc. v. B&L Auto, Inc., 2000 UT 83, ¶ 12, 12 P.3d 580 (quoting Jeffs v. Stubbs, 970 P.2d 1234, 1244-45 (Utah 1998)), which is the type of case that the unjust enrichment doctrine is intended to address. Although unjust enrichment does not apply to the circumstances of this case, McKay Dee was not left without a remedy. Primarily, it could, and did, collect against the borrowers for the sum secured by the lien. As to any missed opportunity to bid on the property due to allegedly being told an incorrect foreclosure sale date, a wrongful foreclosure claim would have been an appropriate cause of action, assuming, of course, that McKay Dee could have proven that Shirra had in fact been given the incorrect date.