

TWO YEARS LATE AND OUT \$5,000

By Judith I. Johannsen

One of a homeowner's greatest satisfactions is paying off his or her mortgage and recording a release of mortgage on the land records. Connecticut even has a statute (CGS §49-8) that concerns the release of satisfied or partially satisfied mortgages and any damages allowed if a lender fails to execute and deliver a release.

So, what would you do if you sold your home and your attorney properly sent a check to your lender as payment in full for your mortgage balance, but you learn five years later that the lender did not execute and deliver a release of the mortgage? Well, if you're Ms. B from the October 2007 CT Supreme Court decision that addressed this very issue, you would make two demands to the lender, both of which are grounded in the statute.

Under CGS §49-8, a lender is liable for damages to anyone aggrieved in the amount of two hundred (\$200) dollars for each week, up to a maximum of five thousand (\$5,000) dollars (whichever is greater, plus costs and attorney's fees), after sixty days has passed from when a written request was sent to or received by the lender. This looked like a five thousand (\$5,000) dollar silver lining to Ms. B's unhappy situation as her attorney had requested the mortgage release in 1998.

In 2003, Ms. B demanded two things from the lender – 1) a release of the mortgage *immediately* and 2) payment to her of five thousand (\$5,000) dollars. In response to Ms. B's demands, the lender sent the release, but did not pay the five thousand (\$5,000) dollars.

Ms. B sued the lender alleging it had violated CGS §49-8 by not issuing a release and the lender filed a motion for summary judgment, claiming Ms. B had brought her lawsuit too late – the statute of limitations had run - therefore, it owed her nothing.

At trial, Ms. B argued that the mortgage was a contract between her and the lender and the statute of limitations for contracts was six years and should be applied in this case because she had brought suit within five years of when the lender failed to execute and deliver the release. She also claimed that the lender's failure to issue a release for five years was one continuous event, not a one-time occurrence, and therefore, the statute of limitations had not run.

The lender's position at trial was that its failure to execute and deliver the release was more a tort action than a contract-based action, so the three-year statute of limitations for torts applied. In response to Ms. B's novel claim that the lender's failure to issue a release was a continuous event, the lender alleged it failed to issue a release just once in 1998, five years ago.

The trial court agreed with the lender that the lender's failure to execute and deliver Ms. B's mortgage release was more like a tort than a contract action and, therefore, the three-year statute of limitations for torts applied. Ms. B's lawsuit did not begin until 2003, five years after the statutory violation, so her allegation was two years too late and, consequently, barred due to the three-year statute of limitations.

Ms. B appealed the trial court's decision, but the appellate court affirmed the trial court's decision – Ms. B's time had run out. Ms. B appealed to CT's Supreme Court.

The issue Ms. B brought to our Supreme Court, whether an action brought under CGS §49-8 was a tort or contract action, was one of first impression. This court established that the basic difference between contract and tort legal actions was in the interests protected.

In a contract action, conduct is based on the parties' intentions, mutually agreed-upon contractual obligations are owed only to the contract parties, and any damages arising from a breach of the contract are particular to that agreement and within the contracting parties' contemplation.

In contrast, conduct in tort actions is based on duties imposed by the law and social policy, not necessarily on the parties' intentions. The Supreme Court's review of other courts' decisions showed that an action sounds in tort when a plaintiff seeks to recover damages for the breach of a statutory duty.

In this case, while the mortgage document was a contract between Ms. B and the lender, the court found the obligation to execute and deliver a release of mortgage came from the statutes, not from the mortgage contract. In her complaint, Ms. B never claimed that any term of the mortgage contract had been breached; rather, she stated that the lender violated its obligation to release the mortgage as required under the statute. Since Ms. B was seeking to recover damages for a breach of a statutory duty, the court deemed it a tort action so it was barred by the three year statute of limitations.

The Supreme Court affirmed the lower courts' granting the lender's motion for summary judgment - Ms. B's claim for damages was barred as she had not brought suit soon enough.

So, did three courts make a good decision or a bad one? It seems that this decision gives the "forgetful" lender a pass if it can escape issuing a release to a consumer for three years. In the meantime, the consumer is inconvenienced and less able to collect damages for the delay. Perhaps what we need is to include a statute of limitations for claims under CGS §49-8 and/or make clear that the statute is a liquidated damages provision, allowing the consumer a remedy for a lender's failure to execute and deliver a release; otherwise, consumers will continue to be sitting ducks ready to be taken advantage of by their lenders.

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