

STATE OF MAINE  
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET  
Location: West Bath  
Docket Nos. BCD-WB- RE-09-04 and  
BCD-WB- SA-09-01

BARBARA GIRARD, ET AL

Plaintiffs

v.

T&M MORTGAGE SOLUTIONS, INC., ET AL,

Defendants

and

NEIGHBORHOOD SOLUTIONS, INC.,

Plaintiff

v.

BARBARA GIRARD, ET AL,

Defendants

ORDER ON MOTION OF DEFENDANTS  
T&M MORTGAGE, ET AL, FOR JUDGMENT  
ON THE PLEADINGS ON COUNTS II, V,  
VII, VIII, IX, XI and XIII OF THE COMPLAINT

Before the court is the motion of Defendants T&M Mortgage Solutions, Inc. ("T&M"), Todd Johnson, Sr. ("Johnson") and Shawn Holt ("Holt") (collectively "the T&M Defendants") for a Judgment on the Pleadings on Counts II, V, and VII, VIII, IX, XI and XIII of Plaintiffs' Complaint. As a preliminary matter, and without objection, Plaintiffs Roger and Barbara Girard ("Plaintiffs" or "the Girards") have dismissed Counts V, VI, VII, VIII, IX and XIII, with prejudice, as to the T&M Defendants, only. Accordingly, this order only addresses the motion for judgment regarding the claims against each of the T&M Defendants in Counts II and XI.

The following factual allegations in the Complaint are relevant to the T&M Defendants' Motion:<sup>1</sup>

#### BACKGROUND

The Girards have resided at 2 Huntington Lane, Richmond, Maine (the "Property") from April 2001 through the present. They arranged to purchase the Property in April 2006 from Barbara Girard's sister, Denise Huntington Clavet, for \$30,000. The Property had been in Mrs. Girard's family for generations.

The Girards were referred to T&M to obtain a loan. T&M, Johnson<sup>2</sup>, and Holt<sup>3</sup> arranged a loan for the Girards with Judith K. Streeter and/or the Judith K. Streeter Revocable Trust (the "Streeter Loan"). The Girards repeatedly informed T&M and Holt that the Property had been in the family for generations and they did not want to engage in any transaction that would jeopardize their rights to the Property.

In connection with the Streeter Loan, on or about April 13, 2006 the Girards executed a promissory note (the "Streeter Note") in the principal amount of \$85,000 and a mortgage deed, security agreement and financing statement (the "Streeter Mortgage") on the Property. In addition, the Girards signed a "Construction Loan Agreement" with an initial interest rate of 13%, default rate of 19%, prepayment penalty of 6 months' interest on the note balance and a balloon payment of \$100,000. The Streeter Loan required interest only payments of \$800 per month for 13 months at which time the balloon payment became due. At the closing of the

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<sup>1</sup> The facts recited in this order are nearly identical to those in the court's Order of even date herewith regarding the motion of Defendant Lincoln Mortgage for judgment on the pleadings on Counts VII, XI and XVII of the Complaint. They are repeated here for ease of reference.

<sup>2</sup> Johnson is alleged to be an owner and officer of T&M Mortgage.

<sup>3</sup> Holt is alleged to be a loan officer in the State of Maine and an officer and/or employee of T&M.

Streeter Loan, the Girards paid closing costs, loan broker fees and other charges exceeding 20% of the value of the loan amount.

The Girards were unable to make all payments on the Streeter Loan and could not make the balloon payment required to payoff the Streeter Note and Mortgage. As a consequence, Johnson, Holt and T&M threatened to take the Property and evict the Girards from their home. Johnson, Holt and/or T&M served the Girard's with a notice to quit. Johnson and T&M then advised the Girards that they had found someone who could provide the Girards with financing to pay off the Streeter Loan.

Johnson referred the Girards to Defendant Ron Greene, who was a mortgage broker at Lincoln. Greene in turn informed the Girards that he had found them permanent financing and a permanent lender in the person of Defendant Donald C. Fawcett ("Fawcett"). Greene arranged for a closing on the transaction with Fawcett for February 18, 2008. Prior to that date, however, Barbara Girard contacted Greene and Lincoln to cancel the closing because Roger Girard was ill. Greene advised the Girards that they had to proceed with the loan closing. Greene and a notary showed up at the Girards' home to conduct the closing. Greene did not explain the documents that he asked the Girards to sign and rushed the Girards through the closing (hereinafter the "Fawcett Transaction").

Included in the documents Greene directed the Girards to sign were a warranty deed transferring the Property's title to Fawcett, a lease of the Property back to the Girards, and an option for the Girards to repurchase for \$138,000 within one year, which was \$38,000 more than the Girard's owed on the Streeter Loan and which required the Girards to make monthly payments of \$1,150.00. At the closing for the Fawcett Transaction, the Girards signed those

documents and a HUD-1 Settlement Statement and other documents. The HUD-1 Settlement Statement reflected that the contract sales price of the Property was \$163,000.

Fawcett simultaneously arranged for a loan with Wells Fargo Bank for \$138,000. Lincoln Mortgage received a fee of \$795.00 and a \$2,695.14 yield spread premium for arranging the Wells Fargo loan for Fawcett. Deducted from the proceeds of the Wells Fargo Loan was a \$100,000.00 payoff to Defendant Auburn Loan Servicing. The HUD-1 also allocated \$59,266 to the seller (i.e. the Girards) but the Girards have not received any such proceeds.

As a result of these transactions, the Girard's monthly housing payments increased by \$400.00 per month and the amount the Girards needed to refinance/repurchase their home increased from \$100,000 to 138,000.

Based upon representations made by Defendants, the Girards believed that the Fawcett Transaction was a refinance of their then existing loan. They did not know that they were transferring their property to Fawcett. At the closing of the Fawcett Transaction, the Girards paid costs and fees of more than 8% of the value of the transaction.

On June 9, 2008, the Girards were served with a Notice to Quit, requiring a payment of \$4,400 for rent arrearages to be made within seven days of the Notice in order to avoid eviction.

At all times relevant to the Girards' Complaint, Fawcett has engaged in the business of purchasing, selling and financing distressed real estate. He has over a million dollars in assets and income from his business of over \$20,000 a month.

The Girards' Complaint, filed on September 8, 2008 asserts the following causes of action against the T&M Defendants<sup>4</sup>: Violation of the Maine Unfair Trade Practices Act, 5 M.R.S. §§ 205-A – 214 (Count II); Intentional Misrepresentation related to the Fawcett

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<sup>4</sup> The Complaint asserts a number of claims against the other named defendants. However, for the purposes of the T&M Defendants' motion, the court's discussion is limited to those claims brought against the T&M Defendants, specifically.

Transaction (Count V); Intentional Misrepresentation related to the Streeter Loan (Count VI); Misrepresentation under Section 9-401 of the MCCC (Count VII); Negligent Misrepresentation (Count VIII); Breach of Contract (Count IX); Unfair, Unconscionable or Deceptive Practices in violation of Section 10-401 of the MCCC (Count XI); and Civil Conspiracy to Commit Fraud (Count XIII). As previously noted, this order addresses the motion for judgment regarding the remaining claims against each of the T&M Defendants in Counts II and XI.

## DISCUSSION

### I. Standard of Review

A “motion for judgment on the pleadings is the functional equivalent of a motion to dismiss for failure to state a claim.” *Stevens v. Bouchard*, 532 A.2d 1028, 1029 (Me. 1987). The Court must “examine the complaint in the light most favorable to the plaintiffs to determine whether it alleges the elements of a cause of action or facts entitling the plaintiffs to relief on some legal theory” and “assume that all factual allegations in the complaint are true.” *Id.* at 1030.

### II. Scope of the Court’s Review.

In support of their Motion, the T&M Defendants attach two affidavits. The first is given by Johnson, to which an appraisal report and various other documents are appended as exhibits. Holt gives the second affidavit, to which he too has attached a number of exhibits.

In opposing the T&M Defendants’ motion, the Girards correctly note that matters outside the pleadings may not be considered at the motion to dismiss stage without converting the motion into one for summary judgment under M.R. Civ. P. 56. *See* M.R. Civ. P. 12(c). As the Girards also correctly note, the motion submitted by the T&M Defendants does not comply with

the requirements of Rule 56.<sup>5</sup> Therefore, the Girards urge the court to convert the motion into one for summary judgment.

The Girards have also filed an affidavit and exhibits in support of their opposition to the T&M Defendants' motion. Despite the Girard's urging, however, and in light the T&M Defendants' insistence that their motion be treated as one for a judgment on the pleadings, the court will exclude the affidavits submitted by the parties and simply rule on the T&M Defendants' motion under the standard outlined in Section I of this Order.

III. Count II: Violation of the Maine Unfair Trade Practices Act.

Count II alleges, among other things, that the T&M Defendants engaged in unfair or deceptive trade practices in violation of Maine's Unfair Trade Practices Act ("UTPA") "by steering the Girards into a transaction and/or balloon mortgage that they knew or should have known [the] Girards could not afford and/or would result in foreclosure and/or loss of their home; by coercing the Girards to engage in a transaction they could not afford; and threatening to evict the Girards without the lawful right to do so." Pls.' Compl. at ¶ 69.

Section 207 of the UTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . ." 5 M.R.S. § 207. As the Law Court has previously explained, "[t]he UTPA does not contain a definition of either the term 'unfair' or 'deceptive.' Determination of whether an act or practice is 'unfair or deceptive' in violation of the UTPA must be made by the fact-finder on a case-by-case basis." *State v. Weinschenk*, 2005 ME 28, ¶ 15, 868 A.2d 200, 206 (internal citations omitted).

The T&M Defendants move to dismiss Count II on the basis that the Girards' "allegation that the Defendants made material promises they did not keep, is blatantly false because the

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<sup>5</sup> For example, the T&M Defendants have not submitted a statement of material fact including short, concise statements of fact supported by record citation. *See* M.R. Civ. P. 56(h).

Notice of Balloon Payment attached to Todd Johnson's Affidavit clearly states that the Girards had to make all of their payments in a timely manner before T&M could obtain a permanent mortgage."

However, given the broad and fact-specific scope of the UTPA and having excluded Johnson's affidavit, the court concludes that the Girards have sufficiently stated a claim under the UTPA. The allegations that the T&M Defendants made material promises to the Girards in order to steer them into a high interest loan they could not afford and that they served the Girards with a "notice to quit" without the lawful right to do so are sufficient to survive a motion to dismiss. Viewing those allegations in the light most favorable to the Girards, as is required at this stage, the court cannot conclude that there are no set of facts under which the Girards might prevail on their UTPA claim.

Further, although the T&M Defendants argue that they are entitled to judgment on Count II based on "accord and satisfaction" and "estoppel," their arguments in this regard are unavailing. See Defs.' Reply at 3 (citing *Butters v. Kane*, 347 A.2d 602, 604 (Me. 1975)). Accord and satisfaction as well as estoppel are affirmative defenses. M.R. Civ. P. 8(c). Under Maine law, a motion to dismiss or for a judgment on the pleadings "may be granted based on an affirmative defense if the facts establishing the defense appear on the face of the complaint." *Sargent v. Sargent*, 622 A.2d 721, 722-23 (Me. 1993). In this case, there is no allegation on the face of the complaint that the "Streeter Mortgage was paid off and discharged,"<sup>6</sup> as Defendants contend. Even there were, it is not immediately evident that accord and satisfaction is a defense

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<sup>6</sup> The court notes that the Complaint alleges that Fawcett borrowed \$138,000 from Wells Fargo Bank and from those proceeds made a \$100,000 payoff to Auburn Loan Servicing, an entity allegedly owned/or operated by Defendant Johnson. Cmplt. at ¶¶ 38, 40 and 41. This payoff is equal to the amount of the balloon payment the Girards owed under the Streeter Loan. While this may raise at best a suspicion that the \$100,000 payoff allegedly made to Auburn Loan Servicing paid off the Streeter Loan, there is no factual nexus or explanation in the Complaint to actually establish or infer a connection between the Wells Fargo payoff and the Streeter Loan.

to Plaintiffs' UTPA claim against the T&M Defendants.<sup>7</sup> Accordingly, the motion must be DENIED as to Count II.

IV: Count XI: Violation of 9-A M.R.S. §10-401.

In Count XI, the Girards allege that the T&M Defendants, as mortgage brokers, also violated Section 10-401 of Maine's Consumer Credit Code ("MCCC"). See Pls.' Compl. at ¶¶ 113 & 114. Section 10-401 provides, in pertinent part:

Any loan broker or loan officers of any loan broker that violate any provision of this Title or any rule issued by the administrator, or that through *any* unfair, unconscionable or deceptive practice cause actual damage to a consumer, are subject to the following:

...

4. A civil action by an aggrieved consumer in which that consumer has the right to recover actual damages from the loan broker or its loan officers in an amount determined by the court, plus costs of the action together with reasonable attorney's fees;

...

9-A M.R.S. § 10-401 (emphasis added).

The T&M Defendants contend that their conduct relative to the Fawcett Transaction, namely referring the Girards to Lincoln, does not give rise to liability under Section 10-401. However, as Plaintiffs correctly point out, Count XI, as pled, incorporates the alleged conduct of the T&M Defendants relative to the Streeter Loan, as well. In light of the fact that the Girards have sufficiently stated a claim for unfair or deceptive practices under the UTPA, and of the fact that the T&M Defendants have failed to identify any fatal deficiency in Count XI based on those

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<sup>7</sup> See *Brown v. Manchester*, 384 A.2d 449, 452 (Me. 1978) (explaining that the so-called *Butters* rule – which provides that a settlement agreement constitutes an accord and satisfaction of all claims – is only available to those who are immediate parties to a release of claims). Further, the T&M Defendants have not cited any case or authority standing for the proposition that payoff of a mortgage loan to which they were not a party (even if that satisfaction were evident on the face of the Complaint) constitutes an accord and satisfaction of the T&M Defendants' legal obligation to refrain from deceptive or unfair trade practices.



alleged facts, the court concludes that the Girards have similarly alleged facts sufficient to state a claim under Section 10-401.

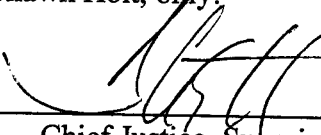
### CONCLUSION

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

The Motion of Defendants T&M Mortgage Solutions, Inc., Todd Johnson, Sr., and Shawn Holt for Judgment on the Pleadings as to Counts II and XI of the Complaint is DENIED; and

Pursuant to Plaintiffs' request, and without objection, Counts V, VI, VII, VIII, XI, XIII, of the Complaint are DISMISSED as to Defendants T&M Mortgage Solutions, Inc., Todd Johnson, Sr., and Shawn Holt, only.

Date: July 14, 2009

  
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Chief Justice, Superior Court