

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

ORDER ON MOTION OF DEFENDANT  
LINCOLN MORTGAGE FOR JUDGMENT  
ON THE PLEADINGS ON COUNTS VII,  
XI and XVII OF THE COMPLAINT

and

NEIGHBORHOOD SOLUTIONS, INC.,

Plaintiff

v.

BARBARA GIRARD, ET AL,

Defendants

Before the court is the Motion of Defendant, Lincoln Mortgage (hereinafter "Lincoln") for a Judgment on the Pleadings on Counts VII, XI, and XVII of Plaintiffs' Complaint. The following factual allegations in the Complaint are relevant to Lincoln's Motion:<sup>1</sup>

#### BACKGROUND

Plaintiffs Roger and Barbara Girard ("Plaintiffs" or "the Girards") have resided at 2 Huntington Lane, Richmond, Maine (the "Property") from April 2001 through the present. 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 Defendants T&M Mortgage Solutions, Inc., Todd Johnson, Sr. and Shawn Holt for judgment on the pleadings on Counts VII, XI and XVII of the Complaint. They are repeated here for ease of reference.

Girards arranged to purchase the Property in April 2006 from Barbara Girard's sister, Denise Huntingon Clavet, for \$30,000. The Property had been in Mrs. Girard's family for generations.

The Girards were referred to Defendant T&M Mortgage Solutions, Inc. ("T&M") to obtain a loan. T&M and Defendants Todd Johnson, Sr.<sup>2</sup> ("Johnson") and Shawn Holt<sup>3</sup> ("Holt") 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 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 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

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

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

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 Lincoln<sup>4</sup>: Violation of the Maine Unfair Trade Practices Act, 5 M.R.S. §§ 205-A – 214 (Count I); Declaratory Judgment Establishing Equitable Mortgage (Count III); "Unconscionability" under Section 9-402 of the Maine Consumer Credit Code ("MCCC") and/or common law (Count IV); Intentional Misrepresentation (Count V); Misrepresentation under Section 9-401 of the MCCC (Count VII); Negligent Misrepresentation (Count VIII); "Illegality" (Count X); Unfair, Unconscionable or Deceptive Practices in violation of Section 10-401 of the MCCC (Count XI); Existing and Supervening Impracticability (Count XII); Civil Conspiracy to Commit Fraud (Count XIII); Violation of Section 10-303-A of the MCCC (Count XVII). Lincoln's motion seeks dismissal of Counts VII, XI, and XVII.

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<sup>4</sup> The Complaint also asserts a number of claims against the other named defendants. However, for the purposes of Lincoln's motion, the court's discussion is limited to those claims brought against Lincoln specifically.

## 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. Count VII: Misrepresentation under Section 9-401 of the MCCC.

Article 9 of the Maine Consumer Credit Code, 9-A M.R.S. §§ 9-101-9-407, governs “Consumer Credit Transactions Made to Acquire Real Estate or Secured by First-Lien Mortgages.” *See id.* Section 9-401 of Article 9, the section upon which Plaintiffs’ Count VII is based, provides:

A creditor or a person acting for him may not induce a consumer to enter into a *consumer credit transaction* by misrepresentation of a material fact with respect to the terms and conditions of the extension of credit. A consumer so induced may rescind the sale, lease or loan or recover actual damages, or both.

9-A M.R.S. § 9-401 (emphasis added). The issue raised by Lincoln’s motion regarding Count VII is whether the Fawcett Transaction was a “consumer credit transaction.” The motion is not directed to the other elements of misrepresentation required by section 9-401 (e.g., inducement of a consumer; misrepresentation of a material fact; etc.) and, thus, will not be addressed by the court in this order.

A “consumer credit transaction” is “a consumer credit sale, consumer lease or consumer loan or a modification thereof including a refinancing, consolidation or deferral.” 9-A M.R.S. §

1-301(12). These three categories of transactions constituting a “consumer credit transaction” are defined as follows:

A. A “consumer credit sale,” is a sale of goods, services or an interest in land in which:

- (i) Credit is granted either pursuant to a credit card other than a lender credit card or by a seller who regularly engages as a seller in credit transactions of the same kind;
- (ii) The buyer is a person other than an organization;
- (iii) The goods, services or interest in land are purchased primarily for a personal, family or household purpose;
- (iv) Either the debt is payable in installments or a finance charge is made;
- (v) With respect to a sale of goods or services, not including manufactured housing or a motor vehicle, the amount financed does not exceed \$25,000; and
- (vi) With respect to a sale of a motor vehicle as defined in Title 29-A, section 101, subsection 42, the amount financed does not exceed \$35,000.

9-A M.R.S. § 1-301(11).

“A ‘consumer lease,’ is a lease of goods....” 9-A M.R.S. § 1-301(13). And, finally, a “consumer loan” is defined to mean:

A. Except as provided in paragraph B, a “consumer loan” is a loan made by a person regularly engaged in the business of making loans in which:

- (i) the debtor is a person other than an organization;
- (ii) the debt is incurred primarily for a personal, family or household purpose;
- (iii) either the debt is payable in installments or a finance charge is made; and
- (iv) for loans made by:
  - (a) A supervised financial organization, either the amount financed does not exceed \$25,000 or the debt is secured by manufactured housing or an interest in land; or

(b) A supervised lender other than a supervised financial organization, either the amount financed does not exceed \$35,000 or the debt is secured by manufactured housing or an interest in land.

B. "Consumer loan" does not include:

(1) A sale or lease in which the seller or lessor allows the buyer or lessee to purchase or lease pursuant to a credit card other than a lender credit card.

9-A M.R.S. § 1-301(14).

Count VII of the Complaint appears to be limited to a claim that the Fawcett Transaction constituted either a "consumer loan," or was a refinancing of an existing consumer loan, namely the Streeter Loan. As such, the Girards do not contend that the Fawcett Transaction constituted either a "consumer credit sale" or a "consumer lease," and the court need not consider the applicability of those definitions to the facts in this case. *See* Pls.' Opp. at 8 ("Here, the facts, viewed in the light most favorable to Girards, support a finding that the Fawcett Transaction is in fact a loan.")

The Girards allege, among other things, that Lincoln, presumably through Greene, misrepresented the terms and conditions of the Fawcett Transaction in order to induce them to enter into that transaction.

Lincoln argues that Count VII fails to state a claim because the Fawcett Transaction did not constitute a "consumer credit transaction" and, as such, the MCCC is inapplicable. According to Lincoln, the Girards did not borrow money in connection with the Fawcett Transaction. Instead, they sold their home. For that reason, Lincoln contends that the Fawcett Transaction was not a "consumer loan." Lincoln further maintains that the Fawcett Transaction did not constitute a "consumer sale" because Fawcett did not purchase the Property for a personal, family, or household purpose. Instead, he bought it as part of his distressed real estate business.

The Girards counter that the Fawcett Transaction was, in effect, either a refinancing of a prior loan or that it constituted a new equitable mortgage loan. The Girards urge the court to look beyond the technicalities of the transaction and recognize that, although it was styled as a sale to Fawcett and a subsequent lease back by the Girards, it was either a refinancing of an existing mortgage loan or was a new loan. See Pls.' Opp. at 6-8 (citing, *inter alia*, *Smith v. Diplock*, 144 A. 383, 386 (Me. 1929); and *Seaman v. Seaman*, 477 A.2d 734 (Me. 1984)) & 7 at n.3.

Strictly construing the MCCC, the Fawcett Transaction, as alleged, does not appear to fall within the definition of a "consumer loan." On the face of it, there was no loan to the Girards in the transaction nor was there a "refinancing" of a loan. Instead, the Girards sold their home to Fawcett and the monthly payments for which the Girards became responsible constituted rent payments under the lease agreement. Therefore, in order to avoid dismissal of Count VII, as a matter of law, the Complaint must assert facts that would support a conclusion that the Fawcett Transaction constituted a "consumer loan" despite the fact that the transactional documents characterized the transaction as a sale. As noted above, the Girards rely on the doctrine of equitable mortgages to support their claim that the Fawcett Transaction falls within the scope of the MCCC.

Maine's Law Court has previously explained the circumstances under which an equitable mortgage may be imposed.

No matter what the form and phraseology of the written evidence of a conveyance, if the court is satisfied that, at its inception, the agreement of transfer was as security, such conveyance, though in form a deed absolute, is in effect an equitable mortgage.



*Seaman v. Seaman*, 477 A.2d 734, 736 (Me. 1984) (quoting *Smith v. Diplock*, 127 Me. 452, 457, 144 A. 383, 386 (1929) and citing *Fulton v. McBurnie*, 134 Me. 6, 180 A. 921 (1935)).

Here, the Girards' Complaint seeks a declaration that the Fawcett Transaction constituted an equitable mortgage, *see* Pls.' Comp. at ¶¶ 70-79, and alleges facts sufficient to state such a claim – namely, that the Girards believed and intended that the Fawcett Transaction was a refinance of an existing loan. *Id. See also Provencher v. T&M Mortgage Solutions, Inc.*, 2008 U.S. Dist. LEXIS 47616 at \* 28 (D. Me. June 18, 2008). In fact, Lincoln does not challenge the Girards' declaratory judgment claim in its pending motion. Thus, assuming the veracity of the claim that the Fawcett Transaction was intended to be a loan and an equitable mortgage, as the court must, the court concludes that the Girards have sufficiently met their burden with respect to Count VII in order to survive Lincoln's motion. Unlike the allegations at issue in the *Provencher* decision cited by Lincoln, the Girards have sufficiently alleged that the Fawcett Transaction – as distinct from the loan from Wells Fargo to Fawcett – constituted a mortgage loan transaction in which they were consumers within the meaning of the MCCC. *See* Pls.' Compl. at ¶¶47, 56-58, & 71-79. *See also Provencher v. T&M Mortgage Solutions*, Docket No. 08-31-P-H, slip op. at 5-6 (D. Me. November 9, 2008).<sup>5</sup>

Accordingly, the court concludes that Plaintiffs have sufficiently stated a claim under 9-A M.R.S. § 9-401 and Lincoln's Motion is Denied as to that count.

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<sup>5</sup> The Court notes that, in *Provencher*, Federal Magistrate Judge Rich did recommend dismissal of the *Provencher*'s claims under the MCCC. However, he subsequently permitted *Provencher* to amend her complaint to recharacterize the transaction at issue. On November 9, 2008, in a later recommended decision, (after Lincoln's motion in this case), the federal district court expressly concluded that by recasting the "equitable mortgage" loan at issue, *Provencher* had sufficiently stated a claim under the MCCC.

III. Counts XI and XVII: Violations of 9-A M.R.S. §§ 10-401 & 10-303-A.

Count XI alleges that Lincoln violated 9-A M.R.S. § 10-401. Section 10-401 provides, in relevant 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 [penalties] ....

*Id.*

Count XVII alleges a violation by Lincoln of 9-A M.R.S. § 10-303-A. Section 10-303-A provides:

1. A loan broker shall, in addition to duties imposed by other statutes or at common law:

A. Act in good faith and with fair dealing in any transaction, practice or course of business in connection with the brokering or making of any mortgage loan;

B. Safeguard and account for any money handled for the borrower;

C. Follow reasonable and lawful instructions from the borrower;

D. Use reasonable skill, care and diligence;

E. Timely and clearly disclose to the borrower material information that might reasonably affect the borrower's rights, interests or ability to receive the borrower's intended benefit from the residential mortgage loan, including the total compensation the broker would receive from any of the loan options the broker presents to the borrower; and

F. Make reasonable efforts to secure a loan that is reasonably advantageous to the borrower considering all the circumstances, including the rates, charges and repayment terms of the loan.

2. The duties and standards of care created in this section may not be waived or modified.

*Id.*


Lincoln contends that the claims in Counts XI and XVII fail because they are based upon a claim that Lincoln acted as a "loan broker," a characterization that Lincoln denies based on its position that the Fawcett Transaction was not a "loan." However, in light of the court's preceding conclusion that the Girards have adequately alleged that the transaction was an equitable mortgage loan, they have similarly adequately stated their claims that Lincoln helped "broker" that loan and is therefore liable under Sections 10-401 & 10-303-A. Accordingly, Lincoln's motion must also be denied as to Counts XI and XVII.

#### 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

Defendant Lincoln Mortgage's Motion for a Judgment on the Pleadings as to Counts VII, XI, and XVII is DENIED.

Date: July 14, 2009

  
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Chief Justice, Superior Court