IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

WELLS FARGO BANK, N.A. as Trustee, **Plaintiff,**	)	
v.	)	**07 CH 16137** **Hon. Kathleen M. Pantle**
FREDERICK J. BIDIGARE, PATRICIA MUHAMMAD, and TYRONE MUHAMMAD, **Defendants.**	)	
PATRICIA MUHAMMAND and TYRONE MUHAMMAD, **Counter-Plaintiffs,**	)	
v.	)	
WELLS FARGO BANK, N.A. as Trustee, *et al.,* **Counter-Defendants.**	)	
PATRICIA MUHAMMAD and TYRONE MUHAMMAD, **Third-Party Plaintiffs,**	)	
v.	)	
ADVANTAGE MORTGAGE CONSULTING, INC., *et al.,* **Third-Party Defendants.**	)	

ORDER

Patricia Muhammad was the sole title-holder of real property commonly known as 7307 Maryland, Chicago, Illinois. She was married to Tyrone Muhammad before buying this property and Tyrone assisted in making the mortgage payments. The Muhammads fell behind on their payments and entered into a sale-leaseback transaction with Platinum Investment Group, LLC. Though the Muhammads believed that they would not lose title to their home, Patricia executed a Warranty Deed transferring title to Defendant Frederick Bidigare who encumbered the Maryland

property with a mortgage in his name, which has gone unpaid. Platinum also engaged in equity-stripping. The Muhammads lost title to their home and over $61,000.00 in equity in their home.

The issues are whether the legal doctrine of equitable mortgage applies to this transaction; whether Wells Fargo is a *bona fide* mortgagee; whether Wells Fargo is entitled to an equitable lien (assuming the Court finds that an equitable mortgage exists and that Wells Fargo is not a *bona fide* mortgagee); and whether Defendant David Chacon violated the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 ILCS 505/1 *et seq.*

There will be a finding for the Muhammads and against Wells Fargo, but Wells Fargo is entitled to an equitable lien.

There will be a finding for David Chacon and against the Muhammads

The Court is also entering default judgments against Defendants Frederick J. Bidigare and Suellen Carpenter in separate Orders entered contemporaneously with this Order.

Findings of Facts

The property on Maryland is a single family home that the Muhammads bought in 1991. It has been their home since then and is the home in which they raised their children. Patricia refinanced the home in 1999. Though only Patricia's name is on the title and on the first mortgage (including the refinance), Tyrone has financially contributed to the mortgage payments and has contributed financially in other ways, *e.g.* making repairs on the Maryland property. Tyrone was not included on the mortgage because he had issues with his credit rating.

The Muhammads began experiencing financial difficulties in the early 2000's due to Patricia's medical problems. They took steps to save their home from foreclosure, including filing for multiple bankruptcies, negotiating with their lender, Countrywide, and applying for

refinancing. None of these efforts were successful, however, and by 2005 they were facing foreclosure.

Their daughter, Nakeana David, worked at Advantage Mortgage and the Muhammads asked her to see if they could get a refinancing with Advantage. Once again, the Muhammads were unsuccessful.

David Chacon then called Patricia and told her that he thought he had a program that could help save her home. They agreed to meet and on May 9, 2005, the Muhammads met with Chacon and Carpenter at Platinum's office located at Jackson Boulevard and Halsted Street in Chicago.

At this meeting, Chacon told the Muhammads that they did not qualify for Advantage, but that he had an "umbrella company called Platinum Investment where they have a lot of nice people that want to lend money to people who could help save their homes." Chacon explained that investors help people save their homes by having the homeowners pay over a certain period of time. The homeowners would hold title with the investor. After that, once the homeowners got their credit together, Platinum would help them get refinanced to get their home back in their names alone.

Though Patricia thought that the purpose of the meeting was to find an investor, she and her husband were presented with a package of documents to sign. These documents had blank spaces where information was to be added, *e.g.* the Warranty Deed did not contain the name of the grantee, a legal description of the property, or the property index number. The Muhammads were given only partial explanations about the documents and neither fully understood the documents or the documents' significance. They did not have the assistance of a lawyer and Carpenter falsely advised them that she was a lawyer looking out for their interests. The

document signing took only about twenty minutes. Carpenter misrepresented the purpose of the documents. Carpenter also promised the Muhammads that they would get their property back.

The Muhammads' signatures were later falsely notarized by a Joshua Blum. The Muhammads never met Blum. Blum was not present when the Muhammads signed the documents. The date that Blum falsely notarized the documents was May 26, 2005, not May 9, 2005. Additionally, the Muhammads signed a blank Power of Attorney for property. A person by the name of Iwona Burnat claims to have witnessed the signing of the POA, but no such person was present when the Muhammads signed.

Additionally, even though the Muhammads signed all the documents on May 9, 2005, some of the documents were altered to make it appear that the documents were signed on May 26, 2005. May 26, 2005 is the date of a purported closing. The Residential Real Estate Sales Contract was altered to make it appear that the Muhammads had signed it on May 20, 2005, one day after the "buyer", Fred Bidigare, signed it and six days before the purported closing.

The Muhammads did not intend to sell their home; rather, they were trying to save their home. They were led to believe by some of the Defendants, and did believe, they would remain on title with an "investor" (whom they never met) and that they would get sole title back after two years. During that two year period, they were to pay rent in the amount of $1000.00 per month.

Chacon testified and confirmed that the purpose of Platinum's program was to save the Muhammads' home from foreclosure and to allow the Muhammads to remain in their home. Chacon also testified that it was the goal and intent of every Platinum deal that the homeowners be able to rebuild their credit, repurchase their home, and remain in their home.

A few weeks after the May 9, 2005 meeting, Chacon called the Muhammads to say that he had a check for them. Chacon wanted the Muhammads to come to Platinum's office because Platinum had found an investor. After ignoring his calls for a little while (because Patricia was beginning to feel uncomfortable with Platinum as Platinum now had her and her husband's social security numbers), the Muhammads went to see Chacon at Platinum's office sometime in June 2005. The Muhammads signed a receipt for a check made payable to them in the amount of $4000. The Muhammads were told to make monthly payments of $1000.00 for two years and to keep their credit clear. Chacon told the Muhammads that at the end of the two years, they would probably have a mortgage with Advantage in the amount of $110,000.00.

The Muhammads did not receive a Truth In Lending Act disclosure or notice at any time.

On May 26, 2005, a purported closing occurred based on the documents the Muhammads signed on May 9, 2005. The HUD-1 Settlement Statement from a May 26, 2005 purported closing reflected a value of the Maryland property at $115,000.00. The HUD-1 Statement also reflects the following transactions: (1) a first mortgage payoff to Countrywide in the amount of $46,742.32 and (2) a second mortgage payoff to Platinum Investment Group in the amount of $40,288.32. Real estate taxes and a water bill for the house were also reflected on the HUD-1 Statement as being paid.

Though the Muhammads had a first mortgage with Countrywide in the amount shown on the HUD-1 Statement, at no time did they have a second mortgage with Platinum. By falsely claiming that this second mortgage existed, Platinum engaged in equity-stripping.

Unbeknownst to the Muhammads, on May 26, 2005, Bidigare borrowed $103,500.00 from Advantage, which was secured by a Mortgage encumbering the Maryland property. Bidigare signed a Note which was secured by the Mortgage in the amount of $103,500.00. This

Mortgage was recorded in the Office of the Recorder of Deeds of Cook County on June 17, 2005. A Warranty Deed that purported represented a conveyance of the Maryland property from the Muhammads to Bidigare was also recorded on June 17, 2005 in the Office of the Recorder of Deeds of Cook County.

On May 26, 2005, Advantage executed a document purporting to assign all of its right, title, and interest in the Note and Mortgage executed by Bidigare to Argent Mortgage Company and this assignment was recorded in the Office of the Recorder of Deeds of Cook County on August 10, 2007.

The Muhammads made 23 payments of $1000.00 to Platinum. At first, Patricia sent the payments to Platinum's office, but later sent them to Carpenter's home at Carpenter's request. At the start of the second year, Carpenter instructed Patricia to make the checks payable to "Fred Bidigare". Patricia stopped making payments in May 2007. She also contacted the Office of the Attorney General and met with representatives from that office.

The Muhammads continued to live in the home on Maryland and never moved out. They procured homeowner's insurance for the property, and paid real estate taxes and utility bills. They also made improvements to the property and performed maintenance on the property.

After consulting with an attorney from the Legal Assistance Foundation, Tyrone signed a Notice of Equitable Mortgage which was recorded in the Officer of the Recorder of Deeds of Cook County on July 17, 2007. This Notice made specific reference to the Warranty Deed that was recorded with the Office of the Recorder of Deeds of Cook County on June 17, 2005, the legal description of the Maryland property, and the common address of the Maryland property. The Notice also sets forth the Muhammads' claim that an equitable mortgage was intended by the parties and not a conveyance of the absolute interest in the property.

Subsequent to the recording of the Notice of Equitable Mortgage, on April 21, 2008, Argent executed a document purporting to assign all of its right, title and interest in the Note and Mortgage executed by Bidigare to Wells Fargo. This assignment was recorded in the Office of the Recorder of Deeds of Cook County on January 24, 2011.

The foreclosure rescue transaction was an equitable mortgage

Illinois law provides:

> Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered a mortgage.

765 ILCS 905/5.

This statute reflects the doctrine of equitable mortgage that has existed in Illinois for well over 100 years. *See Totten v. Totten,* 294 Ill. 70, 77 (1920); *Ruckman v. Alwood,* 71 Ill. 155, 158 (1873).

In determining whether a constructive, or equitable mortgage exists, courts are to consider factors including:

> "'the existence of an indebtedness, the close relationship of the parties, prior unsuccessful attempts for loans, the circumstances surrounding the transaction, the disparity of the situations of the parties, the lack of legal assistance, the unusual type of sale, the inadequacy of consideration, the way the consideration was paid, the retention of written evidence of the debt, the belief that the debt remains unpaid, an agreement to repurchase, and the continued exercise of ownership privileges and responsibilities by the seller. [Citations]'"

Gandy v. Kimbrough, 406 Ill. App.3d 867, 876-77 (1st Dist. 2010), quoting *Robinson v. Builders Supply & Lumber Co.,* 223 Ill. App.3d 1007, 1014 (1991), quoting *McGill v. Biggs,* 105 Ill. App.3d 706, 708 (1982).

Fraud, accident or mistake are *not* elements that need to be proven before a court can enter a declaration that a deed, which is otherwise absolute in form, is a mortgage. *Nave v. Heinzmann*, 344 Ill. App.3d 815, 821 (5th Dist. 2003).

Further, "[t]he question of whether a deed is a transaction in real estate or is to be taken as a mortgage depends on the intention of the parties at the time of the execution." *Id.*

The Illinois Appellate Court has made it clear that sale-leaseback deals transacted by distressed homeowners trying to save their homes are equitable mortgages. *Hatchett v. W2X*, 2013 IL App (1st) 121758, ¶¶ 46-50; *U.S. Bank, N.A. v. Villasenor*, 2012 IL App (1st) 120061; *Gandy*, 406 Ill. App.3d at 877-78. If the transfer of title is intended by the parties as security for a debt and not as an absolute sale, the conveyance is an equitable mortgage. *Hatchett*, 2013 IL App (1st) at ¶ 39. "The parties' intentions are the key consideration and the proof of these factors must be clear, satisfactory and convincing if they are to overcome a written instrument." *Id.*, quoting *Gandy*, 406 Ill. App.3d at 877.

Proof that a transfer of title is an equitable mortgage "can come from almost every conceivable fact that could legitimately aid that determination." *McGill*, 105 Ill. App.3d at 708.

The Muhammads have met their burden of proving that the transaction at issue is an equitable mortgage. The evidence is overwhelmingly in favor of a determination of an equitable mortgage.

The sole intent of the Muhammads when entering into the sale-leaseback transaction was to save their home from foreclosure. They had no intent of leaving their home or conveying title such that they would be off the title. They were led to believe, and did believe, that they would be on title with an "investor" for only a two-year period, at the end of which they would be once again vested with sole title. As stated above, Chacon confirmed that the purpose of Platinum's

program was to save the Muhammads' home from foreclosure and to allow the Muhammads to remain in their home. Chacon also testified that it was the goal and intent of every Platinum deal that the homeowners be able to rebuild their credit, repurchase their home, and remain in their home. Chacon agreed that the goal for Platinum's distressed clients was 'to continue living in the home and to save the home from foreclosure" via a sale-leaseback deal with the intent to repurchase in two years.

The factor of prior unsuccessful attempts for loans has been met. The Muhammads have lived in their home since 1991. They began experiencing financial hardships due to Patricia's ill health so they sought financial help. They tried negotiating with the holder of the first mortgage, Countrywide, but the negotiations were unsuccessful. They applied for refinancing, but were unsuccessful. Patricia's bankruptcy filings were unsuccessful.

The factor of inadequate consideration has been met. The Muhammads conveyed their property for far less than the full value. The stated sales price on the HUD-1 Statement was $115,000.00, which was also the fair market value according to both the lender's appraisal and an appraisal conducted for the Muhammads. The Muhammads received value of only $53,725.68, *i.e.* they owed only $46,742.32 to Countrywide, water bills, and real estate taxes which debts were paid off, and they received a check in the amount of $4000.00. Thus, the Muhammads conveyed title for less than half the value of their home: they received a benefit of $53,725.78 for a home valued at $115,000.00, resulting in inadequacy of consideration of over $61,000.00.

Most of the inadequate consideration was paid immediately to Platinum, *i.e.*, the sum of $40,288.32 was listed on the HUD-1 Statement as a second mortgage to Platinum. There was never any such second mortgage, however. Chacon also testified that Platinum did not even issue

traditional mortgages; its sole business was sale-leasebacks. The consideration for their home was therefore grossly inadequate. Where consideration is grossly inadequate, a mortgage is strongly indicated. *McGill*, 105 Ill. App.3d at 709.

Wells Fargo contends that the *way* the consideration was paid is not at issue. However, the way the consideration was paid is a factor that favors the Muhammads. First, the way the part of the consideration was paid at the purported closing was based on the falsehood that Platinum had a second mortgage on the Maryland property. Second, the check for $4000.00 was paid to the Muhammads after they received a phone call telling them to pick up a check. The Muhammads never received a satisfactory explanation for the purpose of the check.

Wells Fargo's arguments that "Platinum stepped forward to help them" and that the second mortgage to Platinum is a "fee" that "appear[s] to be mislabeled on the HUD as a 'Second Mortgage' to Platinum" are arguments that have no support or basis in the testimony or evidence. Indeed, the argument is contrary to the evidence because the ARDC proceedings leading to the disbarment of Jacobs shows that the "second mortgage" misdesignation was a regular part of Platinum's operating procedure. Additionally, the argument is inherently improbable because no one, no matter how desperate, would pay a "fee" in excess of $40,000.00 to broker a sale of real estate worth $115,000.00. The argument is also inherently improbable given the facts of the entire transaction.

The evidence is undisputed that there was an agreement to repurchase the Maryland property. The Muhammads believed that, at the end of a two-year period in which they paid $1000.00 per month and maintained their credit, they would be the sole title holders on the property. Part of the transaction here was an agreement that, if the Muhammads made the payments and maintained good credit, they could buy the property for $110,000.00 and probably

get mortgage financing from Advantage. At that point, they would be the sole title holders. "An agreement to reconvey has long been considered a significant factor in distinguishing mortgages from absolute sales." *McGill,* 105 Ill. App.3d at 710.

Another factor that is met, and which is commonly seen as significant, is an agreement to remain in the property and make monthly payments. *Id.* As stated above, the Muhammads agreed to make monthly payments and did, in fact, make 23 of 24 payments.

There was an agreement for the Muhammads to remain in the property. Aside from the fact that the undisputed testimony is that the Muhammads remained in the Maryland property is the fact that there is no testimony that Fred Bidigare, the alleged grantee on the Warranty Deed, ever attempted to move into the property or sought to evict the Muhammads from the property. There is no evidence that the Muhammads called him to take care of responsibilities usually performed by a landlord, *e.g.* repairs and maintenance or that he notified them of his willingness to perform the usual duties of a landlord. Instead, the Muhammads continued to exercise ownership privileges and responsibilities, including: (1) making numerous repairs and improvements and (2) paying real estate taxes (until they were told not to), utility bills and homeowner's insurance. Though Wells Fargo argues that these are things that tenants typically do, this argument has no basis in reality. Residential landlords, not tenants, pay property taxes, perform maintenance on the property, and improve the property. Landlords pay homeowner's insurance; tenants pay renter's insurance.

The unusual type of sale, another factor, is immediately apparent. The circumstances surrounding the transaction also lead to the inevitable conclusion that this transaction was a mortgage, not an absolute conveyance. Under pressure, the Muhammads signed documents which were blank in areas that normally contain crucial information. People who were not

present when the Muhammads signed the documents claimed to be there witnessing their signatures. The Muhammads were not present for the purported closing on May 26, 2005. No lawyer representing their interests was present either on May 9, 2005 or on the purported closing date. They were not given an opportunity to consult with an attorney as the documents were presented to them on the first day they met with Chacon and Carpenter and they were lied to about the significance of the documents. When the transaction allegedly closed, a significant falsehood appeared on the HUD-1 Statement. The Muhammads were never provided with a TILA disclosure or notice.

Additionally, some documents were purportedly signed on May 9, 2005 by a now-disbarred lawyer, Marc Jacobs, even though Jacobs was not present when the Muhammads signed the documents.

The Muhammads lacked legal assistance, another factor. Additionally, they were falsely led to believe that Carpenter was a lawyer who was looking out for their interests. Jacobs was also falsely listed on the Residential Real Estate Sales Contract as the Muhammads' attorney even though they never met or spoke to him. Wells Fargo's argument that there was nothing preventing the Muhammads from bringing a lawyer to the meeting ignores the evidence actually adduced at trial: prior to the May 9, 2005 meeting, the Muhammads were not told the true nature of the meeting was to get them to sign blank documents conveying their home to someone who was not even named. Instead, Patricia was told by Chacon that he thought he had a program that could *save* her home. The Muhammads lacked legal representation at the closing because they did not know that a closing was to occur.

The Muhammads also believed that the debt they owed remain unpaid. At no time did they believe that they would not owe money on their property once the transaction was concluded.

Though there is no evidence that the Muhammads had a close relationship with any of the other parties, the lack of evidence on this one factor alone does not dictate a different result, especially given the overwhelming evidence in favor of finding an equitable mortgage. Recent cases (*Hatchett, Villasenor,* and *Grandy*) have all supported the notion that the doctrine of equitable mortgage is applicable in mortgage rescue cases. In most of these cases, there is no evidence that the homeowner has a close relationship with the other party. There is also no case that makes this a determining factor, and given the strength of the evidence on the other factors, this factor is of little importance.

Wells Fargo posits certain arguments that are not supported by the facts. It argues that the Muhammads are not unsophisticated individuals based on the fact that Tyrone has worked as a self-employed plumber and cashier and Patricia as home daycare provider in addition to working at community service centers. Wells Fargo does not explain how plumbers, cashiers, employees at community service centers, and daycare providers obtain crucial knowledge about real estate, financing for real estate purchases, and mortgage lending practices.

Wells Fargo also ironically points to a failed investment in real estate made by Tyrone about twenty years ago with some of his friends as evidence that Tyrone is sophisticated. Tyrone and the others each invested about $950.00 to buy an old building. Within weeks of the closing, the City of Chicago demolished the building under its "Fast Track" demolition program. This failed investment does not show that Tyrone is sophisticated in real estate transactions; it shows the exact opposite.

Moreover, the Court heard their testimony and had the opportunity to observe their demeanor. They are unsophisticated in matters of real estate, finance, and mortgage lending. Neither has a college degree, or training or education in real estate, financing or mortgage lending. For example, no sophisticated individual would ever sign a blank warranty deed or POA. The Muhammads clearly did not understand what they were signing and why they should not be signing blank documents. Patricia still is unsure of the significance of a warranty deed. Patricia has bought only one home. The real estate documents were numerous and complicated. They did not understand when they picked up the $4000.00 check that a closing had occurred.

Additionally, neither Patricia nor Tyrone came from families with experience in real estate. Both grew up in the housing projects. The main reason for buying a home was to break the generational cycle of living in public housing by raising their children in their own home.

Wells Fargo also argues that, because the documents are clear and explicit, Patricia's conveyance of the Maryland property must be enforced. Wells Fargo's argument, however, has no basis in fact. The evidence is clear, specific and convincing that the documents were blank when signed by the Muhammads on May 9, 2005. The Muhammads credibly testified to this fact and Chacon admitted it was typical that documents would be signed in blank. The documents therefore were not, and could not be, "clear and explicit" because they omitted crucial information.

Moreover, the "Articles of Agreement for Deed" is a thirteen-page complicated document whose meaning is not apparent to the average seller of real estate. The "Joint Venture Agreement" is nonsensical and its sole purpose is to confuse and deceive. It has no "Article 1", but rather starts with "Article 2". The grammar is not worthy of a legal document, *e.g.* "They will keep everything is (*sic*) in proper working order. Because it is both parties (*sic*) intention

that PATRICIA MUHAMMAD AND TYRONE MUHAMMAD will exercise his (*sic*) land contract, they is (*sic*) liable for all repairs." More importantly, its sole purpose is to deceive. The Joint Venture Agreement imposes a duty upon the Muhammads to maintain the property by making repairs. Clearly, this provision is intended to deprive the Muhammads from making the claim that they believed they still were on title because they performed repairs and maintenance on the property by making it appear that they accepted responsibility under this Joint Venture Agreement to perform repairs and maintenance.

Even if the documents were clearer, every equitable mortgage case involves documents that formally indicate a sale. If this were not so, there would be no need for the equitable doctrine to have developed or for the legislature to codify the equitable doctrine.

Wells Fargo also argues irrelevancies. Wells Fargo contends that the Muhammads' affirmative defense of fraud fails. However, the Muhammads have not raised the affirmative defense of fraud (other than in their separate claim against representatives of Platinum), which Wells Fargo knows because it concedes on the next page of its argument that "the sole remaining counterclaim against Wells [Fargo]" is the claim of equitable mortgage. In any event, fraud is not a necessary element of equitable mortgage. *Nave*, 344 Ill. App.3d at 821.

Another irrelevant argument posited by Wells Fargo that, since Patricia failed to list the property on bankruptcy petitions in 2005 and in 2011 when she reopened the bankruptcy, she should be estopped from asserting a claim of equitable mortgage. Judicial estoppel can apply if a party takes two opposite positions under oath, one in the bankruptcy proceeding and one in another court. *Holland v. Schwan*, 2013 IL App (5th) 110560, ¶¶ 112-123. Estoppel does not apply to inadvertent or mistaken omissions of claims, especially where the debtor later reopens

the bankruptcy to list those claims. *Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 273 (9th Cir. 2013).

Patricia credibly testified as to why she did not list the property in 2005 and the Court believes her. Moreover, in 2011 the trial of this case was delayed so that Patricia could reopen her bankruptcy, so that she could list the claims being pursued in this case. The Trustee eventually abandoned Patricia's claim, valued at $110,000.00; had the Trustee not abandoned the claim, this case could not have proceeded to trial.

In short, the Muhammads have established the material facts of this case with evidence that is clear, satisfactory, and convincing.

The Muhammads properly rescinded the equitable mortgage under TILA

TILA mandates the disclosure of finance charges and other information applicable to home mortgage loans. TILA applies whether the transaction is a traditional mortgage or an equitable mortgage. *Wilbourn v. Advantage Fin. Partners*, 2010 U.S. Dist. LEXIS 26898, p. 21, 2010 WL 1194950 (N.D. Ill. 2010).

TILA therefore applies to the equitable mortgage loan between the Muhammads (TILA borrower) and Bidigare (TILA creditor). A mortgagee is a TILA creditor if it makes just one high-cost mortgage loan that is brokered. 26 C.F.R. § 226.2(17)(v). Bidigare is a TILA creditor because the Muhammads' equitable mortgage was a brokered, high-cost mortgage.

The equitable mortgage was brokered by Platinum and its agents who played the functional role of the (equitable) mortgage broker. *See Hruby v. Larsen*, 2005 U.S. Dist. LEXIS 42285, p. 12, 2005 WL 1540120 (D. Minn. 2005).

The Muhammads' equitable mortgage was "high-cost" because the fees exceeded 8%. 26 C.F.R. § 226.32(a)(ii). Fees on an equitable mortgage equal the difference between the

benefit received (the "amount financed") and the repurchase price. *Hodges v. Swafford*, 863 N.E.2d 881, 890-91 (Ind. App. Ct. 2007). The fees here are $56,274.22 (buyback price of $110,000.00 minus benefit of $53,725.78)—more than half of the buyback price.

TILA disclosures were therefore mandated because TILA applies. No TILA disclosures were given, however, at any time to the Muhammads. As a result, the Muhammads can rescind the equitable mortgage. A notice of rescission was mailed on December 13, 2007, and was also attached to the Answer filed that day and served on all parties.

The equitable mortgage lien is therefore void. Rather than owing the debt set forth in the original transaction, the Muhammads owe the unsecured amount known as a TILA tender. The amount herein is $26,725.68 which is calculated by taking the consideration received by the homeowner ($53,725.68) minus payments made ($23,000.00), and minus statutory damages ($4000.00). *Hodges v. Swafford*, 868 N.E.2d 1179, 1181 (Ind. App. Ct. 2007).

Wells Fargo is not a *bona fide* mortgagee

Wells Fargo contends that it is a *bona fide* mortgagee because it acquired an interest in the Maryland property for valuable consideration without actual or constructive knowledge of the Muhammads' ownership interest in the property. It is Wells Fargo's burden to prove *bona fide* mortgagee status. *Davis v. Elite Mortgage Service*, 592 F. Supp.2d 1052, 1056 (N.D. Ill. 2009). Wells Fargo must meet the above requirements to obtain the role of *bona fide* mortgagee. *Villasenor*, 2012 IL App (1st) 120061, ¶ 58. Wells Fargo's argument fails as it was on constructive notice of the Muhammads' adverse interest in the Maryland property.

"Constructive notice is knowledge that the law imputes to a purchaser, whether or not he had actual knowledge at the time of the conveyance." *Id.* at ¶ 59. Constructive notice can be

established by one or more "red flags". *LaSalle Bank v. Ferone*, 384 Ill. App.3d 239, 248-49 (2d Dist. 2008).

The first red flag is the sham second mortgage to Platinum. This Court has already rejected Wells Fargo's attempt to rewrite the evidence and will not repeat those observations. Additionally, if Platinum truly had a second mortgage, Wells Fargo could have easily produced a title report, payoff statement, release, or other document showing the existence of the second mortgage. Wells Fargo did not because it could not. The line-items on the HUD-1 Statement should have led to a diligent inquiry on Wells Fargo's part, therefore, but Wells Fargo failed to make such an inquiry.

The second red flag is the Notice of Equitable Mortgage that was recorded a year before the assignment of the Bidigare mortgage to Wells Fargo. Though it contains one error, *i.e.* it lists Tyrone, rather than Patricia, as the sole title-holder, it contains more than sufficient information to provide notice to any party taking an interest in the property as to the true nature of the events in May and June 2005. Moreover, Patricia's name appears on the Notice along with the Document number of the Deed recorded with the Office of the Recorder of Deeds of Cook County, Illinois under which Patricia took title in 1991. The date of the recording of that Deed also appears. A title search, therefore, would have exceedingly simple despite the mistake as to who the sole title-holder is. In any event, Wells Fargo elicited no evidence that it even attempted such a title search, but was stymied due to the mistake.

The third red flag is the Muhammads' possessory interest in the Maryland property. A subsequent purchaser or lender is always on inquiry notice of the rights of those in possession of the property at the time it acquires the interest. *Villasenor*, 2012 IL App (1st) 120061, ¶¶ 59-64. Had Wells Fargo inquired in April 2008 when it took the assignment of the Bidigare mortgage,

the Muhammads would have told Wells Fargo in no uncertain terms that they were the owners of the property. Wells Fargo, however, did not make this simple inquiry.

Finally, the assignee of a trust deed in the nature of a mortgage takes it subject to the same defenses that existed between the original parties to the instrument. *Inland Real Estate Corp. v. Oak Park Trust and Sav. Bank,* 127 Ill. App.3d 535, 542 (1st Dist. 1984), citing *King v. Harpster*, 306 Ill. 202, 209 (1922). In this case, Advantage's knowledge about the rescue nature of this transaction was imputed to Wells Fargo.

Advantage and Platinum were both owned by Chris Bidigare. They shared offices and many of the same employees. Advantage issued traditional mortgages. When Advantage had customers who could not qualify for a traditional mortgage, it referred them to Platinum, to see if they could qualify for a sale-leaseback.

Under the deal arranged by Platinum, the Muhammads conveyed title to Fred Bidigare, a "straw buyer". His purchase was funded by a mortgage from Advantage and therefore Advantage was fully aware of the rescue nature of this transaction. Advantage's knowledge is therefore imputed to Wells Fargo.

Any one of these red flags, standing alone, defeats Wells Fargo status as a *bona fide* mortgagee. Even if they did not individually, the cumulative effect of the red flags put Wells Fargo on constructive notice that the true nature of the transaction was that of an equitable mortgage. *See Ferone*, 384 Ill. App.3d 248-49.

Wells Fargo is not a *bona fide* mortgagee.

Wells Fargo has an equitable lien with subrogation rights

Wells Fargo contends that, even if the Court rules that the evidence clearly, satisfactorily, and convincingly supports an equitable mortgage and that Wells Fargo is not a *bona fide* mortgagee, it is entitled to an equitable, first priority lien on the Maryland property.

> An equitable lien is the right to have property subjected to the payment of a claim. It is neither a debt nor a property right; rather, it is a remedy for a debt. An equitable lien arises in two situations. First, the lien arises where the parties express in writing their intention to make real or personal property, or some fund, the security for a debt, or where there has been a promise to convey or assign the property as security. Second, equity recognizes such a lien without an express agreement between the parties, which arises wholly from general considerations of fairness and justice. In either case, the essential elements of an equitable lien are: (1) a debt, duty, or obligation owing by one person to another, and (2) a *res* to which that obligation attaches.

Paine/Wetzel Assoc., Inc. v. Gitles, 174 Ill. App.3d 389, 393 (1st Dist. 1988).

The second situation applies here.

The Muhammads do not dispute that several of their debts were paid with proceeds of the loan, *i.e.* their first mortgage to Countrywide, real estate taxes, and a water bill and they therefore received a monetary benefit. Wells Fargo additionally has paid property taxes on the Maryland property since it acquired Advantage's mortgage lien in April 2008. Wells Fargo is therefore entitled to an equitable lien.

The amount of the equitable lien is the amount of the TILA tender calculated above, *i.e.* $25,725.68 plus the amount of taxes paid by Wells Fargo, *i.e.* $5,814.76. The total amount of the equitable lien is therefore $32,540.44.

David Chacon did not violate the Consumer Fraud Act

The Muhammads seek recovery against David Chacon for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act in the event they do not prevail on their

equitable mortgage claim or the Court finds that Wells Fargo is a *bona fide* mortgagee. 815 ILCS 505/1 *et seq.*

The Muhammads allege that the Platinum program, and their specific transaction, was commercially unfair under *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 417-18 (2002) because they lost a significant amount of home equity due to the transaction. The allegations center on the equity-stripping portion of the transaction. The Muhammads further contend that each of the defendants who facilitated this commercially unfair transaction should be held jointly and severally liable for damages in the amount of the Muhammads' lost equity.

The evidence, however, does not establish that Chacon violated the ICFA. The determination of whether a certain practice is "unfair" under the ICFA requires a case-by-case determination. *People v. Knecht*, 216 Ill.App.3d 843, 853 (1st Dist. 1991). Though there is no doubt that Chacon engaged in some behavior relative to the transaction, the evidence does not support the Muhammads' argument that Chacon knew that the program was likely to fail.

When Chacon was working for Platinum and involved in the events herein he was 21 years of age. Chacon did not go to college and he was not a trained real estate professional. His role in Platinum was essentially that of a salesperson. Chacon worked as an employee for only a little over one year, of which two months was training with Advantage. The only training he received with Advantage was to acquaint him with terminology. He did not receive any training with Platinum. Prior to working with Platinum he worked at Extreme Traffic Builders selling car dealer promotions. Before that, he worked at a small business newspaper and a grocery store.

His boss, Chris Bidigare, gave Chacon instructions as to who to call. The list of people who Chacon was to call was developed from information obtained by Chris Bidigare. Chris learned whose homes were in foreclosure. After Chacon called the people, he would obtain

information from them and take it back to Chris. Chris would evaluate the information to see if a sale-leaseback mortgage rescue transaction could be undertaken and then give instructions to Chacon to call potential customers. Chacon had no involvement with the decision about whether Platinum would do a transaction with a homeowner.

Chacon did not prepare any documents; Carpenter did the preparation. Chacon did not explain the documents to homeowners; Carpenter explained the documents. Chacon did not attend the closings and did not prepare any documents for the closings.

Chacon did not receive any commissions on any work that he did. Chacon's compensation was his weekly salary and a Christmas bonus.

Chacon also was one of the "investors" who took title to property and who was then obligated on a mortgage. He was an investor-mortgagor on five properties. He was an investor-mortgagor before he worked for Platinum. Three of the five properties on which he was an investor-mortgagor have been foreclosed upon because Platinum did not make the payments on the properties. The properties went into foreclosure while he was working at Platinum, but he was not told of the foreclosures; he thought everything was fine. Only one homeowner bought her property back.

Chacon was told by Chris that some sale-leaseback transactions were successful and that the homeowners got their property back.

In short, the evidence shows that Chacon did not create this scheme or personally profit from it. His involvement was minor. He did not decide who to target. He did not prepare or explain any documents to the homeowners. He did not prepare the closing documents showing the equity-stripping. There is no evidence that he knew that equity was being stripped as he did not attend the closings on which he was an investor-mortgagor. He did not know the transactions

were like to fail. He did not work for Platinum long enough to find out a realistic number as to how many transactions were likely to fail.

The fact that he was an investor-mortgagor is evidence that he believed that this program was legitimate. By the time he learned that it was not, three of the five properties for which he held the mortgage were the subject of foreclosures, Platinum had gone out of business, and he was a defendant in a number of lawsuits. It is apparent that Chacon was being used as a cat's paw by the wrong-doers at Platinum.

As the Muhammads have not proven that Chacon violated the ICFA, there will be finding for Chacon.

There will be a finding for Patricia and Tyrone Muhammad and against Wells Fargo. Wells Fargo has an equitable lien in the amount of $32,540.44, however.

There will be a finding for David Chacon and against Patricia and Tyrone Muhammad.

DATE: March 26, 2014

ENTERED
JUDGE KATHLEEN M. PANTLE-1775
MAR 26 2014
Kathleen M. Pantle
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK