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

Angela Carter,	)	
	)	
Plaintiff,	)	No. 06 CH 26787
	)	
v.	)	Hon. Sophia H. Hall
	)	
Second Chance Program, Inc., J.T. Foxx, Norma Wallace, Justin Core, LLC, BankFinancial, F.S.B., Corporation, and Unknown Others	)	
Defendants.	)	

DECISION

This case came on for trial on plaintiff Angela Carter's complaint seeking a variety of relief regarding the transaction involving the sale of her home under the defendant Second Chance Program. Count I seeks entry of an order voiding the warranty deed to Justin Core, LLC executed and delivered by Carter based on the theory of equitable mortgage. Count II seeks rescission of the transaction for violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq., ("TILA"), because the transaction is an equitable mortgage and the "lender" failed to make mandated disclosures. Count III alleges that the transaction is a non-conforming equitable mortgage, and seeks rescission under the Home Ownership and Equity Protection Act ("HOEPA"), Pub. L. No. 103-325, § 151, 108 Stat. 2160, 2190 (1994) (amending TILA at 15 U.S.C. §§ 1061-02, 1604, 1610, 1639-41, 1648).

Count IV alleges the transaction violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. ("ICFA"), and Count V alleges common law fraud. Count VI seeks to void the Warranty Deed on grounds of unconscionability, and Count VIII alleges unjust enrichment. Count VII, a breach of fiduciary duty claim, was dismissed on December 21, 2007.

FINDINGS OF FACT

Ms. Carter's Financial Crisis

Ms. Carter testified that she is a high school graduate, with college-level studies in "general studies" (*i.e.*, math and English) and accounting at Loop College -- which is now Harold Washington College -- and at Olive-Harvey College. Ms. Carter was employed for 27 years in various clerical capacities that required her to review documents and work with laptop computers. Ms. Carter and her former husband leased a number of apartments and jointly owned a home that they chose to abandon after it went into foreclosure.

Ms. Carter testified that she and her family have lived in the West Side brick two-flat located at 4320 W. Cermak ("Home" or "Subject Property") for over 45 years. Ms. Carter grew up in the Home and moved back in with her sister and mother after getting divorced in the early 1990's. At the time, Ms. Carter was working at Dontech (a yellow pages company) doing clerical and computer work.

Soon after moving back, Ms. Carter's family members quitclaimed their interests to Ms. Carter so she could obtain a loan to make home repairs. When she obtained the loan, Ms. Carter testified that she did not put her mother, Essie Hurd, on the mortgage, because Ms. Hurd was 71 years old and was living on a fixed income. Ms. Carter used the loan proceeds to make repairs to the second floor unit, roof, windows, and plumbing system. About a year later, Ms. Carter obtained another mortgage loan to pay for work on her mother's bathroom and kitchen and to purchase a new water heater. Ms. Carter later refinanced these two mortgage loans with a loan from ABN AMRO.

In November 2001, before September 2002 when she lost her job at Dontech paying $38,000 per annum, Ms. Carter testified that she was unable to service various unsecured loans. She filed a Chapter 7 bankruptcy petition. In that petition, Ms. Carter valued the subject Property at $125,000. The November 2001 bankruptcy petition implied that Ms. Carter had no equity in the Property, which was then reportedly encumbered by $119,000 in debt. The bankruptcy court accepted that figure in granting a discharge without requiring the home to be sold. Ms. Carter testified that approximately two years later, at the time of the closing of the instant sale to defendant Justin Core, LLC. She had no reason to believe the Property was worth more than $125,000.

In April and May of 2004, Ms. Carter was served with a foreclosure complaint. She undertook to research her options. Ms Carter testified that her overriding intent was to retain possession of the property for her mother. Ms. Carter sought a lawyer's advice who told her to file a Chapter 13 bankruptcy petition. She asked him "how could he file a Chapter 13, [since] that meant that [Ms. Carter] had to be working to pay the money back." Trial Transcript (hereinafter "TT") at 67. She rejected his advice. Ms. Carter also contacted the Legal Assistance Foundation of Metropolitan Chicago for advice, but "it was taking them awhile to get back to [her] so [she] continued to look for somebody else to help [her]." TT at 68. Ms. Carter did not attempt to get a new loan because she had been unemployed since September 2002 and did not think she could qualify.

Second Chance Program

Around that time, Ms. Carter received a mailed solicitation from the Second Chance Program signed by defendant J.T. Foxx. Mr. Carter testified that she opened the Second Chance envelope because it said "Illinois' Only Second Chance Program," which made her think it was a program being offered through the State of Illinois, and because it said "**EXERCISE YOUR RIGHT to a SECOND CHANCE™,**" which made her think it would help her stay in her Home. TT at 73. When she opened the envelope, what most caught Ms. Carter's eye in the mailed solicitation was the message in bold caps: "**STAY IN YOUR HOME on YOUR OWN TERMS not the BANKS**". TT at 74. The 5 bullet points listed below reinforced Ms. Carter's understanding that Second Chance was a program to keep her in her Home.

All of the language in the Second Chance solicitation suggested that Second Chance would help homeowners stop their foreclosures and stay in their properties on their own terms. There is no language suggesting the manner in which the Program would accomplish that. The solicitation states that it is a committee-based program composed of various members who vote on the allocation of private funds. That the committee screens applicants for the ability to pay "monthly house payments"—not "rent". The solicitation states, in bold, "**Let me reiterate, the objective here is solely for homeowners to stay in their homes.**" The solicitation further states that each applicant's situation is different and unique. .

Foxx testified at trial that the purpose of Second Chance was to keep people in their homes. TT348. This intent was corroborated by Gary Greenberg ("Greenberg"), manager of Defendant Justin Core LLC, which took title from Ms. Carter.

The Visits with Ms. Carter

Ms. Carter responded to the Second Chance solicitation. Thereafter, Norma Wallace, a representative of Second Chance, visited her at her home. Ms. Carter did not identify any false or misleading statement made by Ms. Wallace at this meeting. Ms. Carter testified that Wallace asked some questions and told Ms. Carter she needed to meet with Mr. Foxx. Ms. Carter does not "really remember the whole conversation. [She] just remember[s] [Wallace] telling [her] [she] had to meet Mr. Foxx . . . ." TT at 80. Wallace took a tour of Ms. Carter's home, collected information for Foxx, and had Ms. Carter write a hardship letter and sign some paperwork.

Ms. Carter testified that her brother, formerly a Vice President of American National Bank, attended a portion of Ms. Carter's first meeting with Ms. Wallace. After hearing a description of the transaction from Ms. Carter, Ms. Carter testified that her brother said "something like he knew somebody that got in a program like that and one day they came home and the furniture was sitting outside." TT at 129. Ms. Carter testified that Ms. Wallace said "that if you pay your rent, that won't happen," and that Wallace specifically used the term "rent." TT at 132.

Subsequently, on June 7, 2004, Ms. Wallace and J.T. Foxx visited Ms. Carter at her home. Ms. Carter testified that there was "no discussion of [Ms. Carter] selling her home," TT at 82-83, and that Mr. Foxx said "we could just buy your mortgage back from ABN AMRO." TT at 83.

During that visit with Ms. Carter, Foxx used language intended to soothe her and gain her trust. He shared his life story with her including his family's experience with foreclosure, insisting he knew how she felt, and stating that he wanted to help people because of the foreclosure his family experienced. Foxx complimented Ms. Carter on her Home, saying that it smelled nice. Foxx told Ms. Carter she could stop worrying and could sleep at night. To allay her fears, Foxx referred Ms. Carter to a Second Chance homeowner (another African-American woman) who recently closed on a deal. Foxx said he knew people he could work with at ABN AMRO to buy the mortgage from them.

Although she was suspicious of Foxx, at his direction, at this first meeting with him, Ms. Carter signed various documents. Ms. Carter testified that she did not read them. She signed a real estate sale contract, a residence lease, and a lease rider granting to lessee a repurchase option. Ms. Carter signed these documents as they were presented to her by Mr. Foxx or Ms.

Wallace, and could not recall anything that was said about them as she signed, other than "sign here" or "initial here." TT at 84-88. Ms. Carter testified that she thought "[she] was signing documents for [Foxx] to buy [her] loan from ABN AMRO," TT at 89, and believed Foxx was thereby trying to "solve her problem," notwithstanding the fact that she never understood how Foxx's purchase of the defaulted ABN AMRO loan would "accomplish anything." TT at 225.

Ms. Carter discussed the repurchase option with her son Christopher who lived in California. Ms. Carter had that conversation because she "knew that [she] had to pay money to get [her] building back." TT at 138.

According to the documents (as amended), Ms. Carter agreed to sell her Home to Justin Core LLC., for $140,000, and to remain in the Home making monthly payments of $1,200 or $1,300, depending on whether she made her rent payment by the 15th of the month, with an option to repurchase the Home within 1 year for $180,000 or 2 years for $190,000. Ms. Carter testified that she understood "that Mr. Foxx was going to contact ABN AMRO to purchase [her] loan that [she] owed them and then [she] would owe Mr. Foxx." TT at 98-99. No lawyer was present at the June 7, 2004 meeting at which Ms. Carter executed these documents. After Ms. Carter signed the sale-leaseback documents on June 7, 2004, Foxx said he would get her an attorney.

J.T. Foxx Testimony

Foxx testified that he started the Second Chance sale leaseback business because he wanted to help people to save their homes from foreclosure, people in financial distress who were qualified to participate. Foxx testified that he shared his personal story with Ms. Carter about how his family had been subjected to a foreclosure and lost their home and that was not necessary and he believed that the home could be saved.

Foxx testified that his intention was for the Second Chance Program to be a success when people repurchased their home. They would stay in the home as renters and then would repurchase. He wanted to make sure the homeowner could make the monthly payment and have a chance to buy the home back. He turned down applicants he did not think could repurchase. He testified that he would take the client's word about the financial feasibility of the transaction, and would not do an independent financial analysis of affordability. Ms. Carter's credit score was not important.

In the Carter transaction, Foxx testified that he asked Ms. Carter for an outline of what her family could afford. He had Ms. Carter provide documents with the signature of every family member and what they could contribute. She also provided information that her son, Christopher, who lived in California, would be able to repurchase. Christopher provided a pay stub. Foxx believed that the family was motivated to contribute, and that Chris was moving back to Chicago. Carter told Foxx that she wanted to stay in the home.

Upon receiving this information, Foxx prepared a Pro-Forma for the file regarding his views of the transaction. He believed that the property was a good one, with a value of $210,000 - $220,000, with an immediate sale price of $195,000, and that the monthly payments would go from $1100, which Carter was presently paying, to $1200 a month pursuant to the proposed transaction. He indicated that he believed that though Ms. Carter was without a job, her family would contribute to the rent. He testified that he believed that Ms. Carter's son would buy the property back in two years.

Mr. Foxx, particularly, testified to his view of this particular transaction.

> "Well, one, as I mentioned yesterday, she said that she was about to get a job; two, we had given her three months' head start, she had four family members contributing, including her ex-husband, to make the monthly rent payment; and her son, who was moving back, she told me he had great credit and he'd be able to buy back. So it just seemed that as long as what she said would happen, happened, they would have got the home back." TT at 408.

He, further, testified concerning his expectations regarding the transaction:

> Q. Well when you had Ms. Carter go into this transaction, it was because you expected that she would be able to afford the monthly payments, correct.
>
> A. Correct
>
> Q. And you expected she'd be able to buy the home back, correct?
>
> A. Correct.

TT at 414-15.

The Closing

Prior to the closing, Ms. Carter received a call from attorney Terrance Godbolt who was chosen by Mr. Foxx. Ms. Carter met Mr. Godbolt at the closing which took place on June 21, 2004. This was the first time that Ms. Carter had any legal representation in connection with the

transaction. Mr. Foxx was also present. Ms. Carter testified that at the closing she "remember[s] a lot of papers being thrown at [her] and the lawyer just pointing, telling [her] where to sign, and [she] would just sign," without any explanation. TT at 95.

She testified that "[i]n the middle of the transaction, when there were so many papers for [Ms. Carter] to sign, [Ms. Carter] started feeling like [she] may be selling [her] house." TT at 99. Ms. Carter continued signing documents because she "felt they were [her] only choice, that [she] didn't have any other alternative but to go with the Second Chance Program" in order to "keep [her] home." TT at 99.

Ms. Carter understood that "[she] had to make rent payments" after the closing, and that those "rent" payments would continue until "[she] was able to get [her] house back." TT at 101. Ms. Carter testified that she understood that "getting the house back" meant "[she] had to purchase the house back" in a period of "one or two years." TT at 101. Ms. Carter was not sure how much money she would have to pay in order "to get the house back" because "there was a piece of paper that had two different totals, one for the first year then another one for the second year." TT at 101-102. Ms. Carter initialed the two option prices set forth therein, $180,000 the first year, and $190,000 the second year.

According to the HUD-1, the transaction was a cash sale to Justin Core for $140,000, and it paid off Ms. Carter's prior mortgage loan at an amount of $126,470.48, plus property taxes in the amount of $2,468.00. P8, and Ms. Carter also received cash out of $833.32 (line 603). According to Godbolt, Ms. Carter later received an insurance rebate of $721.94. Including all of these sums, the total amount of consideration received by Ms. Carter was $130,493.74.

Ms. Carter testified that nothing said by Foxx caused her to continue with the transaction. She had researched her other options, and felt this was her only choice. Mr. Godbolt testified that he explained everything to Ms. Carter during the course of the closing.

A month after the closing, the Property appraised for $225,000. At trial, Mr. R.J. Schmitt testified that this value would have applied to both June and July 2004, given the comparable sales used in the appraisal. Based on the appraisal, Bank Financial issued Justin Core a note with an initial principal of $112,000, and a mortgage with a maximum lien amount of $224,000, and a cross-collateralization provision applying to the 25-20 other Second Chance properties securing Bank Financial loans. Shortly before closing, Foxx estimated the value of the Property at $210,000-$220,000, and he stated that it was in a "very good location and appreciating area."

Post Closing

Since the closing, Ms. Carter and her family have remained in the Home. Although Ms. Carter remained unemployed at the time of closing, she managed to make monthly payments for about 17 months (from September 2004 through March 2006), plus two additional payments of $200 and $500, for a total of $28,000. Ms. Carter sent the checks to Justin Core, LLC, the grantee on the Warranty Deed. All but one or two of those checks contained the notation "Rent." Ms. Carter has also been responsible for water and other utility bills, maintenance, and repairs.

When Ms. Carter began to fall behind on rent payments, she had numerous conversations with Mr. Gary Greenberg, manager of Justin Core, about those late payments. Mr. Greenberg referred Ms. Carter to Mr. Scott Siegel, a loan officer at HomeStar Bank for assistance in obtaining a mortgage loan to finance a repurchase of the home. After a commitment for mortgage financing was obtained for Ms. Carter's mother, Ms. Carter chose not to go forward with the transaction, based on advice from Mr. Lindsey, her trial counsel in this case.

Defendants have served three notices of termination of tenancy on Ms. Carter. The last resulted in the filing of a forcible entry and detainer action, which triggered the filing of this lawsuit.

CONCLUSIONS OF LAW

COUNT I

In Count I, Ms. Carter seeks a declaration that the transaction resulted in an equitable mortgage. The transaction was documented by a deed from Ms. Carter to Justin Core LLC, a lease and an option to repurchase, all signed at the closing. Under Illinois law, the Court may look at all of the circumstances surrounding the transaction and the intent of the parties to determine if the transaction should be considered an equitable mortgage.

The court in *Beelman v. Beelman*, 121 Ill.App. 3d 684, 690 (5th Dist. 1984) stated:

> A deed which on its face appears to be an absolute conveyance is to be considered a mortgage if it appears that the parties intended it to serve only as a security. Whether a deed is to be taken as a mortgage depends on the intention of the parties at the time of the execution of the deed. Any evidence tending to indicate that the parties intended to create a loan and security is admissible. (citations omitted).

The Court is allowed to consider many factors surrounding the transaction to determine the intent of the parties. As the court in *Beelman* further stated:

> Whatever its nature, the body of evidence must provide clear, satisfactory and convincing proof that the deed absolute in form was intended to be a mortgage. When a deed is intended by the parties to be a mortgage, the relationship created between the parties is that of equitable mortgagor and mortgagee. *Id.* (citations omitted).

Accordingly, in the instant case, Ms. Carter must prove by clear, satisfactory and convincing proof, that she and J.T. Foxx intended that the transaction would operate like a mortgage transaction.

Factors which this Court might consider in determining the intent of the parties are extensively enumerated in *McGill v. Biggs,* 105 Ill. App. 3d 706, 709-710 (3d Dist. 1982). These factors include:

> 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 the 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. *Id.* at 709.

This Court need not find proof of every one of the so-called *McGill* factors in order to find that an equitable mortgage existed in this case. No particular factor is required to find an equitable mortgage and different courts have stressed different factors in examining whether an equitable mortgage should be found.

As stated in *McGill*, "[a]n agreement to reconvey has long been considered a significant factor in distinguishing mortgages from absolute sales. Agreements made in writing at the same time as the conveyance resolve any doubt as to the character of the conveyance in favor of a mortgage. *Id.* at 710. The court in the more recent case of *Nave v. Heinzmann*, 344 Ill. App. 3d 815, 822 (5th Dist. 2003), addressed a transaction, with circumstances different than the instant case, but which also included a simultaneously signed sale and repurchase agreement, and found that it was an equitable mortgage.

This Court has reviewed the evidence in the instant case and finds that the evidence is clear, satisfactory and convincing that the parties intended for the transaction to act as a mortgage. First, though the deed from Ms. Carter to Justin Core LLC is absolute on its face, the lease and repurchase agreement signed at the same time as the deed suggests a different intent of the parties. The Court, next, addresses the parties' testimony regarding their intent.

Ms. Carter testified that she wanted to stay in the home and keep it for her mother. Although she realized that she was selling her property to Justin Core, LLC., she also knew that she would remain living in the property pursuant to a lease and the payment of rent, and would be able to repurchase the house within two years. She knew that upon entering into the transaction, the foreclosure proceedings would be stopped, and she would be able to stay in her home.

She testified that she had explored other options at the time of the foreclosure such as bankruptcy, and believed that she could not get a traditional mortgage because she was not working. Ms. Carter was educated and had prior life experience from purchasing other property, obtaining financing and even going through bankruptcy. She sought the advice of her family in her decision to enter into the transaction with Second Chance. She, ultimately, felt she had no choice but to go through with the transaction with Second Chance, and that it was consistent with her intent to keep her home.

J.T. Foxx persuasively testified to the same intent. As he testified, the transaction was intended to be a second chance for Ms. Carter to stay in her home. He testified that he considered that the Second Chance Program was a success when people repurchased their home.

As to the Carter transaction, he and the committee that voted on the expenditure of Second Chance funds as set forth in the solicitation he signed, relied on untraditional information to support the decision to help Ms. Carter. Foxx required information from her and members of her family, to satisfy himself that the family had the desire to make payments and repurchase the home, and had the resources to do so. He had Carter's family members' signatures on documents evidencing their commitment to contribute to the monthly payments. He received the pay stub from Christopher, Ms. Carter's son in California, who he believed was going to help her to repurchase the home in the future.

The evidence shows that Foxx took exceptional steps to personally relate to Ms. Carter and allay her concerns about him and the transaction. He visited her home, shared with her his heartfelt personal experience with foreclosure, commented on the niceness of her home, and referred her to other Second Chance clients whom he had helped. He also recommended an attorney, Mr. Godbolt, who represented her at the closing.

He testified that he expected that Ms. Carter would be able to afford the monthly payments to repurchase her home, and expected she would be able to repurchase her home. Foxx testified that he believed Ms. Carter was a good risk.

Based on the form of the transaction, Ms. Carter's testimony about her intent, and Mr. Foxx testimony about his intent and the documents upon which he relied, the Court finds that the transaction was intended to operate like a mortgage. Mr. Foxx put up money to benefit Ms. Carter in remaining in her home and forestalling foreclosure. Ms. Carter paid Mr. Foxx monthly. Ms. Carter could also "release" Mr. Foxx's interest in the property by paying a final amount within two years as agreed by the parties.

Accordingly, this Court declares that the transaction is an equitable mortgage.

COUNTS II and III

Having declared an equitable mortgage, this Court must now determine whether the agreement of the parties is subject to rescission under the Truth in Lending Act and the Home Ownership and Equity Protection Act.

Counts II and III seek the relief of rescission, under either TILA, or HOEPA, for failure to make statutorily mandated disclosures and for failure to allow Ms. Carter to rescind the transaction. 15 U.S.C. § 1635. The parties agree that the TILA and HOEPA-mandated disclosures were not made in this case. Counts II and III are alternative claims because each affords the plaintiff the relief of rescission.

Count II of Carter's complaint is a claim under TILA. TILA applies to equitable mortgages, *see Rowland v. Haven Props., LLC*, 2005 U.S. Dist. LEXIS 13353, *7, 13 (N.D. Ill. June 24, 2005), *Hodges v. Swafford*, 863 N.E.2d 881, 886 (Ind. Ct. App. 2007), therefore, because the subject transaction is properly construed as an equitable mortgage, as discussed above, TILA applies.

Count III of Carter's complaint is a claim under the Home Ownership Equity and Protection Act ("HOEPA"), 15 U.S.C. § 1639, an amendment to TILA. A mortgage subject to HOEPA is one in which "the total points and fees payable by the consumer at or before closing will exceed the greater of--(i) 8 percent of the total loan amount; or (ii) $ 400." 15 U.S.C. § 1602(aa)(1)(B). One way to ascertain the fees on a mortgage in order to determine if it falls under the protections of HOEPA is to calculate the difference between the cost of the loan (i.e. what must be paid at the time of repurchase) and the total loan amount (i.e. the benefit received

by the borrower at closing). *Hodges*, 863 N.E.2d at 890-91. In this case, plaintiff argues, the cost of the loan was at least $180,000 because that would be Ms. Carter's cost to repurchase the Home, and the total loan amount was around $130,000 because that amount represents the satisfaction of her preexisting mortgage with ABN AMRO. Thus, the fees on the loan equal at least $50,000. As such, fees amount to over 35% of the total cost of the loan, far in excess of HOEPA's 8% fees trigger.

The defendants failed to provide TILA or HOEPA Disclosures, which gave Ms. Carter an extended, 3-year, right of rescission. 12 C.F.R. § 226.23. Ms. Carter exercised her right of rescission by delivering a notice of rescission dated December 8, 2006, within three years of the June 21, 2004 closing. Accordingly, this Court awards statutory damages under TILA, 15 U.S.C. § 1640 (a)(2)(A)(iii), to Ms. Carter in the amount of $2,000 for the disclosure violation and $2,000 for the failure to honor her TILA rescission notice.

Because Ms. Carter is entitled to judgment on her TILA and HOEPA rescission claims, she owes Justin Core a TILA rescission "tender" calculated pursuant to 2 C.F.R. § 226.23. This tender amount is calculated by taking the consideration received by the homeowner (the amount financed) and subtracting offsets of statutory damages, and all finance charges paid on the loan. *Hodges*, 863 N.E.2d at 893. In this case, the finance charges, which include all payments of interest, are all of the payments Ms. Carter made on the equitable mortgage loan, totaling $28,000. Thus, the TILA tender amount is $98,493.74, calculated as follows: $130,493.74 (consideration received at closing) - $2,000 (statutory damages for failure to disclose) - $2,000 (statutory damages for failure to honor TILA rescission notice) - $28,000 (loan payments made by Ms. Carter).

Because this Court determined, above, that the subject deed transfer is an equitable mortgage, it enters an order confirming title in Ms. Carter, subject to an equitable mortgage lien in the amount of the TILA tender, $98,493.74, to be adjusted upward if Justin Core can demonstrate payment of taxes and insurance proceeds reimbursable by Ms. Carter.

COUNTS IV, V

Count IV seeks an order voiding the Warranty Deed as well as money damages under the ICFA, 815 ILCS 505/1 et seq. Plaintiff pleads that the transaction is a deceptive practice and is unfair.

In order to plead a private cause of action for a deceptive practice under section 2 of the ICFA, a plaintiff must establish: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deceptive act or practice, (3) the occurrence of an actual deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff, (5) proximately caused by the deceptive act or practice. *See* 815 ILCS 505/10a(a); *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359, 373 (1998). Significantly, in a cause of action for fraudulent misrepresentation under the ICFA, a plaintiff must establish that he or she was actually deceived by the misrepresentation in order to establish the element of proximate causation. *Zekman,* 182 Ill. 2d at 375.

Similarly, Count V pleads common law fraud as a basis for an order voiding the Warranty Deed and granting actual and punitive damages. The elements of common law fraud are: (1) a false representation of material fact; (2) by a party who knows or believes it to be false; (3) with the intent to induce a plaintiff to act; (4) action by a plaintiff in reliance on the statement; and (5) injury to plaintiff as a consequence of that reliance. *Wash. Courte Condo., Ass'n-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 814-15 (1st Dist. 1994). It is well established in Illinois, that fraud may include "anything calculated to deceive and may consist of a single act, a single suppression of truth, suggestion of falsity, or direct falsehood, innuendo, look or gesture." *Miller v. William Chevrolet/Geo, Inc.*, 326 Ill. App. 3d 642, 648 (1st Dist. 2001).

The Court finds that the evidence fails to prove by a preponderance of the evidence the element of deception required for a violation of the ICFA, or prove a false representation or reliance thereon at the time of the closing to constitute common law fraud. The evidence shows that Ms. Carter knew that she was conveying her property to Justin Core LLC, and signing a lease to pay rent and that she had a right to repurchase, thus she was not deceived as required by the ICFA. Furthermore, the evidence fails to show that the documents were misrepresented to her or her reliance thereon, to prove the elements of common law fraud.

Second, as to the unfairness basis for violation of the ICFA in Count IV, in *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18 (1992), the Illinois Supreme Court explained that Illinois courts should look to the three elements when determining whether a practice is "unfair," particularly, whether an act or practice (1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers. (citing

FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n. 5 (1972). The court further held that all three criteria are not required to support a finding of unfairness, and "[a] practice may be unfair because of the degree to which it meets one of the [Sperry & Hutchinson] criteria or because to a lesser extent it meets all three." *Robinson*, 201 Ill. 2d at 418 (quoting and citing *Cheshire Mortg. Servs., Inc. v. Montes*, 612 A.2d 1130, 1143-44 (Conn. 1992)). The burden of proof to show unfairness under ICFA is by a preponderance of the evidence. *Cuculich v. Thompson Consumer Elecs., Inc.*, 317 Ill. App. 3d 709, 717 (1st Dist. 2000).

Ms. Carter argues that the transaction was unfair because Foxx set up an "improvident loan" by structuring the transaction such that Ms. Carter and her family would not possibly be able to pay him back. The evidence shows that Carter and her family committed to the transaction based on the information Ms. Carter and her family submitted to Foxx, that they made the $1200 per month payments for 17 months, and that Ms. Carter's mother did obtain a commitment for mortgage financing to repurchase the home. Accordingly, Ms. Carter and her family were satisfying all of the terms of the transaction as applied to her unusual situation. Therefore, Ms. Carter failed to prove the transaction was unfair to her under the ICFA.

Count VI and VIII

Count VI seeks to void the Warranty Deed on grounds of unconscionability. A contract can be rescinded for unconscionability based on either procedural or substantive grounds, or based on a combination of both. *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 21 (2006). On the substantive side, the question is whether the terms of the contract are grossly one-sided. *Basselen v. Gen. Motors Corp.*, 341 Ill. App. 3d 278, 288 (2d Dist. 2003). Procedural unconscionability "refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it." *Kinkel*, 223 Ill. 2d at 22. Whether an agreement is procedurally unconscionable depends, in part, on the "disparity of bargaining power between the drafter of the contract and the party claiming unconscionability." *Id.* Where a contract is found to be unconscionable, courts will refuse to give full effect to it as written. *Piehl v. Norwegian Old Peoples' Home Soc'y*, 127 Ill. App. 3d 593, 596 (1st Dist. 1984).

The Court finds that under the facts presented, Ms. Carter has failed to prove that the transaction was unconscionable, and, in any event, the Court has found that the transaction will be rescinded for other reasons.

Count VIII seeks to void the Warranty Deed on grounds of unjust enrichment. The Illinois Appellate Court has set forth the standard for stating a claim of unjust enrichment in *Adams v. American International Group, Inc.*, 339 Ill. App. 3d 669, 675 (1st Dist. 2003):

> Our supreme court has held that to "state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." (quoting *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 160 (1989)).

Since the Court has granted the relief of rescission, the defendants have not been unjustly enriched.

CONCLUSION

For all of the foregoing reasons, the Court finds in favor of plaintiff on Count I, declaring an equitable mortgage, and on Counts II and III, rescinding the agreement and entering an order confirming title in Ms. Carter, subject to an equitable mortgage lien in the amount of the TILA tender, $98,493.74. The Court finds against plaintiff on Counts IV, V, VI and VIII.

Entered _____

Date _____