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

<table>
<tr><td>DEUTSCHE BANK TRUST COMPANY, AMERICAS, f/k/a Banker's Trust Co., as Trustee
Plaintiff,

v.

SHEILA THOMAS-BATTLE

Defendant.</td><td>No. 03 CH 15866

Judge Patrick E. McGann
Cal. 6</td></tr>
<tr><td>SHEILA THOMAS-BATTLE

Third-Party Plaintiff

v.

HOME MORTGAGE, INC. and HAMMER FINANCIAL CORP.,

Third-Party Defendants.</td><td></td></tr>
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Memorandum Opinion and Order

Third Party Defendants, Home Mortgage ("Home Mortgage") and Hammer Financial, ("Hammer") (together "the Defendants") seek to dismiss the four count Amended Third Party Complaint filed by the Third Party Plaintiff, Sheila Thomas-Battle, ("Battle" or the "Plaintiff") pursuant to Section 2-615 and 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, 5/2-619.

I. THE THIRD PARTY COMPLAINT

The Plaintiff owns her home located at 5553 S. Wentworth and has lived there

since her birth 36 years ago. She inherited the home from her grandmother in 2000. The Defendants are Illinois corporations involved in the residential mortgage trade. In May 2001, the Plaintiff contacted Budget Construction Company to perform repairs to her home. The construction contract was contingent on financing. An agent of Budget, it is alleged on information and belief, referred the Plaintiff to a mortgage broker, Hammer.

On August 31, 2001, an agent of Hammer came to the Plaintiff's place of employment for the closing. At that time, the Plaintiff closed on a loan secured by a mortgage evidenced by a note in the amount of $45,000.00 payable to Home Mortgage. The nature of the loan is a 15-year balloon note. The interest rate on the loan is 9.625% and required 179 payments of $382.50 with a balloon payment of $36,747.05 then due.

At the time of the closing, Ms. Battle signed a Federal Truth In Lending Disclosure Statement. She also signed a Settlement Statement, referred to in the vernacular as a HUD-1 or RESPA statement. The interest rate on the Truth in Lending Statement was 10.61% and the stated amount financed was $41,850.00. Settlement charges assessed against Ms. Battle in connection with the loan included a $2,200.00 mortgage broker fee paid to Hammer, a $395.00 underwriting fee, a $60.00 tax services fee, a $25.00 wire fee, a $20.00 flood certification fee, a $50.00 courier fee, $981.00 for title insurance, $205.00 for title examination and a $600.00 appraisal fee. Hammer was paid a $900.00 yield spread premium ("YSP") by Home Mortgage.

In Count I, the Plaintiff seeks to find Home Mortgage in violation of the Illinois Interest Act, 815 ILCS 205/4.1a for charging fees in excess of 3% of the loan amount, on a loan that bears an interest rate in excess of 8%. She asserts that the mortgage broker fee

($2,200.00) and administrative fee ($395.00) paid to Hammer and Home respectively, must be included in the calculation. This sum represents 5.77% of the loan.

In Count II, Plaintiff seeks to find Home Mortgage in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505 et seq. (the "ICFA") She bases her allegations on the claim that Home Mortgage is in violation of the Illinois Office of Banks and Real Estate Regulations (the "OBRE Regulations") implementing the Illinois Banking Act, 205 ILCS 5/48(6)(a) for charging fees in excess of 6% of the loan amount on a loan that is categorized as a high risk home loan[1] on residential real property. Ms. Battle alleges that the following charges are fees and costs as defined by the regulations: a) $200.00 fee greater than the normal and customary fee for an appraisal; b) $2,200.00 mortgage broker fee; c) $395.00 underwriting fee; d) $25.00 wire fee; e) $20.00 flood certification fee; f) $50.00 courier fee; g) $60.00 tax service fee; h) $260.00 settlement fee; I) $831.00 overcharge for title insurance fees; j) $900.00 yield spread premium. These total 12.42% of the loan amount.

In Count III, Plaintiff seeks to find the Defendants in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505 *et seq*. (the "ICFA") She bases their allegations on the claim that the Defendants are in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. 2607(a). ("RESPA") because of a hidden interest rate upcharge. This results in approximately $13,788.45 in additional interest payments over the life of the loan.

In Count IV, Plaintiff seeks to find Hammer in breach of its fiduciary duty towards the Plaintiff. The Plaintiff alleges a fiduciary duty exists based on a disparity in

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[1] High Risk Loan is one which carries points and fees exceeding 5% of the total loan amount or $800.00. 38 Ill. Admin. Code § 345.10

commercial background and experience and that Hammer did not fulfill its duty to procure competitively priced financing, did not put the Plaintiffs' interests above its own interests, did not disclose the nature of the yield spread premium and accepted a yield spread premium solely in exchange for brokering a loan with a hidden interest rate upcharge.

II. SECTION 2-615 LEGAL STANDARD

Granting or denying a section 2-615 motion to dismiss addresses the sound discretion of the trial court. *See* In re Estate of Casey, 222 Ill. App. 3d 12, 19 (1991). The only question presented by such a motion is whether the plaintiff has alleged sufficient facts, which if proven, would entitle him to relief. *See* Kirchner v. Greene, 294 Ill. App. 3d 672, 679 (1998). To avoid dismissal under this section, a pleading must set forth a legally recognized cause of action, and plead facts bringing the claim within that cause of action. *See* Vincent v. Williams, 279 Ill. App. 3d 1, 15 (1996).

A section 2-615 motion attacks the legal sufficiency of the pleading only. *See* Bryson v. New America Publications, 174 Ill. 2d 77, 86 (1996). Accordingly, all well pled facts in the pleading and those contained in the exhibits attached thereto are taken as true for purposes of the motion. *See id.* However, conclusions of law or factual conclusions, which are unsupported by allegations of specific facts, are not taken as true. *See* Vincent, 279 Ill. App. 3d at 5.

When the legal sufficiency of a complaint is challenged on a Section 2-619 motion to dismiss, all well-pleaded facts and reasonable inferences are accepted as true. *See* Swavely v. Freeway Ford Truck Sales, 298 Ill. App. 3d 969, 972 (1998). Subsection 2-619(a)(9) permits dismissal where the asserted claim is barred by other affirmative

matter avoiding the legal effect of or defeating the claim. *See* Klein v. DeVries, 309 Ill. App. 3d 271, 273 (1999). "Affirmative matter" encompasses any defense other than the negation of the essential allegations of the claim. *See id.* The initial burden rests with the defendant but the burden shifts to the plaintiff who must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proved. *See id.* If, after considering the pleadings and supporting affidavits, the court finds that the plaintiff has failed to carry the shifted burden, the motion to dismiss based on affirmative matter may be granted. *See id.*

III. DISCUSSION

A. CLAIMS AGAINST HOME MORTGAGE, INC.

1. COUNT I-ILLINOIS INTEREST ACT VIOLATION

The Defendant, Home Mortgage, initially asserts that a plain reading of the Interest Act[2] excludes the commission paid to Hammer Financial. Hence, the amounts received by Home Mortgage is only $395.00, significantly less than the 3% cap on such fees. This result is required, Home Mortgage urges, because there is no allegation that Hammer was acting as Home's agent, as a result, broker's fees are excluded from the calculation required by the Act. In its original ruling on this issue, the Court stated that the determination of whether the fee is to be included in the calculation is factual because the statute includes fees imposed directly or indirectly by the lender. The Court reasoned that if the loan could only be procured from Home Mortgage through the use of a broker's services, that could constitute prohibited indirect fee. Upon reflection, that statement was too expansive.

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[2] 815 ILCS 205/4.1(a)

The Defendant, Home Mortgage, correctly cites to decisions of the Appellate Court in Farrell v. Lincoln National Bank, 24 Ill. App. 3d 142 (1974) and Mills v. State National Bank, 28 Ill. App. 3d 830 (1975) to stand for the proposition that fees paid to the borrower's broker for efforts undertaken to obtain the loan on behalf of the borrower are not interest charges for purposes of determining the true interest rate of the loan. Both cases were decided on motions for summary judgment and the trial court, in each case, determined that as a matter of law the brokers were acting as agents for the borrowers. However, the Mills Court noted that where the [broker's] fee is paid to the lender's agent for making the loan, the amount of the fee will be treated as interest for purposes of determining [the interest rate]. 28 Ill. App. 3d at 834.

These decisions, at first reading, appear to be inopposite because the focus of the inquiry, in those decisions, was whether the fees should be considered interest for purposes of determining whether the loan was usurious. This Court is directed by the Interest Act to analyze these charges to determine if the fees imposed by the lender either directly or indirectly as consideration for the loan or in connection with the loan, was higher than permitted. However, the purposes of the statutes are identical. They both serve to prevent unscrupulous lenders from preying on vulnerable or unsophisticated borrowers by obtaining exorbitant profits. Hence, unless it can be alleged that directly or indirectly Home Mortgage either benefited from the $2,200.00 fee or assessed that sum in connection with the loan, the Plaintiff's claim fails.

One possible scenario is suggested by the decisions in Farrell and Mills. The fees paid to an agent of the lender for services provided for that party's benefit would be sums

paid as consideration for the loan. This result is reached because the lender is avoiding an expense and consequently increasing its income.

The Court in its earlier decision suggested another fact pattern. The requirement that a broker be employed in order to make a loan application similarly obviates the necessity of maintaining a staff to complete loan applications and other employees. This again serves to transfer the lender's costs to the borrower, increasing profits.

The Amended Complaint suggests neither scenario nor does it allege any facts suggesting the $2,200.00 broker fee was charged by the lender as consideration for or in connection with the loan. The allegations state that the fee was paid to the broker. That the broker and lender were each corporations. Moreover, there are no allegations that these separate entities shared officers, directors or even office space. Nothing in the Amended Complaint suggests a principal-agent relationship, either actual or apparent. As a result, this Court cannot conclude that anything more than the $395.00 underwriting fee was charged. The Plaintiff's claim in Count I fails.

The Plaintiff may re-file her claim within 28 days hereof if she can allege facts consistent with the outline of liability suggested here. This will avoid any potential prejudice as a result of the Court's inartful expression of the law in the prior opinion.

2. COUNT II – ILLINOIS CONSUMER FRAUD ACT – BASED ON OBRE REGULATIONS

Home Mortgage alleges that because the Plaintiff's cause of action accrued before there was a private right of action under the OBRE regulations,[3] the ICFA claim based on a statutory violation of the OBRE should necessarily fail. Home Mortgage relies on

[3] A private cause of action was created in 2004 by the Illinois High Risk Home Loan Act. 815 ILCS 137/1 *et seq.*

Anthony v. Country Life Manufacturing, 2002 U.S.Dist. LEXIS 19445 (2002). There, an ICFA claim based on violations of the Food, Drug and Cosmetic Act (the "FDCA") failed because the federal act did not provide a private right of action. Id. at p. *8. The Plaintiff counters that its reliance on the OBRE regulations is distinguishable from Anthony, because its reliance on the OBRE regulations is only to establish a standard for unlawfully high fees. The Plaintiff claims that this is an accepted use of the regulations as a standard for commercial conduct. The Plaintiff relies on Grove Fresh Distributors, Inc. v. Flavor Fresh Foods, Inc., 720 F. Supp. 714, 716 (1989). There it was decided that because Grove Fresh relied on the FDA regulation merely to establish the standard or duty which defendants allegedly failed to meet its claim was not barred because the FDCA did not provide for a private right of action. The District Court ruled that because Grove Fresh did not base its claim solely on the FDA regulations, but merely used those regulations in order to define "orange juice from concentrate," Grove Fresh could attempt to establish a violation of the Lanham Act. Here too, the Plaintiff has an independent basis for her claim, the ICFA, without the OBRE regulations she would simply need to provide other evidence establishing unlawfully high mortgage loan fees. Plaintiff has sufficiently alleged a violation of the ICFA.

B. CLAIMS AGAINST HOME MORTGAGE AND HAMMER FINANCIAL

COUNT III – ILLINOIS CONSUMER FRAUD ACT –FAILURE TO DISCLOSE INTEREST RATE UPCHARGE

The Defendants assert several arguments attempting to dismiss this cause of action.

First, Hammer argues that the signing of the HUD-1 Settlement Statement by the Plaintiff has been held to be sufficient disclosure of the yield spread premium. Thomas v. Ocwen Federal Bank, 2002 U.S. Dist. LEXIS 1231 (2002). The difficulty with this argument is Hammer's assumption that disclosure of the YSP somehow relieves the defendant of liability under RESPA. Although, a YSP must be disclosed according to HUD regulations[4], disclosure does not apparently legalize the payment of a YSP. Barbosa v. Target Mortgage, 968 F.Supp. 1548, 1554-1555 (S. Dist. Fla. 1997). In order to allege a violation of RESPA's anti-kickback provision, the Plaintiff must allege (1) the existence of an agreement between the lender and broker whereby the broker promises to refer settlement service business to the lender; (2) the transfer of a thing of value between the lender and broker based upon that agreement; (3) the referral of settlement service business by the broker to the lender and either that (4) the broker received a YSP without providing any goods or services of the kind typically associated with a mortgage transaction or (5) if the broker did provide such goods or services, the total compensation paid to the broker was not reasonably related to the total value of the goods or services actually provided. Johnson v. Matrix Fin. Servs. Corp., 354 Ill. App. 3d 684, 695 (2004). It is not necessary to allege that the YSP was undisclosed in order to allege a violation of RESPA.

In any case, the Thomas case was not on point, as there, the court ruled that after signing the settlement statement, the Plaintiff cannot claim that she acted diligently for the purposes of the statute of limitations, the legality of the YSP was not at issue. Id. at *12.

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[4] 24 C.F.R. §3500.14, Appendix B.

The Court notes that the Plaintiff does not allege that the YSP was undisclosed, rather she claims that the interest rate upcharge which resulted in the YSP was undisclosed and that she did not understand what the YSP was paid for, how it worked, or its result in more than $13,000 in additional interest payment. The Court acknowledges that the Mortgage Loan Origination Agreement, signed by the Plaintiff, Hammer does state that:

> "In some cases, if permitted by law, Hammer may be paid all of its compensation by either you or the lender. Alternatively, if permitted by law Hammer may be paid a portion of its compensation indirectly through a higher interest rate in which case Hammer will be paid direct by the lender. Hammer also may be paid by the lender based on (i) the value of the mortgage loan or related servicing rights in the market place or (ii) other services, goods or facilities performed or avoided by Hammer to the lender."

By signing, the Plaintiff acknowledged that she received a copy of the agreement. Said compensation, the YSP, is detailed in the Settlement Statement, signed by the Plaintiff: "Compensation by Lender to Hammer Financial $900.00 (POC)". Finally, the Loan Variance Disclosure Statement, signed by the Plaintiff presumably at the August 31, 2001 closing, notifies her that the interest rate of her loan has increased and the broker's fees have been reduced by $550.00 and that that sum will be paid by the lender. What is significantly omitted from this disclosure is what the Plaintiff claims is the truth of the transaction. That is, according to the well-pled facts, Ms. Battle is the recipient of a $550.00 savings on her broker's fee, but in exchange for that savings she will be required to pay more than $13,000 in additional interest solely so that her broker can receive an additional commission from her lender. That, if true, is oppressive and deceptive wrong-doing.

Second, the Defendants claim that the Plaintiff did not plead, as required by the Johnson ruling, the existence of an agreement that business incident to or a part of a real estate settlement service involving a federally related mortgage loan will be referred in exchange for receipt of a yield spread premium. The Complaint alleges the referral of home mortgage loans. It has been determined and is clearly set forth in the HUD Regulations that providing the financing for a loan is a "settlement service". Hastings v. Fidelity, 984 F.Supp. 600, 611 n.10 (N. D. Ill. 1997); Barbosa, 968 F.Supp. at 1558-1559; Dubose v. First Security Savings Bank, 974 F.Supp. 1426, 1429 (M.D. Ala. 1997). The HUD Regulations define settlement service as

> "any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:
>
> (1) Origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of such loans);
>
> (2) Rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender);
>
> (3) Provision of any services related to the origination, processing or funding of a federally related mortgage loan;
>
> (4) Provision of title services, including title searches, title examinations, abstract preparation, insurability determinations, and the issuance of title commitments and title insurance policies;
>
> (5) Rendering of services by an attorney;
>
> (6) Preparation of documents, including notarization, delivery, and recordation;

> (7) Rendering of credit reports and appraisals;
>
> (8) Rendering of inspections, including inspections required by applicable law or any inspections required by the sales contract or mortgage documents prior to transfer of title;
>
> (9) Conducting of settlement by a settlement agent and any related services;
>
> (10) Provision of services involving mortgage insurance;
>
> (11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;
>
> (12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;
>
> (13) Provision of services involving real property taxes or any other assessments or charges on the real property;
>
> (14) Rendering of services by a real estate agent or real estate broker; and
>
> (15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay."
> 24 CFR §3500.2.

The definition of "Settlement Service" appears broad enough to include any of the services provided by Home Mortgage for a home mortgage loan, specifically, the "[p]rovision of any services related to the origination, processing or funding of a federally related mortgage loan."

Thirdly, Hammer contends that there is no liability according to RESPA for referring secondary market transactions, but only for "table-funded" transactions. These are defined in Novakovic v. Samutin, 354 Ill. App. 3d 660, 671 (2004):

"[T]able-funded" transactions, *i.e.*, a closing at which a loan is funded by contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds, are not secondary market transactions and are thus subject to RESPA disclosure requirements."

The Plaintiff's complaint does sufficiently allege that the closing of the loan with Hammer Financial was contemporaneous with the funding of the loan by Home Mortgage. The closing with the Hammer agent and provision of a mortgage loan by Home Mortgage occurred simultaneously on August 31, 2001.

Fourth, Hammer alleges that the Plaintiff failed to plead the reasonable market rate for market services in a market similar to that of Hammer Financial by merely pleading that the reasonable market rate was 2%. Whether this is the reasonable market rate is a factual question which will be decided upon the deliberation of the facts. Hammer will be granted sufficient opportunity to dispute the alleged reasonable market rate.

Fifth, Hammer alleges that the YSP should not be counted in the OBRE regulations 6% cap. Hammer relies on The Bank of New York v. Mann, 2004 U.S. Dist. LEXIS 16385 (August 18, 2004). This case is clearly not on point as it deals with the Illinois Interest Act and not the OBRE Regulations. According to the OBRE regulations, "points and fees" include "all compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table funded transaction...and "all compensation paid to mortgage brokers." 38 Ill.Adm.Code 345.10 incorporating the definition in 12 CFR 226.32 (b)(1)(ii). As cited above from the Loan Origination agreement, the YSP was compensation paid to Hammer paid directly by the lender and indirectly by the Plaintiff.

Finally, the Defendants raise an identical argument to that raised by Home Mortgage in Count II regarding the use of the OBRE regulations in an ICFA claim. This argument was discussed and rejected above and the reasoning is also applicable to Count III.

C. CLAIM AGAINST HAMMER FINANCIAL

1. COUNT IV – BREACH OF FIDUCIARY DUTY

Hammer's first contention is that the Plaintiff has only pled a disparity of commercial backgrounds and has not pled anything that does not exist in all broker – borrower relationships. These allegations were raised in the last Motion to Dismiss resulting in this Court's Previous Decision. This appears to be another attempt to persuade this Court to reconsider its last decision. There as here, the Plaintiff has sufficiently pled the elements of a breach of fiduciary duty.

Hammer asserts that the terms of the Mortgage Loan Origination agreement negate the alleged fiduciary relationship between the parties, as the agreement states that Hammer is acting as an independent contractor and cannot guarantee the lowest price or best terms available in the market. This identical argument was rejected in Watson v. CBSK Fin. Group, Inc., 2002 U.S. Dist. LEXIS 6872, *7 (D. Ill., 2002). There the court decided that matter of agency/principal relationship was reliant on factual underpinnings and therefore could not be resolved on a motion to dismiss.

Here, as in Count III, the Plaintiff refers to the "hidden" nature of the interest upcharge resulting from the YSP. As discussed above these allegations should be stricken from the Complaint.

IT IS HEREBY ORDERED:

A. Defendants' Motion to Dismiss is GRANTED to the extent outlined in this Memorandum of Opinion and Order and DENIED in all other respects.

B. Plaintiff is granted 28 days to file an Amended Complaint consistent with this Memorandum of Opinion and Order;

C. Defendants are given 28 days thereafter to answer the Amended Complaint or otherwise plead;

D. The matter is set for a status conference on July 22, 2005, at 9:45 a.m.

ENTERED

MAY 18 2005

Dated: ______________________ Entered: JUDGE

PATRICK McGANN - Judge 1510