NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

FREEDOM MORTGAGE CORPORATION Plaintiff, -v.- MAMIE E. MAJOR, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. BER-F-32463-13 DECISION AFTER HEARING

TRIED: JUNE 26, 2014

DECIDED: JULY 31, 2014

Honorable Gerald C. Escala, J.S.C.

Stuart West, Esq. (Pluese, Becker & Saltzman) for plaintiff

Michael A. Cassata, Esq., and Joseph A. Chang, Esq. (Joseph A. Chang & Associates) for defendant

---

ESCALA, J.S.C.:

This is an action for foreclosure. On motion of plaintiff to strike defendant's pleadings, the Court found that plaintiff had established the right to foreclose (see order of May 15, 2014), but that there was a factual issue to be tried on violation of the Consumer Fraud Act.

Having heard the testimony of defendant and of a representative of plaintiff, having reviewed the evidence, and having heard and considered the argument of counsel, I make the following findings of fact and conclusions of law.

In 2009, Mamie E. Major lived at 136 William Street, Englewood, in the family home she had acquired in 1980 for $43,000. She mortgaged the property over the years and had a mortgage with Wells Fargo whose balance was then about $341,500. Ms. Major, then 70 years old, worked at Englewood Hospital and earned somewhat over

$30,000 a year. She wanted to refinance the mortgage to take additional money out of the house's equity to help pay for her grandson's college and to lower the interest rate of 5 5/8%. She was put in contact with Freedom Mortgage Corporation (hereinafter "Freedom"). It appears that most information relative to a refinance was obtained over the telephone and that all papers—including the loan application and related documents—were signed at the closing on her front porch on March 23, 2009. She told the interviewer that she made $30,000. The notion of her obtaining any more equity from the house on the refinance appears to have disappeared in the process, and the refinance was directed at reducing the interest rate, from 5 5/8% to 5%.

The Wells Fargo loan then in existence was already an FHA-insured loan and was current. The new loan would lower the interest rate. Therefore, according to Sheila Harkness, a senior vice-president of Freedom, this refinance could be treated as an FHA "streamline loan," which would require little or no new or extra documentation, nor would an appraisal be needed. Under the FHA criteria, Freedom was free to depend on the prior mortgage's underwriting, she testified, in order to refinance to lower the interest rate. See Streamline Your FHA Mortgage (P-4ev).

There was no new appraisal. Cited in the loan application signed by defendant at the loan closing (D-1ev) were the essentials: her name and address, the interest rate, data about the house (address, when built, market value of $365,000), amount owed on the current mortgage ($341,572.71) and current monthly payment on principal and interest ($1,963.22), and proposed new p & i ($1,900.38) and escrows ($271.89 for hazard insurance, $461.44 for property taxes, and $150.75 for mortgage insurance), showing a proposed monthly payment of $2,792.49. The completed form had no entries for other assets or other liabilities (other than the property and the mortgage-loan balance) and was blank as to her income. Ms. Major was required to sign a form 4506-T (D-4ev) that would authorize Freedom to obtain her tax records for 2005, 2006, 2007, and 2008. But no tax returns were obtained by Freedom. The loan application showed a proposed new-loan amount of $354,005.

Also brought to the closing by Freedom's representative was a notice to the applicant as to credit-score information disclosure (D-2ev). This form in its preprinted portion indicated that there were ranges for possible scores of the three credit-bureau

providers of about 300 to 850. The entry on the form for defendant's score is 99. She signed the form. At the hearing Ms. Harkness disclosed that this number was not a credit score but rather a code which indicated that there was no credit report ordered. That is not apparent from the document itself. Thus, Ms. Major was required to sign a paper that set forth inaccurate information.

At the closing she signed a form HUD-1A Settlement Statement (P-9ev), which showed the transaction data: the new loan was for $354,005; the Wells Fargo Loan being paid off was $341,572.72; open second-quarter taxes paid was $1,382.07; and the open first-quarter tax balance of $220.43. The settlement charges of $11,479.65 included a loan-discount (1 point) to Freedom of $3,540.05; commitment fee to Freedom of $795; application fee to Freedom of $596; courier fee to Freedom of $55; mortgage-insurance premium to FHA of $5,231.61; title work to the lawyer of $840; title insurance of $1,277; and recording fees.

Supposedly, the "net-benefit test" used by Freedom to support the justification of the refinance was that the interest rate and the monthly payment were both lowered, according to the testimony of Ms. Harkness. However, a mathematical overview of this refinance shows that for a reduction of the interest rate from 5 5/8% to 5%, the borrower paid almost $11,500 in fees, which were added to her Wells Fargo loan balance of $341,572.72 and thus increased her mortgage loan to $354,005. By lowering her interest rate by five-eighths of a percent, she would pay $2,134.83 less a year in interest, but by her having to pay some $11,479 in fees to accomplish that reduction in interest, it would take her 5 plus years to break even. Her monthly payment was lowered by less than $63 a month. She made six payments and defaulted.

Analysis

Under the New Jersey Consumer Fraud Act (CFA), a consumer who can prove (1) unlawful conduct by the alleged violator of the CFA; (2) an ascertainable loss on the part of the claimant; and (3) a causal relationship between the unlawful conduct and the ascertainable loss is entitled to relief. D'Agostino v. Maldonado, 216 N.J. 168, 184 (2013).

The Act defines an unlawful practice as "[t]he act, use or employment by any

person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby . . ." N.J.S.A. § 56:8-2. The broad language of the Consumer Fraud Act encompasses the offering, sale, or provision of consumer credit. Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 577 (2011) (internal citation omitted).

In 1971, the legislature expanded the Act to include "unconscionable commercial practice" within the unlawful practices prohibited by the Act. Cox v. Sears Roebuck & Co., 138 N.J. 2, 15 (1994) (internal citation omitted). Unconscionability is "'an amorphous concept obviously designed to establish a broad business ethic.'" Id. at 18 (quoting Kugler v. Romain, 58 N.J. 522, 543 (1971)). An "unconscionable commercial practice" is an activity which materially departs from standards of "'good faith, honesty in fact and fair dealing.'" Associates Home Equity Services, Inc. v. Troup, 343 N.J. Super. 254, 278 (App. Div. 2001) (quoting Kugler, 58 N.J. at 544). "[T]he need for application of that standard 'is most acute when the professional seller is seeking the trade of those most subject to exploitation–the uneducated, the inexperienced and the people of low incomes.'" Troup, 343 N.J. Super. at 278 (quoting Kugler, 58 N.J. at 544).

Courts have traditionally recognized that Consumer Fraud Act violations "can be divided, for analytical purposes, into three categories[:]" 1) affirmative acts, 2) knowing omissions, and 3) regulatory violations. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556 (2009) (citing Cox, 138 N.J. at 17). A lack of intent to deceive will not preclude liability for an affirmative act. Id. In order to find a violation of the CFA for an omission or concealment, the claimant "'must show that the defendant acted with knowledge, and intent is an essential element of the fraud.'" Bosland, 197 N.J. at 556 (citing Cox, 138 N.J. at 18)). In all types of consumer fraud, the "capacity to mislead is the prime ingredient." Cox, 138 N.J. at 17 (citing Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 378 (1977)).

"Because the fertility of the human mind to invent new schemes of fraud is so

great, the CFA does not attempt to enumerate every prohibited practice, for to do so would severely retard its broad remedial power to root out fraud in its myriad, nefarious manifestations." Gonzalez, 207 N.J. at 576 (internal citations omitted). Guided by the language of the Consumer Fraud Act, "a trial court adjudicating a CFA claim conducts a case-specific analysis of a defendant's conduct and the harm alleged to have resulted from that conduct." D'Agostino, 216 N.J. at 186. See also Kugler, 58 N.J. at 543. The Act, like most remedial legislation, is to be "construed in favor of consumers." Cox, 138 N.J. at 15.

Under the CFA, a person who suffers "any ascertainable loss of moneys or property, real or personal," as a result of the use of an unconscionable commercial practice may bring a lawsuit seeking legal and/or equitable relief, treble damages, and reasonable attorneys' fees. N.J.S.A. 56:8-19. One purpose of the remedies available against violators of the CFA is "'not only to make whole the victim's loss, but also to punish the wrongdoer and to deter others from engaging in similar fraudulent practices.'" Gonzalez, 207 N.J. at 585 (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 12 (2004)).

Applying the "net-benefit test" to this transaction –the reduction of the interest rate from 5 5/8% to 5% resulting in a savings of interest that would take more than 5 years to amortize and reduction of the monthly payment from $1963.22 to $1900.38 demonstrates that the financial benefit to Freedom in fees for arranging this refinance far exceeded the nominal benefit of savings to the defendant.

In deciding whether there was a violation of the Consumer Fraud Act, the price charged the consumer is one element to be considered. Kugler, 58 N.J. at 530 (holding that the price for a "book package was unconscionable in relation to defendant's cost and the value to the consumers" and finding there to be a fraud within the contemplation of the CFA). The price paid by the consumer takes on even more serious characteristics of imposition "[i]f the price is grossly excessive in relation to the seller's costs, and if in addition the goods sold have little to no value to the consumer for the purpose for which he was persuaded to buy them and which the seller pretended they would serve." Id.

In D'Ercole Sales, Inc. v. Fruehauf Corp., the Appellate Division stated that "[a]n insight into the nature of the consumer transaction contemplated by the New Jersey

Consumer Fraud Act . . . can be gleaned from an analysis of the Uniform Consumer Sales Practice Act, (UCSPA)." 206 N.J. Super. 11, 29 (App. Div. 1985). There, the Appellate Division examined the USCPA and the criteria it set forth to assist the court in determining unconscionability under the CFA. Id. at 29. These criteria, set forth in the USCPA, included "'circumstances such as the following which the supplier knew or had reason to know:

> (3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;
>
> …
>
> (5) that the transaction he induced the consumer to enter into was excessively one-sided in favor of the supplier;" Id. at 29-30 (citing UCSPA, 7A U.L.A. 231 *et seq*).

Here, the plaintiff lender was able to take advantage of the then lax requirements of the FHA that permitted use of prior documents that accompanied (or didn't accompany) an existing FHA-insured loan. This the lender undertook regardless of the then age of the borrower (70) in the context of her employment and future income prospects. Had the lender simply checked the annual income of the borrower from its telephone interview notes, it would have seen the obvious – that her annual income did not support the monthly mortgage payment itself. Apparently, not only did the plaintiff proceed to process the loan using the underwriting data of the existing loan, it never examined those documents. It never made diligent inquiry into her then ability to make the loan payments going forward. As demonstrated here, defendant defaulted within a few months. Such default so soon after the making of the loan suggests her then financial frailty.

These facts then leads to the conclusion that the loan was granted in order to engender fees for the lender and not for the benefit of the borrower. The reduction in her interest rate would take five plus years to amortize via reduced interest payments set off against the additional fees she incurred and that increased her principal balance. The transaction has been demonstrated to be effectively one-sided, for the benefit of the lender. The token reduction in the monthly payment for the borrower while substantially increasing her debt shows only token benefit to her.

Conclusion

While the plaintiff has demonstrated its right to foreclose, its participation in this transaction under what the court has determined to be consumer fraud will result in the following limitations on its proceeding to judgment of foreclosure:

1. The fees charged by Freedom in this transaction ($11,479.65) will be forfeited.
2. The principal for which judgment will be entered will be limited to $341,572.72, the amount paid off and refinanced.
3. Interest attributable to this amount since the date of default will be forfeited.
4. Advances paid by Freedom shall be added to the amount due.
5. The damages sustained by defendant are the fees ($11,479.65) she was charged for this transaction, which amount will be trebled to $34,438.95; after giving credit for the forfeiture of fees in paragraph 1 above, the net credit which shall be deducted from the amount to be sought in the judgment of foreclosure shall be $22,959.30.
6. Plaintiff is to delay for one year from the date of this order before applying to the Office of Foreclosure for entry of judgment, in order to allow plaintiff time to obtain a buyer for the property or to refinance from other sources.
7. Plaintiff shall pay to defendant's counsel the sum of $26,165 for counsel fees and costs.

With these limitations imposed, the matter will be referred to the Office of Foreclosure for further proceedings.

Gerald C. Escala, J.S.C.