

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN RE:)
GARRY S. ROBERT) CHAPTER 13
MARY A. ROBERT,) CASE NO. 04-42266-HJB
Debtor(s))
_____))
GARRY S. ROBERT)
MARY A. ROBERT,)
Plaintiff(s)) ADVERSARY PROCEEDING
vs.) NO. _____
HOUSEHOLD FINANCE CORPORATION II,)
Defendant)
_____)

FIRST AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

Plaintiffs, home owners, institute this action for rescission, actual damages, statutory damages, attorney fees and the costs of this action against the defendant, Household Finance Corporation II, a mortgage lender, for multiple violations of the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* (hereinafter TILA), the Federal Reserve Board Regulation Z, 12 C.F.R. §226, promulgated pursuant thereto, for violations of the Real Estate Settlement Procedures Act ("RESPA") and for violations of Massachusetts General Laws Chapter 140D, the state truth in lending act, which contains corollary provisions identical to the federal TILA, M.G.L. c. 183 §63 and the and common law. Additionally, Plaintiffs maintain violations of 12 U.S.C §2605, Regulation X, and violation of Massachusetts high cost loan statute. Plaintiffs seeks to determine the secured status of the claim of the defendant pursuant to 11 U.S.C §502.

II. JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. §§1331, 1334, and 1337.
2. This Court has supplemental jurisdiction over the Plaintiff's state law claims pursuant to 28 U.S.C. §1367.

III. PARTIES

3. The Plaintiff, GARRY S. and MARY A. ROBERT, are natural persons residing at 2 Grimes Street, North Adams MA 02247.
4. The Defendant, Household Finance Corporation II, is a corporation organized and existing under the laws of the state of Delaware and whose address is 165 Westgate Drive, Brockton, MA 02301. (Hereinafter referred to as "HFC".)
5. At all time relevant hereto, the Defendant, in the ordinary course of its business, regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is payable in more than four installments.

6. The Defendant originates mortgage loans, including the mortgage loan at issue in this case, for locations including its address in Massachusetts stated above.

IV. FACTUAL ALLEGATIONS

7. On or about November 15, 2001, the Plaintiffs refinanced their house with Defendant in order to consolidate debt. The Plaintiffs' were told that the financing would resolve their financial situation by giving them a total payment lower than that which they were paying.
8. The transaction required a three (3) year pre-payment penalty equal to a minimum of three (3) months interest, but the amount could be as much as eleven (11) months interest.
9. Settlement charges of \$10,615.06 were charged, including what were deemed to be discount points of three percent (3%) or \$4,392.52. Despite the nomenclature of "discount points" the contract interest rate was 10.554%. The average thirty (30) year fixed rate mortgage as of the day of closing had an interest rate of between 6.45% and 6.75%, 4% under the contract rate. In essence the "discount point" title was used to disguise fees inuring to the benefit of Defendant but to keep the funds from being counted towards a "high cost loan".
10. In addition, Defendants sold Plaintiffs' life insurance and disability insurance with a combined cost of \$10,799.92. These premiums show on the face of the Loan Repayment And Security Agreement giving the Plaintiffs the clear understanding that those insurances were necessary. The disclaimer on page 3 of said Agreement indicates that optional insurances and disclosures "are attached to this Agreement and are incorporated herein by reference". This would give the clear indication that the information contained on the face page of the Loan Repayment And Security Agreement did not show optional insurance.

The CE Optional Credit Insurance Disclosure, while signed by the Plaintiffs at the time of closing, did not give the Plaintiffs any understanding, that the amounts disclosed on the document that was to be considered the Promissory Note, were not required premiums.

11. The principal amount of the borrowing was \$146,414.56. The total of fees described above is \$21,414.80, this amounts to 14.63% of the principal amount of the loan.
12. The house was appraised by Defendants prior to closing and was determined to have a value of \$125,000.00. This made the loan 117.13% of the value determined by Defendant's Appraiser.
13. The details of the transaction were never explained to Plaintiffs nor were they given all of the Disclosures required under Massachusetts State Laws and Regulations and Federal Law and Regulations. Further, the Mortgage Lender Disclosure Required By The Attorney General's Consumer Protection Regulations does not reference in anyway the insurance, which was sold to the Plaintiffs, nor does it indicate the true amount of the principal balance of the loan. Further, the mortgage lender license is shown as RI0431 clearly a Rhode Island Lenders License which does not obviate the need for a Massachusetts License which was required for this transaction. Minimally this makes the Disclosure incorrect. At worst the Defendant did not have authorization to do business in the Commonwealth. The Disclosure, which was dated by Defendants as 10/25/01, but was dated by Plaintiffs on 11/15/01 during their closing.
14. In the documents, which Plaintiffs maintain is the complete closing file, and has been kept together by them until turned over to counsel, there is only one (1) Notice Of Right To Cancel despite the fact

that there should have been four (4). Further, Plaintiffs maintain that the Borrowers Notice Of Confirmation dated 11/20/01 was signed at the same time as all other documents were signed. It can be seen that the handwritten date does not match any of the signatures or dating done by Plaintiffs. Plaintiffs contend that the document is signed by them and dated by Defendant prior to the expiration of the three (3) day rescission period.

15. Plaintiffs allege that the "Truth In Lending Disclosures" are confusing and that they were given no choice but to accept the document. While no signature was required, the purpose of the document was to allow the Plaintiffs to understand the cost of their borrowing on an annual basis. No sufficient explanation was given for a borrowing in excess of \$146,000.00 and an amount financed of less than \$136,000.00. Further, there was no explanation of the 1% difference in the interest rate with the Truth In Lending Disclosure showing an APR greater than the rate shown on the loan repayment agreement.
16. Despite the fact that the first mortgage dealt with above was 117% percent of value as referenced above, Defendants loaned an additional \$26,523.00 bringing the total indebtedness incurred by Plaintiffs at the time of closing to \$172,937.00 or 138.35% of value. The fact that this second loan was stripped off in bankruptcy does not ameliorate nor mitigate conduct by Defendants. In fact Plaintiffs maintain it was Defendants actions which were major contributor to Plaintiffs Chapter 7 and Chapter 13 filings, both of which were undertaken to keep their house.
17. The Plaintiffs did not understand the effect of their actions, the cumulative effect of the payments to which they became obligated, and most importantly the improper and, it is alleged, illegal conduct of Defendant.
18. Plaintiffs maintain that the entire transaction was conducted by Defendants' employees not by any third party, contractors, agents or attorneys.

V. CAUSE OF ACTION

COUNT I

UNJUST ENRICHMENT

19. Plaintiff repeats and re-alleges all paragraphs 1-18 above as if set forth fully herein.
20. The defendants wrongful conduct as aforesaid led to their unjust enrichment at the expense of the plaintiff.
21. Plaintiff is entitled to equitable remedies including disgorgement, restitution and related injunctive relief as remedies for unjust enrichment.

COUNT II

VIOLATION OF MGL 140(D), TILA AND MASSACHUSETTS CCCDA

22. Plaintiff repeats and re-alleges all paragraphs 1-21 above as if set forth fully herein.
23. At all times relevant hereto HFC was a creditor within the meaning of the Consumer Credit Disclosure Act ("CCCDA"), M.G.L. c. 140D, §1 et seq. and/or the Truth in Lending ("TILA"),

- 15 U.S.C §1601 et seq.
24. The initial transaction and the subsequent refinance transaction were consumer credit transactions within the meaning of CCCDA and TILA.
 25. In connection with each transaction, the Plaintiff did not receive a disclosure statement in conformity with the CCCDA and/or TILA.
 26. The disclosure statement provided in connection with each mortgage fails to set forth accurately the finance charge, amount financed and annual percentage rate, because the amount financed includes fees that the law requires to be disclosed as finance charges under G.L. c 140D §4 and 15 U.S.C §1605.
 27. The disclosure statement provided in connection with each mortgage fails to set forth accurately the annual percentage rate and the disclosure rate and the note rate do not match.
 28. By these mis-disclosures, HFC has violated G.L. c 140D §12(a) and 15 U.S.C §1638(a).
 29. Plaintiff is entitled to remedies under G.L. c 140D §32 and/or 15 U.S.C §1640(a).

COUNT III

VIOLATION OF MASSACHUSETTS DIVISION OF BANKS REGULATIONS 209 CMR 32.04 et seq. ; 12 USC §2605, 209 CMR 42, MGL 183 §66

30. Plaintiff repeats and re-alleges all paragraphs 1-29 above as if set forth fully herein.
31. By misleading the Plaintiffs with regards to the cost of the first mortgage loan, Defendants violated 209 CMR 32.04 by not declaring that the total number of points and other settlement costs, including insurance, exceeded the thresholds of what is now referred to as a Predatory Home Loan Practice and created a high cost loan.
32. By failing to remediate the problem when brought to its attention Defendant continued the violation and in doing so also violated the Servicer Act portion of RESPA, 12 USC §2605.
33. By charging the Plaintiffs 14.63%, Defendants violated 209 CMR 40, 42, 32.32, and 32.34.
34. By charging more then 3 discount points, Defendants violated the same portions of Mass Regulations as stated above.
35. By charging the Plaintiffs points exceeding 5% of the principal, Defendants violated the aforementioned sections of Mass CMR.

COUNT IV

UNFAIR AND DECEPTIVE TRADE PRACTICES AND VIOLATION OF MGL Ch 93(A)

36. Plaintiff repeats and re-alleges all paragraphs 1-35 above as if set forth fully herein.

37. Defendants by violating the Truth In Lending laws, both State and Federal committed a per se violation of MGL 93(A).
38. The Defendants engaged in intentional and malicious unfair and deceptive trade practices in charging the Plaintiffs' 14.63% in closing costs, part of which was for a one (1) time insurance premium which Defendants led Plaintiffs' to believe was required.
39. As stated in the Factual Allegations Defendants gave Plaintiffs' a "Truth In Lending Disclosure" which in itself is confusing and did not reflect the true APR based on the actual amount being financed at that time. The said Disclosures are misrepresentative of the truth and deceptive on their face by implication therefore they are also unfair. This meets the definition of an unfair and deceptive trade practice.
40. The violations cited in Count III meet the test of an unfair and deceptive trade practice in addition to violating other statutes and regulations of the Commonwealth. This also rises to a violation of MGL 93(A).

COUNT VI

DECEIT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

41. Plaintiff repeats and re-alleges all paragraphs 1-40 above as if set forth fully herein.
42. Plaintiff maintained that Defendants are guilty of the common law cause of action of Deceit. From the start of the loan origination process, Plaintiffs' who are admittedly unsophisticated, were told that the transaction was to their benefits and that the rate offered was the best available rate in the market. Plaintiffs allege that Defendants knew in fact that the rate quoted to the Plaintiff's was more than 4% above the market rate at the time of origination. Further, Defendants charged Plaintiffs "discount points" which if they explained the charges to the Plaintiffs, as is required under the law, would have informed the Plaintiffs that the Defendants were charging more than \$4,000.00 to get the Plaintiffs the best available rate.
43. Defendants knew that they would be able to deceive Plaintiffs due to Plaintiffs lack of sophistication and understanding into believing that Defendants were offering the best available "deal". This information was known to be false by the Defendants and therefore meets the standard of deceit.
44. Plaintiff repeats and re-alleges all paragraphs 1-43 above as if set forth fully herein.
45. Plaintiffs allege that Defendants in servicing the loan since the time of filing the Chapter 13 Bankruptcy have improperly credited monies between the interest and principal accounts. The record provided by the Defendants shows that for no discernable reason monies would be credited all to interest or a portion between interest and principal month after month. No explanation has been provided for the percentage or actual dollar amount allocated between the two (2) categories.
46. Plaintiffs allege that the improper credit may have enured to the benefit of the Defendants or may

have been to their benefit, there being no way to determine the answer.

47. Plaintiffs allege that the payment history and treatment of payments violates 12 USC 2605 and further violates MGL 93(A) as an unfair and deceptive practice and lastly violates 11 USC , 1322 et seq.

PRAYER FOR RELIEF

WHEREFORE, it is respectfully prayed that this Court:

1. Assume jurisdiction of this case;
2. Declare the Security Interest in Plaintiffs' home as void.
3. Rescind the transaction;
4. Order Defendants to return all monies paid by Plaintiffs since the origination of the loan in an amount equal to the monies collected based on the inflated interest rate;
5. Order the Defendants to return any monies collected from Plaintiffs' for "Discount Points";
6. Take Judicial Notice of the Agreement between the Commonwealth of Massachusetts and HSBC, HFC, Household Finance Corporation II, and any other affiliated organizations, and in so doing determine that the Plaintiffs are the victims of a pattern and practice of blatantly illegal behavior by Defendants;
7. Award Plaintiffs damages as specified above, actual damages associated with the costs of Plaintiffs Bankruptcy filing, such punitive damages as the Court feels will stop the practices of Defendant, as they have shown no remorse or abatement of their actions;
8. Award Attorneys Fees and Costs as allowed for under MGL 93(A);
9. Award treble damages for all prayers for monetary relief as Defendants receive a demand letter under MGL 93(A), no later than July 13, 2009, yet failed to respond in any manner.

Date: September 22, 2009

Garry M. and Mary A. Robert

By their Attorney

/s/ Richard I. Isacoff, Esq.

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