

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FILED

APR 1 2008

DONNA GIBSON and
MIKE GIBSON,

**U.S. DISTRICT COURT
CLARESBURG, WV 26301**

Plaintiffs,

v.

CIVIL ACTION NO. 1:07-CV-0097

CARTERET MORTGAGE CORPORATION,
NATIONAL CITY BANK, as successor in interest to
THE PROVIDENT BANK, CHASE MANHATTAN
MORTGAGE CORPORATION, LASALLE BANK NATIONAL
ASSOCIATION, and COLLEEN DICKERSON,

Defendants.

AMENDED COMPLAINT

INTRODUCTION

1. This case arises out of the practice known as predatory lending.¹ The Defendants induced the Plaintiffs into an exploitive loan based on misrepresentations and an inflated appraisal with an exploding ARM, which can go up but can never go down. When the monthly rates on their loan exploded upward, the Defendants refused to provide them payments they could afford, and the Defendant, Chase Manhattan Mortgage Association (“Chase”), which acts as their loan servicer, refused payments offered by the Plaintiffs in violation of West Virginia law. The Plaintiffs bring this action to save their home and for other appropriate relief.

PARTIES

2. (a) Mike and Donna Gibson, a married couple, are natural persons residing in Sutton, Braxton County, West Virginia.

¹ See HUD-Treasury National Predatory Lending Task Force, Joint Report: Curbing Predatory Home Mortgage Lending, (visited June 6, 2007) <<http://www.huduser.org/publications/hsgfin/curbing.html>>.

(b) Mike Gibson is disabled and suffers from Type I diabetes, which affects his concentration and ability to think clearly.

(c) Donna Gibson is employed by the Bureau for Child Support Enforcement.

(d) The Gibsons are not sophisticated in financial matters.

3. The Defendant broker, Carteret, is a Virginia corporation licensed as a broker and doing business in West Virginia. Its principal place of business is 6211 Centreville Road, Suite 800, Centreville, Virginia, 20121. Carteret was the broker in the transaction that is the subject matter of this action.

4. The Defendant, National City Bank is the successor in interest to The Provident Bank, an Ohio banking corporation licensed to do business in West Virginia with a principal place of business of One East Fourth Street, Cincinnati, Ohio, 45202. Provident was the originating lender in the transaction.

5. LaSalle Bank National Association is a national bank doing business at 1 American Square, Indianapolis, Indiana. LaSalle is the current holder of the Plaintiffs' loan. LaSalle is subject to all claims and defenses the Plaintiffs have arising out of the loan origination.

6. The Defendant servicer, Chase Manhattan Mortgage Corporation, is a corporation with its principal place of business located at 4915 Independence Parkway, Tampa, Florida 33634-7523. Chase Manhattan was assigned the servicing rights of the Plaintiffs' loan from Provident.

7. The Defendant appraiser, Colleen J. Dickerson f/k/a Colleen Butler Smith, was living and doing business at 320 Twistville, Sutton WV 26601 but now resides at 4711 Deeson Road, Lakeland, FL 33810. Dickerson was the appraiser in the transaction that is the subject matter of this action.

STATEMENT OF FACTS

8. Beginning on March 1, 2003, the Plaintiffs began renting a house located at 2631 Old Turnpike Road, Sutton, WV 26601.

8. After renting the house for a year, the Plaintiffs inquired about buying the house. They were referred to Carteret. The Plaintiffs dealt with Dave Cruickshanks, who represented that he could obtain financing for the purchase of the home.

9. Cruickshanks informed the Plaintiffs that they could get an adjustable rate after two years, setting monthly payments at \$522.73.

10. Cruickshanks represented to the Plaintiffs that after two years the Plaintiffs could refinance with no down payment and obtain a fixed rate on the loan.

11. The Plaintiffs relied on Cruickshanks' aforementioned representation, knowing they could not afford higher payments.

14. (a) Carteret arranged for appraisal with Colleen Dickerson.

(b) Dickerson appraised for between \$80,000.00 and \$85,000.00.

(c) This was false. The actual value was no more than \$71,000.00.

15. Thereafter, the Plaintiffs began making monthly payments of \$522.73 on a home mortgage from Provident.

16. Within two months after closing, the servicing rights were assigned to Chase Manhattan.

17. On July 1, 2004, National City acquired Provident and the Plaintiffs' loan.

18. In February of 2006, the Plaintiffs' interest rate exploded upward, causing payments to increase from \$522.73 to \$659.99 with an 11% interest rate by April of 2006.

19. The Plaintiffs could not afford to make the increased monthly payments. The Plaintiffs attempted to refinance, but were unsuccessful.

20. The Plaintiffs attempted to make whatever payments they could afford, but Chase Manhattan informed the Plaintiffs that it would not accept anything less than the full amount due.

COUNT I – ILLEGAL MORTGAGE SOLICITATION

21. The Plaintiffs incorporate paragraphs one through twenty by reference.

22. The Defendant broker, Carteret, – with respect to the extension of credit by others and in return for the payment of money – represented that it can obtain an extension of credit, within the meaning of *West Virginia Code* section 46A-6C-2(a)(2).

23. (a) The Defendant broker, Carteret, failed to provide the Plaintiffs with a written broker agreement they could keep that was consistent with West Virginia law, and thereby failed to disclose adequately to the Plaintiffs the following:

- (i) The services to be performed by the Defendant broker, Carteret;
- (ii) The cost of the broker services to be performed; and
- (iii) Notice of cancellation rights of the broker services.

(b) The Defendant's brokering activities were in violation of *West Virginia Code* section 46A-6C-6 & -7.

WHEREFORE, the Plaintiffs respectfully request the following relief:

(a) A declaration that the Defendant broker, Carteret, violated *West Virginia Code* section 46A-6C-1 *et seq.*;

(b) Civil penalties of \$40000.00 from the Defendant broker, Carteret, for each Plaintiff pursuant to *West Virginia Code* section 46A-5-101(1) & -106;

(c) Actual damages, not less than the broker fees, and punitive damages, from the Defendant broker, Carteret, pursuant to *West Virginia Code* sections 46A-2-101 & 46A-6C-9;

(d) Reasonable attorney fees and the cost of this litigation pursuant to *West Virginia Code* sections 46A-2-104 & 46A-6C-9; and

(e) Such other relief as this Court deems equitable and just.

COUNT II – BREACH OF FIDUCIARY DUTY

24. The Plaintiffs incorporate paragraphs one through twenty-three by reference.

25. The Defendant broker, Carteret, owed a fiduciary duty to the Plaintiffs as a broker (a) to disclose the existence and terms of the broker relationship; (b) to act on their behalf and to obtain and pursue loans with the best available terms; (c) to provide them a written agreement disclosing the services to be performed and the total cost thereof; (d) to provide them notice and an opportunity to cancel the broker agreement; and (d) to disclose to them the range of options and risks associated with their loan.

26. The Defendant broker, Carteret, breached its fiduciary duty to the Plaintiff by engaging in the following activities (this list is not necessarily exhaustive):

- (a) failing to seek out and obtain credit for the Plaintiffs on the best terms available;
- (b) obtaining credit terms without regard for the Plaintiffs' ability to pay; and
- (c) misrepresenting and suppressing material facts to the Plaintiffs;
- (d) arranging for an inflated appraisal.

27. The Plaintiffs were injured by the Defendant broker's breach of its fiduciary duty when they were induced into a loan agreement not supported by the true value of their home on terms favorable to the brokers and lender without regard to terms more favorable to the Plaintiffs that may have been obtained from other lenders.

28. As a direct and proximate result of the Defendant broker's breach of its fiduciary duty, the Plaintiffs suffered substantial monetary losses and damages to their property, including potential loss of their home.

WHEREFORE, the Plaintiff respectfully request the following relief:

(a) A declaration that the Defendant broker, Carteret, had a fiduciary duty to the Plaintiffs;

(b) A declaration that the Defendant broker, Carteret, breached its fiduciary duty to the Plaintiffs by, *inter alia*, (i) failing to disclose adequately, and consistent with West Virginia law, the nature and terms of the agreement between the Plaintiffs and the Defendant broker, Carteret; (ii) failing to seek out and obtain credit for the Plaintiffs on the best terms available; (iii) obtaining credit terms without regard for the Plaintiffs' ability to pay; and (iv) arranging for an inflated appraisal.

(c) A declaration that by breaching their fiduciary duty to the Plaintiffs, the Defendant broker, Carteret, engaged in unconscionable conduct in the inducement of the loan agreement;

(d) Actual and punitive damages;

(e) Reasonable attorney fees and the costs of this litigation; and

(f) Such other relief as this Court deems equitable and just.

COUNT III - FRAUDULENT MISREPRESENTATION

29. The Plaintiffs incorporate paragraphs one through twenty by reference.

30. (a) The Defendant broker, Carteret, misrepresented to the Plaintiffs that they could refinance after two years and obtain a fixed rate loan.

(b) This was false. After two years the Plaintiffs indebtedness exceeded the actual value of their home, making it impossible to refinance.

31. The Plaintiffs reasonably relied on this representation in taking out the mortgage. The Plaintiffs knew they could not afford an increased payments and agreed to enter into the loan only based on the representation that they could refinance prior to their payments going up.

32. The Defendant's misrepresentations were material and intentional.

33. The Plaintiffs were injured as a proximate result of the Defendant's misrepresentation and suppression of material facts.

WHEREFORE, the Plaintiffs respectfully request the following relief:

(a) A declaration that the Defendant broker, Carteret, engaged in unlawful conduct as alleged;

(b) Actual and punitive damages; and

(c) Such other fees and costs as may be deemed reasonable and just.

COUNT IV - UNCONSCIONABLE CONTRACT

34. The Plaintiffs incorporate paragraphs one through thirty-three by reference.

35. The Defendants, The Provident Bank, and LaSalle Bank National Association, are large national lenders that have engaged in a pattern of predatory lending practices to make unfair loans to borrowers originated by unscrupulous brokers and based on fraudulently inflated appraisals.

36. The Plaintiffs are not sophisticated consumers and did not understand the details of the transaction.

37. The loan issued by the Defendants put the Plaintiffs in jeopardy of losing his home.

38. (a) The circumstances of the loan created confusion, the documents and the loan closing were not in keeping with industry standards for proper lending practices in the following ways:

(i) The loan application, which was completed by Dave Cruickshanks, an agent of Carteret, contains the misrepresentation that the Plaintiffs had property worth \$80,000.00 to

\$85,000.00, when at the time of the application, the market value of the Plaintiffs' property was no more than \$71,000.00.

(ii) The contract for the sale of the property is dated March 1st, 2003, when in fact the loan closing took place on or around March 1st, 2004; and the contract for sale misrepresents that the Plaintiffs were to make twelve monthly payments of \$300.00 followed by a balloon payment of \$65,000.00 on March 1st, 2004, when in fact the Plaintiffs had, in the twelve months preceding March 1st, 2004, merely paid \$300.00 in rent each month.

(iii) The Plaintiffs were not provided a full set of their loan documents. They were not provided important documents such as their broker agreement, notice of cancellation rights of the broker services, and other important documents disclosing the terms of the transaction.

(b) Certain terms of the loan were suppressed, and the Plaintiffs were not provided adequate explanation of the documents.

39. The loan agreement contained the following unfair terms, which constituted an unfair surprise to the Plaintiffs:

- (a) Excessive fees;
- (b) A loan based on a fraudulent appraisal, which exceeded the market value of the home;
- (c) A yield spread premium, included without the Plaintiffs' knowledge, which resulted in the Plaintiffs receiving a higher interest rate than that for which they qualified;
- (d) An exploding ARM, which could adjust upward to \$14.570 but could never go below the initial rate and which would adjust upward and produce a monthly payment that exceeds the Plaintiffs' ability to pay.

40. The loan issued to the Plaintiffs was unconscionable, under all circumstances alleged, at the time it was made and/or was induced by unconscionable conduct, and therefore is unenforceable.

WHEREFORE, the Plaintiffs respectfully request the following relief:

- (a) A declaration that Plaintiffs' loan was induced by unconscionable conduct;
- (b) A declaration that the loan agreement is void and unenforceable;
- (c) Actual damages and a civil penalty of \$4000, pursuant to *West Virginia Code* section 46A-5-101;
- (d) Reasonable attorney fees and the cost of this litigation, pursuant to *West Virginia Code* section 46A-5-104; and
- (e) Such other relief as the Court may deem equitable and just.

COUNT V - FRAUD AND CONSPIRACY

- 41. The Plaintiffs incorporate paragraphs one through forty by reference.
- 42. The Defendant, Carteret, suggested an appraisal at or above \$80,000 to \$85,000.
- 43. Thereafter, the Defendant appraiser conducted an appraisal suggesting that the market value of the Plaintiffs' home to be at or above \$80,000 to 85,000. This appraisal was false.
- 44. In fact, the market value was no more than \$71,000.00.
- 45. The Defendant broker, Carteret, intentionally employed the Defendant appraiser, Dickerson, to misrepresent the market value of the Plaintiffs' property for the purpose of inducing the Plaintiffs into the contract.
- 46. The Defendant broker, Carteret, conspired with the Defendant appraiser, Dickerson, to fraudulently misrepresent the market value of the Plaintiffs' home.
- 47. The Plaintiffs reasonably relied upon the misrepresentations of the Defendants when entering into the loan agreement.

48. The Defendants' misrepresentation of the market value of the property was intentional and material.

49. The Plaintiffs were damaged by the Defendants' fraudulent appraisal.

WHEREFORE, the Plaintiffs respectfully request the following relief:

- (a) Actual and punitive damages;
- (b) Set-off and other equitable relief;
- (c) Reasonable attorney's fees and the cost of this litigation; and
- (d) Such other relief as the Court deems equitable and just.

**COUNT VI - DISHONESTY, MISREPRESENTATION,
AND BREACH OF PROFESSIONAL STANDARDS**

50. The Plaintiffs incorporate paragraphs one through forty-nine by reference.

51. The Defendant appraiser, Dickerson, in making the false appraisal as hereinbefore alleged, engaged in dishonesty, fraud, and /or misrepresentation with the intent to substantially benefit herself or another, and with the intent to substantially injure another in violation of the Real Estate Appraiser Licensing and Certification Act, *West Virginia Code* section 30-38-12(3).

52. The Defendant appraiser, Dickerson, breached the standards for professional practice in violation of *West Virginia Code* section 30-38-17.

53. The Plaintiffs were injured as a proximate result of the Defendant's breach of standards.

WHEREFORE, the Plaintiffs respectfully request the following relief:

- (a) A declaration that the Defendant appraiser, Dickerson, engaged in unlawful conduct as alleged;
- (b) Award the Plaintiffs a penalty pursuant to *West Virginia Code* section 30-38-15(c) in an amount determined by the Court for the unlawful conduct as alleged;
- (c) Actual and punitive damages; and

(d) Such other fees and costs as may be deemed reasonable and just.

COUNT VII - BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

54. The Plaintiffs incorporate paragraphs one through twenty by reference.

55. The Defendants breached their duties of good faith and fair dealing implied in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the benefit of their contract.

56. The Defendants, as a matter of intentional and planned business practices, breached their duties by refusing to accept payments by the Plaintiffs in violation of *West Virginia Code* section 46A-2-115.

WHEREFORE, the Plaintiffs respectfully pray that the Court enter judgment in their favor and against the defendants as follows:

(a) The Court enter declaratory judgment that practices are illegal as alleged, and enjoin the Defendants from any further attempt to enforce all or part of the contracts or assert liability thereunder;

(b) Enjoining the illegal practices as alleged;

(c) Actual damages;

(d) Civil Penalties of \$4,000.00 per violation pursuant to *West Virginia Code* section 46A-5-101;

(e) Reasonable attorneys fees and the cost of this litigation;

(f) Such other relief as the Court may deem equitable and just.

COUNT VIII – JOINT VENTURE, CONSPIRACY, AND AGENCY

57. The Plaintiffs incorporate paragraphs one through fifty-six by reference.

58. Each Defendant had a pecuniary interest in the loan transaction with the Plaintiffs.

59. The Defendants combined their money, skill, and knowledge to carry out the enterprise, that is the loan to the Plaintiffs.

60. On information and belief, each Defendant had an agreement – written, oral, constructive, or otherwise – with one another to close the loan.

61. Each of the acts of the Defendants hereinbefore alleged, were done in furtherance of a joint venture in which each of the acts of each of the Defendants was pursued with a joint purpose.

62. The Defendants conspired to commit the unlawful acts, or lawful acts by unlawful means, hereinbefore alleged, and each is responsible for all acts alleged herein.

63. Each of the Defendants' acts were conducted as a part of the principal-agency relationship between the Defendants.

THE PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES SO TRIABLE

**MIKE GIBSON and
DONNA GIBSON,
By Counsel**

/s/ Bren J. Pomponio
Bren J. Pomponio (State Bar ID No. 7774)
Daniel F. Hedges (State Bar ID No. 1660)
Mountain State Justice, Inc.
1031 Quarrier St., Ste. 200
Charleston, WV 25301
(304) 344-3144
(304) 344-3145 (fax)
COUNSEL FOR PLAINTIFFS

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ASSOCIATION, and COLLEEN DICKERSON,

Defendants.

CERTIFICATE OF SERVICE

I, Bren J. Pomponio, counsel for the Plaintiffs, hereby certify that on the 24th day of September, 2007, I electronically filed the "MOTION TO AMEND COMPLAINT" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

Nicholas S. Preservati
Bryant J. Spann
David B. Thomas
Peter G. Markham
William W. Booker

and by U.S. Mail to:

Bernard R. Mauser
P.O. Box 155
Sutton, WV 26601
Counsel for Colleen J. Dickerson

/s/ Bren J. Pomponio
Bren J. Pomponio (State Bar ID #7774)