UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HELEN B. JACKSON,

Plaintiff,

v.

FORD CONSUMER FINANCE COMPANY, INC., and MORTGAGE FUNDING NETWORK, INC.,

Defendants.

CIVIL ACTION
NO. 1:96-CV-1009-RLV

O R D E R

This is an action under the federal Real Estate Settlement Procedures Act ["RESPA"], 12 U.S.C. § 2601 et seq.; the plaintiff also asserts state law claims for fraud, tortious interference with contractual relationship, unjust enrichment, and breach of fiduciary duty. Pending before the court are the parties' cross motions for summary judgment [Doc. Nos. 23, 25, and 27]. Also pending before the court are the plaintiff's motion to strike portions of the deposition testimony of Denny P. Hanysak and Michael P. Lang and portions of the affidavit of Mathew Wolfort [Doc. No. 34], the plaintiff's motion to strike the supplemental affidavit of Mathew Wolford [Doc. No. 41], the plaintiff's motion to supplement the record with the affidavit and report of Sidney Davis [Doc. No. 50], the plaintiff's motion for leave to file a supplemental brief in support of her motion for summary judgment [Doc. No. 57], Mortgage Funding's requests for oral argument [Doc. Nos. 30 and 48], and the plaintiff's request for oral argument [Doc. No. 35]. The requests for oral argument are DENIED. The

plaintiff's motion for leave to file a supplemental brief is GRANTED.[1] The court GRANTS the plaintiff's motion to supplement the record with Dr. Davis's affidavit, DENIES the plaintiff's motion to strike portions of the depositions of Mr. Hanysak and Mr. Lang and portions of the affidavit of Mathew Wolfort, and DENIES the plaintiff's motion to strike the supplemental affidavit of Mathew Wolford; however, as explained later in this order, the court concludes that the designated portions of these materials are not supportive of any party's motion for summary judgment.

I. FACTUAL BACKGROUND

Helen Jackson is a 69 year old widow who owns the houses and property located at 60 and 66 Whitehouse Drive, S.W., Atlanta, Georgia. She holds a masters degree, is a retired school teacher, and was formerly an adjunct professor at the University of Georgia.

Ford Consumer Finance Company, Inc. ["FCFC"] is a New York corporation in the business of making residential mortgage loans; Mortgage Funding Network, Inc. ["MFN"][2] is a licensed mortgage broker, which also provided real estate settlement services.

In late 1994, Ms. Jackson was solicited by an MFN telemarketer about obtaining a mortgage loan on her property. When Ms. Jackson

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[1] The court has also considered Ford Consumer Finance Company's supplemental brief in support of its motion for summary judgment [Doc. No. 56].

[2] At the time relevant to this case, MFN was known as Home Mortgage Network, Inc., but since that time has undergone a name change; for convenience, the court will use the current name of the company.

indicated an interest in obtaining a mortgage loan on her property, she was placed in contact with Mathew Wolfort, an MFN employee. Ms. Jackson subsequently entered into an agreement with MFN, whereby MFN agreed that it would attempt to obtain a loan for her.

MFN took an application from Ms. Jackson, procured a credit report, and completed a good faith estimate of settlement costs, which was sent to Ms. Jackson. MFN subsequently prepared a loan package for submission to various lenders for consideration. MFN first submitted a loan package to Equivantage, but Equivantage declined to make a loan to Ms. Jackson because of her excessive debt ratios and insufficient income. MFN then submitted a loan package to National Mortgage Corporation, which also declined to make the loan. Next MFN submitted a loan package to Equicredit, which issued a conditional approval for a loan; however, after further communications and additional submissions from MFN, Equicredit also turned down the loan.

In February 1995, MFN submitted a loan application to FCFC, and FCFC issued a preapproval for the loan. MFN then forwarded a loan package to FCFC, consisting of an application, credit report, income verifications, appraisals, and payoff information. Based upon the poor condition of the two pieces of property which were to serve as collateral for the loan, FCFC declined to make the loan. Ms. Jackson made repairs to the properties, and the loan was resubmitted in April 1995. Again, FCFC rejected the loan, this time because Ms. Jackson had not paid property taxes on the

properties. However, after an appeal to the regional office, FCFC approved the loan.

In connection with the loan, Ms. Jackson received a Good Faith Estimate of Settlement Costs, which was prepared by FCFC and which was signed by Ms. Jackson. Line 808 of that document showed "BROKER FEE PAID BY BORROWER OUT OF LOAN PROCEEDS" in the amount of $5385; line 813 showed a "BROKER FEE PAID BY FCFC OUTSIDE OF CLOSING TO MTG FUNDING NETWORK FOR SERVICES RENDERED" in the amount of $3590.

Ms. Jackson's loan closed on April 26, 1995. The amount financed was $95,115.50 with an initial variable interest rate of 14.75% and with a special introductory rate of 12.85% for the first six months.[3] At the time of closing Ms. Jackson was given an HUD-1 form, which set out the settlement charges and other disbursements. Line 808 disclosed a "BROKER FEE" to MFN in the amount of $4403.66; line 811 showed "SERVICE RELEASE FEE TO MTG FUNDING NETWORK BY FORD" in the amount of $3752. The "service release fee" was "paid outside closing," i.e., it was paid directly by FCFC and did not come out of the loan proceeds.

After the loan closing, Ms. Jackson expressed dissatisfaction that she had not received any cash at the closing, since all the money had gone toward fees and to pay off debts. MFN then sent Ms. Jackson a check for $600.

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[3] Four months later, on August 7, 1995, Ms. Jackson refinanced her loan with FCFC at a fixed interest rate of 14.27%. MFN played no role in the refinancing, and the second loan is not at issue in this case.

Much of FCFC's mortgage lending, such as the loan made to Ms. Jackson, is in what is known as the "sub-prime" or "non-conforming" credit market. This market is composed of persons who pose a higher credit risk because of past credit problems such as bankruptcies, foreclosures, late payments, or judgments. Although FCFC has a "direct sales" office in Dallas, Texas, it does not maintain any retail or branch offices in Georgia. Instead, FCFC makes loans in Georgia through a network of approved independent mortgage brokers.

During the time period relevant to this suit, FCFC had two broker programs (denominated Program I and Program II) that were available to the brokers with whom it did business. Brokers had to elect participation in one of the programs for an extended period of time and could not change their election on a loan-by-loan basis. Brokers who elected Program I received no fee from FCFC but were free to contract with their customers, i.e, the borrowers, for a broker fee; this fee would be paid directly to the broker out of the loan proceeds. Brokers who chose to participate in Program II were paid a sum equal to 4% of the loan amount from FCFC and were also free to contract with the borrowers for an additional broker fee; this fee was paid outside closing and did not come from the loan proceeds given to the borrowers. The 4% rate was non-negotiable, non-adjustable, and did not depend on the rate of the loan. Interest rates on the loans made under Program II were 1% higher than the rates charged for loans made under Program I. Most brokers chose to participate in Program II. On July 13, 1993, FCFC

and MFN signed an agreement whereby MFN agreed to refer prospective borrowers to FCFC under FCFC's Program II.

II. LEGAL DISCUSSION

A. RESPA

Having found that "significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges in some areas of the country," Congress enacted RESPA in 1974. 12 U.S.C. § 2601. One of the purposes of RESPA is to "effect certain changes in the settlement process for residential real estate that will result . . . in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). Congress delegated to the Department of Housing and Urban Development the authority to issue regulations implementing RESPA.

In Count I of her amended complaint, Ms. Jackson alleges that FCFC violated RESPA by paying a kickback and splitting charges in violation of 12 U.S.C. §§ 2607(a), (b); in Count II of her amended complaint, Ms. Jackson alleges that MFN violated RESPA by receiving a kickback and splitting charges in violation of 12 U.S.C. §§ 2607(a), (b). These two sections provide as follows:

> (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that

> business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
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> (b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually rendered.

A violation of these sections results in a penalty "equal to three times the amount of any charge paid for such settlement service" together with court costs and attorney's fees. 12 U.S.C. §§ 2607(d)(3), (5).

In proscribing referral fees, however, Congress did not intend to prohibit the use of mortgage brokers altogether. RESPA expressly permits payments by a lender to a mortgage broker for services the broker renders in relation to the obtaining, processing, and closing of a loan. Section 2607 specifically provides:

> Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. . . .

Recognizing that persons who wish to violate RESPA may categorize referral fees as being for services rendered, HUD implemented regulations which provide a test to determine whether a payment for purported services is, in actuality, a referral fee. "If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is

not for services or goods actually performed or provided." 24 C.F.R. § 3500.14(g)(2).

Ms. Jackson argues that FCFC's Program II is designed to operate as an incentive for brokers to refer borrowers to FCFC, because the 1% higher interest rate under Program II was, in fact, a yield spread premium and that this spread was then paid to MFN in the form of the 4% fee payable under Program II.[4] Ms. Jackson contends that the 4% fee was illegal because (1) the written agreement between FCFC and MFN does not state that FCFC will pay MFN for services rendered, nor does it state what services, other than referring business to FCFC, that MFN must perform in order to obtain the fee; (2) the payment of the fee was not tied to any services but was tied solely to the value of the loan; (3) the fee was paid only if the loan closed; (4) the fee was paid regardless of how little or how much time the broker spent on the loan; (5) the fee was not for services because neither FCFC nor MFN itemized the services performed by MFN, nor did they track the time it took for MFN to perform the services; (6) at the time of closing, the parties did not characterize the fee as being for services rendered but, instead, called it a "service release fee"; and (7) the fee cannot be for "services rendered" because Program I brokers performed essentially the same work.

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[4] A yield spread premium is a fee from a mortgage lender to a broker paid when the broker arranges a loan with an interest rate that is higher than would otherwise be charged.

FCFC and MFN contend that the 4% fee was for services actually rendered. They point out the numerous acts performed by MFN, including obtaining a credit report, collecting financial data, verifying her income, arranging for an appraisal of her property, retaining a closing attorney, counseling Ms. Jackson as to her loan options, and providing the good faith estimate of settlement charges. It is significant to note, however, that MFN received a fee from Ms. Jackson for performing these services; the settlement statement shows that MFN received a broker fee from the loan proceeds in the amount of $4403.66 (approximately 4.6% of the loan). Nevertheless, FCFC and MFN argue that MFN performed services that FCFC would otherwise have performed if MFN had not been a Program II broker and that the total fee paid to MFN-$8155.66 (approximately 8.5% of the loan proceeds)-was a reasonable market rate for the settlement services performed by MFN. At this summary judgment stage, there are several problems with these arguments.

First of all, even though Mr. Hanysak, who was president of FCFC at that time that Ms. Jackson took out her loan, testified at his deposition that Program I brokers did not perform the same services that Program II brokers did, his testimony is contradicted by that of William Hickey, who served as district manager of FCFC at the time relevant to his case. In his deposition, Mr. Hickey was asked, "Would the brokers under program one provide the same services that the brokers in program two would provide?" Mr. Hickey answered, "Yes, in most cases." Hickey Deposition at 39-40

Of greater significance, however, is the fact that there is no credible evidence in the record by which the court can determine as a matter of law that the 8.6% total fee charged for settlement services was a reasonable market rate. The affidavit of Dr. Sidney Davis, who has a doctorate in economics simply took the average salaries of residential loan officers (as found in the Bureau of Labor Statistics's Occupational Outlook Handbook) and extrapolated from that what he considered to be a fair market rate. No empirical study of the actual market rates was done. Thus, the court finds Dr. Davis's opinion to be of no significance.

Likewise, FCFC and MFN have simply presented the self-serving testimony of their employees and agents that the fees charged were at a reasonable market rate. These persons give no facts on which they based their conclusions. Mr. Hanysak's deposition is illustrative:

> The programs that we developed or looked at, we were really looking at what-consistent with the new RESPA guidelines of the services that were provided by the broker, what was a reasonable compensation. With that, we looked at the marketplace that we were doing business to determine what, you know, our competitors were paying the broker for the services rendered.
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> We also looked at what it cost Ford Consumer Finance from the employee cost and the cost of-of putting together packages and the cost in our direct lending operations.
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> We-we also looked at other ways that the broker was doing business and the compensation levels that they received under those programs, and it was our determination based upon all of that that 8 percent appeared to be what the marketplace valued-and it cost us in effect more than that to originate direct

loans and put the packages together, but that 8 percent was a number that the marketplace valued as what the services that the broker was providing.

Hanysak Deposition at 23-24.

An additional point is worth noting. The HUD-1 settlement statement did not characterize FCFC's payment to MFN as being for services rendered in relation to obtaining and processing the loan; instead, the HUD-1 statement says that the money is a "SERVICE RELEASE FEE." The following testimony of Mr. Hanysak is instructive on this issue:

Q. We'll move on to another one, then.

Let's see here. What is a service release fee? Are you familiar with that term?

A. I am familiar with that term, and I would tell you that that terminology is common from my mortgage banking days and dealt primarily in the mortgage banking industry where a fee is paid when somebody retains the servicing rights or pays for the servicing rights of a mortgage and then from there, with those servicing rights, they're the one that bills the customer on a normal basis for the loan amount, takes care of the escrows, the mortgage, and the insurance. And that servicing fee is for-you know, for the release of that so that they can do that and collect the fees from the customer. It's not something that is common in our industry.

Q. Okay. And a service release fee is a fee that would normally be earned by a company which made and continued to service loans; is that correct sir?

A. Yes.

Q. Is that a fee that would be applicable to a mortgage broker which simply arranged a loan with your company?

A. No, it would not.

Hanysak Deposition at 32.

Although not dispositive, the court does find it meaningful that FCFC and MFN's characterization of the 4% charge has changed between the time that the HUD-1 document was prepared and the filing of this suit. If the 4% percent was, in fact, to compensate MFN for actual services performed, there is no reason not to have so identified the charge. Instead, FCFC and MFN chose to designate it as a "service release fee," even though they concede that there were no services to be "released."

The court further notes that the 4% fee is not paid if the loan is not closed, even though MFN would have performed the same services. Additionally, the fee is based not upon the amount of actual work done but is, instead, based solely on the amount of the loan. Both of these factors are more characteristic of a referral fee rather than a fee for services actually rendered.

Because there is conflicting evidence as to what the 4% fee covered and because the court finds that no party has come forward with credible evidence with respect to whether the fee paid was within or outside the reasonable market rate, the court finds that no party is entitled to summary judgment with respect to Ms. Jackson's RESPA claim.

B. Tortious Interference with Contractual Relationship

In Count III of her amended complaint, Ms. Jackson alleges that FCFC induced MFN to breach its agency contract with her by

offering and paying to MFN an illegal payment to steer Ms. Jackson to FCFC for a loan with an artificially inflated rate.

Under Georgia law, to establish a claim for tortious interference with contractual relationship, a plaintiff must show the "intentional and non-privileged interference by a third party with existing contractual rights and relations." Lake Tightsqueeze, Inc. v. Chrysler First Financial Services Corp., 210 Ga. App. 178, 181 (1993). A claim is actionable if the interfering party causes a breach of the contract, retards performance of duties under the contract, or makes it more difficult or expensive to perform under the contract. McDaniel v. Green, 156 Ga. App. 549 (1980).

Because the contract between FCFC and MFN, whereby MFN participated in FCFC's Program II was entered into before Ms. Jackson entered into her contract with MFN, it cannot be argued that inducing MFN to become a Program II interfered with any existing contract between Ms. Jackson and MFN. When Ms. Jackson hired MFN to obtain a loan for her, FCFC already had its agreement with MFN that limited the loan options that MFN could seek from FCFC to Program II loans. Both FCFC and MFN acted pursuant to this per-existing agreement in providing a loan for Ms. Jackson at the only interest rate that MFN could obtain for her from FCFC.

Additionally, although Ms. Jackson contends that the actions of MFN and FCFC resulted in her getting a loan at an inflated interest rate, there is no evidence in the record to support this allegation. It is true that, if MFN had been a Program I broker,

Ms. Jackson's interest rate would have been 1% lower. However, MFN was not a Program I broker and, as noted above, had become a Program II broker prior to the time that Ms. Jackson hired MFN to obtain a loan for her.

Because Ms. Jackson has failed to show that FCFC interfered with any existing contractual relationship between her and MFN, FCFC is entitled to summary judgment on this claim.

C. Breach of Fiduciary Duty

In Count IV of the amended complaint, Ms. Jackson alleges that MFN breached its fiduciary duty to her by obtaining a loan for her on unfavorable terms and by receiving a kickback from FCFC for referring Ms. Jackson to FCFC.

In Georgia, an agency relationship is created when one party, expressly or by implication, authorizes another to act for him. O.C.G.A. § 10-6-1. The relationship between an agent and a principal is fiduciary in nature. McLane v. Atlanta Market Center Management, 225 Ga. App. 818 (1997). As part of the contract by which the agency relationship arises, the agent agrees to exercise loyalty and absolute good faith in dealing with the principal. Id.

As noted above, Ms. Jackson has not come forward with any evidence to show that MFN could have obtained more favorable terms for her with another lender; in fact, the evidence is to the contrary, since MFN shopped her application with at least two other lenders, both of which declined to make the loan. However, the court has also found that there is a genuine issue of material fact with respect to whether the 4% payment to MFN under FCFC's Program

II constituted an improper referral fee. Accepting an improper fee from FCFC could constitute a breach of the duty owed to Ms. Jackson. Therefore, the court holds that MFN is not entitled to summary judgment on this claim.

D. Restitution for Money Had and Received

In Count V of her amended complaint, Ms. Jackson contends that FCFC has been unjustly enriched by that portion of her monthly payments which is attributable to the inflated component of her first loan contract. Because Ms. Jackson has failed to show that she could have obtained a loan at rates more favorable than those she obtained from FCFC, the court finds that she has failed to show that FCFC was unjustly enriched by the loan obtained from it. As pointed out previously, Ms. Jackson was not eligible for a loan under Program I; this was not the result of any action by FCFC but was because MFN had chosen to participate in Program II, rather than under Program I. Furthermore, any argument that FCFC was unjustly enriched by the higher rate is undermined by the fact that the additional 1% in the rate of the loan was not retained by FCFC but was paid to MFN. Regardless of whether that payment was proper, it is undisputed that it was not retained by FCFC. Consequently, the court holds that FCFC is entitled to summary judgment on this claim.

E. Fraud by Concealment

In Counts VI and VII of the amended complaint, Ms. Jackson alleges that FCFC and MFN concealed the fact that FCFC was paying

a fee to MFN to steer her to FCFC and the fact that Ms. Jackson paid a higher interest rate than she would otherwise have been qualified for.

First of all, there is no evidence that Ms. Jackson would have qualified for an interest rate lower than that which she obtained. She could not have qualified for the 1% lower rate under FCFC's Program I because MFN was not a Program I broker. Furthermore, Ms. Jackson has not come forward with any evidence to show that the fee arrangement between FCFC and MFN was used as an incentive to steer borrowers to FCFC. The 4% fee may have been an inducement to participate under Program II, rather than Program I, but Ms. Jackson has not shown how it acted as an inducement to steer borrowers. Indeed, Ms. Jackson's argument is seriously undercut by the fact that MFN tried to place her loan with other lenders and turned to FCFC only when those other lenders would not make a loan to Ms. Jackson.

Finally, the court notes that the payment of the 4% was not concealed from Ms. Jackson because the HUD-1 settlement statement specifically noted the payment from FCFC to MFN.

For all these reasons, the court finds that FCFC and MFN are entitled to summary judgment on the fraudulent concealment claims.

III. SUMMARY

The plaintiff's motion for summary judgment [Doc. No. 23] is DENIED; FCFC's motion for summary judgment [Doc. No. 25] is GRANTED with respect to Counts III, V, and VI of the amended complaint but is, in all other respects, DENIED; MFN's motion for summary

judgment [Doc. No. 27] is GRANTED with respect to Count VII of the amended complaint but is, in all other respects, DENIED; the plaintiff's motion to strike portions of the deposition testimony of Denny P. Hanysak and Michael P. Lang and portions of the affidavit of Mathew Wolfort [Doc. No. 34] is DENIED; the plaintiff's motion to strike the supplemental affidavit of Mathew Wolford [Doc. No. 41] is DENIED; the plaintiff's motion to supplement the record with the affidavit and report of Sidney Davis [Doc. No. 50] is GRANTED; the plaintiff's motion for leave to file a supplemental brief in support of her motion for summary judgment [Doc. No. 57] is GRANTED; and the parties' requests for oral argument [Doc. Nos. 30, 35, and 48] are DENIED;

SO ORDERED, this 2nd day of February, 1998.

ROBERT L. VINING, JR.
Senior United States District Judge

ENTERED ON DOCKET

FEB 03 1998

BY

DEPUTY CLERK