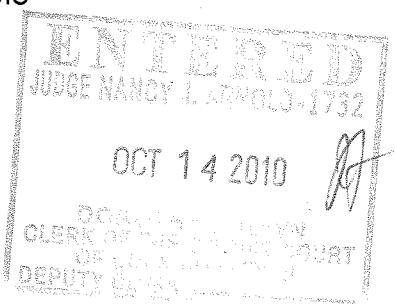
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION



[redacted] HILL,

Plaintiff,

vs.

CAPITAL FORECLOSURE SOLUTIONS, INC., GERALD PRZYBYLSKI, KEITH PABLEY, BARRY KAHAN, US BANK, AND UNKNOWN OTHERS,

Defendants.

08 CH 12735
Hon. Nancy J. Arnold
Judge Presiding

US BANK,

Counter-Plaintiff

vs.

[redacted] HILL,

Counter-Defendant.

OPINION AND JUDGMENT ORDER

THIS CAUSE COMES ON FOR RULING after trial on all issues in this cause, styled as one "to quiet title and for other relief." The companion case, 08 CH 45435 US Bank v. Pryzbylski, *et al*, is a suit for mortgage foreclosure, and has not yet been set for trial or other disposition.

The Plaintiff's Amended Complaint in this cause names several defendants. All claims against one of these, Defendant Barry Kahan, had been dismissed before trial. The trial proceeded against Defendants Capital Foreclosure Solutions, Inc. and Keith Pabley, who presented a united defense with no distinctions between them; Gerald Pryzbylski, and US Bank. This last Defendant was joined as the current holder of first and second mortgages on the property, having taken those interests by assignment from the original

lender. The mortgagee is joined in the suit only in the count that seeks to divest legal title from its mortgagor (Count) I, as well as in Count VII, plead as "unjust enrichment."

The Pleadings

Although the Amended Complaint is plead in several counts, two of them were given center stage at trial. In Count I, Plaintiff seeks to have this court declare that the various transactions Plaintiff entered into with regard to her real estate (her home) resulted in only an equitable mortgage in favor of the party who took legal title (Pryzbylski) rather than an outright transfer of ownership. As indicated, the current title holder's mortgagee, US Bank, is a Defendant in this count, as well as Pryzbylski. In Count III, Plaintiff seeks damages or equitable relief for violation of the Mortgage Rescue Fraud Act, 765 ILCS 940/1 et. seq. The Defendants in this count are Pabley/Capital Foreclosure Solutions and Pryzbylski. The effective date of that statute was January 1, 2007; amendments to the Act were made subsequently, in April, 2009.

The Amended Complaint makes general allegations applying to all counts. The Plaintiff alleges that she and her husband, since deceased, had purchased their home in 1998 and that she had been keeping up with her mortgage payments until sometime in 2006, when she lost her job. Her mortgage payments at the time were $867.00 per month. Plaintiff alleges that in May 2006 foreclosure proceedings were initiated and that in December, 2006, she responded to solicitations from Pabley/Capital Foreclosure offering aid with foreclosure. Plaintiff alleges that in January, 2007, Mr. Pabley met with her in her home. Plaintiff alleges that she advised Mr. Pabley that she had no job at the time and apprised him of her sole other income. Mr. Pabley presented her with a document outlining a proposed solution to her foreclosure problem. Plaintiff alleges that she understood that per the proposal she would be refinancing her home, not selling it. Plaintiff alleges that Pabley knew that Plaintiff had substantial "equity" in her home.

Plaintiff alleges further that on January 31, 2007, she appeared at the closing, where she signed documents. They included a warranty deed, a mortgage, a HUD-1 statement, and Articles of Agreement.

She said she was not given enough time to read them, and no one explained them to her. She alleges that had they been explained to her, she would not have signed them. Plaintiff alleges further that Defendant Pryzbylski was at the closing, where he executed two new mortgages.

Plaintiff alleges that she was induced into entering this "rescue transaction" because Pabley/Capital Foreclosure and Pryzbylski, engaged in a joint enterprise, told her they would save her home from foreclosure and she would "get it back" in 12 months through the Articles of Agreement for Deed. Plaintiff alleges that Pabley and Pryzbylski paid off her mortgage and the foreclosure case was dismissed, but that they knew and did not disclose to Plaintiff that she could not afford to make the monthly payments under the Articles or to buy her home back at the purchase price set out there. Plaintiff alleges that these Defendants acted in concert and intentionally, to "strip" the equity from her home.

In Count I, Plaintiff seeks a judicial declaration of an equitable mortgage based on her allegation that she received far less from the transaction than the value of her home; that the relative sophistication of the parties should be considered; that she was not represented by counsel; that she was allowed to remain in the home for 12 months after the transaction; and that her option to repurchase the property under the Articles of Agreement was more in the nature of an obligation for repayment of a debt.

In Count III, Plaintiff asserts that Pabley/Capital Foreclosure and Pryzbylski were both "distressed property consultants" and "distressed property purchasers" as defined in the Mortgage Rescue Fraud Act, 765 ILCS 940/1 et. seq. Plaintiff alleges that these Defendants violated the Act in various ways, and seeks actual damages, punitive damages, and equitable relief. There were at least two other counts in the Amended Complaint related to Count III. These were Count IV (plead under the Consumer Fraud Act) and count X (plead as common law fraud). There was also a related count to Count I; this was Count II (plead under the Truth in Lending Act).

US Bank asserted six affirmative defenses to Plaintiff's Amended Complaint, namely, 1) estoppel

to deny understanding of executed documents; 2) adequate remedy at law; 3) estoppel to deny anything other than that Plaintiff intended by the subject transaction to effect an outright transfer of the real estate; 4) that the assignor/lender was a bona fide purchaser for value; 5) that the assignor/lender had no obligation to make disclosures other than those required in RESPA, with which it complied; and 6) a right of set off by virtue of the Plaintiff's having remained on the property far in excess of two years without having paid either rent or mortgage payments. US Bank also filed a counterclaim. Count I charged Plaintiff with fraud by virtue of her having signed an ALTA statement affirmatively misrepresenting that there were no unrecorded contracts or options to purchase the property at the time of closing. Count II charged Plaintiff with negligent misrepresentation in that by signing the closing documents she induced the assignor/lender to issue loan funds that inured to her benefit, including full payment of her outstanding mortgage.

At the close of the Plaintiff's case, the court granted motions for judgment against the Plaintiff by Defendants US Bank and Pryzbylski on Count VII (unjust enrichment), and granted a motion for judgment against the Plaintiff by Pryzbylski on Counts VI ("unconsciounability") and X (common law fraud).

Law Regarding Equitable Mortgage

The doctrine of equitable mortgage allows courts to construe as a mortgage an instrument that appears on its face to be an absolute conveyance if the circumstances so warrant. *Robinson v. First Fed. Sav. Bank of Proviso Twp*, 223 Ill. App. 3d 1007, 1014 (1st. Dist. 1991). The court may declare an equitable mortgage if the parol evidence presented by the party seeking the mortgage demonstrates by clear and convincing evidence that the conveyance was intended by the parties merely to serve as security on a debt and was never meant to be permanent. *Flack v. McClure*, 206 Ill. App. 3d 976, 982-83 (1st. Dist. 1990).

There are several factors the court may look to in determining whether a conveyance was intended only as security. These factors include the existence of a close relationship between the parties, prior

unsuccessful attempts for loans, the circumstances surrounding the transaction, the disparity of the situations of the parties, the lack of legal assistance, an unusual type of sale, inadequacy of consideration, the way consideration was paid, the retention of written evidence of the debt, the belief that the debt remained unpaid, an agreement to repurchase, and the continued exercise of ownership privileges and responsibilities by the seller. *McGill* v. *Biggs*, 105 Ill. App. 3d 706, 708 (3d Dist. 1982). The indispensible factor, however, is the existence of a debt. For the court to find that a conveyance was in fact an equitable mortgage, it is essential that a debt existed. *Evans. V. Berko*, 408 Ill. 438, 444 (1951) ("A mortgage is for the purpose of securing a debt, and if there is no debt, there is no mortgage.); *Nave v. Heinzmann*, 344 Ill. App. 3d 815, 822 (5th Dist. 2003) ("[I]t is essential for a mortgage that there be a debt relationship."); *Flack*, 206 Ill. App. 3d at 985 ("The existence of a debt is the essential element to establish an equitable mortgage.").

Law Regarding the Mortgage Rescue Fraud Act Claim

The Mortgage Rescue Fraud Act, 765 ILCS 940/1 et. seq., became effective January 1, 2007. The pertinent provisions of the Act as it read at that time are as follows:

Section 5 is a definition section, which includes definitions for "distressed property consultant," "distressed property purchaser," and "distressed property conveyance." A distressed property "consultant" is defined as a person who solicits a distressed property owner and represents that he can perform for compensation from the owner any of a variety of services including, pertinent here, stopping a foreclosure sale or saving the owner's residence from foreclosure. A distressed property "purchaser" is defined as a person who acquires any interest in fee in a distressed property while allowing the owner to possess the property or "any person who participates in a joint venture or joint enterprise involving a distressed property conveyance." The parties here dispute whether under the facts in this case Pabley/Capital Foreclosure can be considered a distressed property "purchaser" under the Act. A distressed property conveyance is

defined as a transaction in which the owner of distressed property transfers an interest in fee, then the acquirer of the fee interest allows the owner to occupy the premises, and the acquirer promises to convey an interest in fee back or gives the owner an option to purchase the property at a later time. There is no doubt that the transaction in the present case was a distressed property conveyance.

Section 10 of the Act sets out certain provisions that must appear in a distressed property consultant contract, which is required to be in writing. Section 20 provides that any waivers by the owner of the requirements for a consultant contract in Section 10 are void and unenforceable. Sections 25 and 30 require a written contract for every distressed property conveyance and set out requirements as to form and content of such a contract. Section 40 is similar to 20, voiding any attempt at waiver of the statutory requirements for a conveyance contract.

Section 50(a) sets out certain acts by a distressed property consultant that will constitute a violation of the Act. Section 50(b) sets out acts by a distressed property purchaser that will be violations. Section 55(b) states as follows:

> (b) A consumer who suffers loss by reason of any violation of any provision of this Act may bring a civil action in accordance with the Consumer Fraud and Deceptive Business Practices Act [815 ILCS 505/1 et. seq.] to enforce that provision. All remedies and rights granted to a consumer by the Consumer Fraud and Deceptive Business Practices Act shall be available to the consumer bringing such an action. The remedies and rights provided for in this Act are not exclusive, but cumulative, and all other applicable claims, including, but not limited to, those brought under the doctrine of equitable mortgage, are specifically preserved.

FINDINGS OF FACT

The evidence in this case presented a very definitive picture. Each of the protagonists had his or her own role and his or her own understanding and use for the transaction they participated in. Plaintiff, fifty-seven years old, reasonably educated, and out of work for basically the first time in her life, had not responded to a mortgage foreclosure case proceeding against her and her home, and that case had progressed past the judgment stage and was moving toward judicial sale.

Pabley had two or three years earlier started a business through which he could make money from people in the Plaintiff's position. He called it a "mortgage recovery service," and described it as being a "group of private investors." In fact, the business consisted only of himself, and for each person like Plaintiff who responded to his solicitation, he attempted to place some private "investor" to function in a "recovery" transaction that Pabley would create. Mr. Pabley had had no experience in real estate or law, and his only work experience had been three years in job placement and recruiting.

The "investor" that Pabley placed with Plaintiff for this transaction was Mr. Pryzbylski. He was recruited by a friend of his, a young real estate broker with a high school education who was not even employed by Pabley, but thought of herself as a "consultant in training." Mr. Pryzbylski was motivated to engage in the transaction by being told that he would be given a cash payment, extra monthly income for one year, and would be "lending his credit" to a homeowner in need. In reality, he purchased Plaintiff's home, taking on the liability of two mortgages to do so, and gave back to the Plaintiff Articles of Agreement for Deed. These articles obligated Plaintiff to make monthly payments to Mr. Pryzbylski for one year and gave Plaintiff the opportunity for one year to repurchase the home at a stated price. The monthly payments were not to be applied to the purchase price, but were meant to cover Mr. Pryzbylski's own mortgage payment obligations, which he had taken on in this transaction, and in fact, the greater part of these monthly payments had already been paid out to him at the closing.

The case is before the court because the Plaintiff only made three of the monthly payments; she did not exercise the option to repurchase the property for the stated price; Mr. Pryzbylski could not afford his new mortgage payment obligations once the twelve months passed; and his lender was threatening foreclosure proceedings. Those foreclosure proceedings now pend

before this court as a "companion" case.

Findings of Fact as to the Claim of Equitable Mortgage

Although her attorneys have argued vigorously that Plaintiff never intended to sell her home, but at all times intended to "save" it, and Plaintiff herself protested as much during her testimony, the court finds to the contrary. Plaintiff signed documents presented to her by Pabley on two occasions, one group on January 12, 2007 and another group at the closing on January 31, 2007.

At the closing she signed a warranty deed in favor of Pryzbylski; a HUD-1 settlement statement naming herself as "Seller" and Pryzbylski as "Borrower"; an ALTA statement, which she signed as seller and Pryzbylski signed as purchaser; and at the closing she saw Articles of Agreement for Deed, which Plaintiff signed as "Purchaser."[1] Her testimony as to whether she read them or understood their portent was vague. As to most of them, she simply said the documents had not been explained to her. Some she did not recall, although she acknowledged her signature on them. Shown the HUD-1 statement, Plaintiff acknowledged her understanding that it showed her existing mortgage as being paid off in full.

Plaintiff's testimony revealed that she did understand the difference between "refinancing" and selling one's home. She had successfully refinanced her home herself after her husband died. The result was a lower monthly payment. The court disbelieved Plaintiff's effort at pretense that she thought the subject transaction was a "refinancing" too. Throughout her testimony Plaintiff persisted in voicing her theme, namely, that she was "saving her house by getting it out of foreclosure." On cross examination she admitted that the house was "getting out of foreclosure"

[1] This document will be discussed in more detail infra, inasmuch as the party identified therein as "seller" is Capital Foreclosure Solutions.

because her existing mortgage was being paid in full. When asked where the money came from to pay her mortgage off, Plaintiff responded that she did not know. The court found this response to be not credible. Plaintiff has a reasonable amount of education; she has an Associate Degree, earned after two years of college. She had been in the work force basically her whole life – seventeen years as a caseworker for the Department of Public Aid, six years for the Chicago Tribune as an administrative assistant, a year or so as an independent contractor for the State of Illinois, doing data entry work for a certain state program. She is articulate and reserved; every indication is that she is of at least normal intelligence. Ms. Raines, the "consultant in training" for Pabley, was at the closing. She testified that when Plaintiff and Pryzbylski were introduced to each other at the closing, Plaintiff said, "I'm going to buy my house back," and Mr. Pryzbylski replied, " I hope you do." Mr. Pryzbylski confirmed that he said that when they met, Plaintiff thanked him for helping her.

In sum, the court finds that the seller (Plaintiff) and the buyer intended that this transaction was a sale of the property. While they both used the term "temporary" sale, there was no doubt that the sale would prove to be temporary only if the Plaintiff were able in the succeeding twelve months to get a job and qualify for a new mortgage in order to pay the purchase price. The court finds that this transaction was NOT intended by the parties as one to provide security for a debt. The only debt owed by the Plaintiff to Pryzbylski was twelve monthly payments of $500 each (total, $6,000). The home was stipulated to have a market value of $232,000 on the date of closing. Plaintiff was under no obligation to repay to Pryzbylski any of the liability he undertook in order to pay off her mortgage, and she had no belief that she was under any such obligation. Clear and convincing evidence is required to establish that a deed absolute on its face was intended instead to be only a mortgage to secure repayment of a debt. There was no evidence here.

Findings of Fact as to the Mortgage Rescue Fraud Act Claim

Defendant Pryzbylski meets the statutory definition of "distressed property purchaser," 765 ILCS 940/5, but the court finds he is not guilty of any violations of the Act and was not the proximate cause of any losses Plaintiff sustained. While section 50(b)(1) makes it a violation for a purchaser to enter into a conveyance without verifying that the owner of the property has demonstrated a reasonable ability to pay for the contemplated conveyance back, it was not Mr. Pryzbylski who put this transaction together. He was used, and is as much of a victim here as Plaintiff. He was told, in a written proposal, entitled "The Opportunity," that the Plaintiff had been making monthly mortgage payments of $876, and that now they could be reduced to $600. He was also told that until recently the Plaintiff had worked for the City doing data entry and that she was then looking for another job. The person who "explained" this document to him was a friend of his, with only a high school education; she explained it to him in a bar. This was Ms. Raines, who testified that at the outset Plaintiff was saying she expected to get another job; she was optimistic. Plaintiff testified that she never thought she had any agreement with Mr. Pryzbylski. She thought her agreement was with Pabley. A document presented to both Plaintiff and Mr. Pryzbylski, captioned a "Post-Closing Document," initialed by both of them, says in paragraph 2 that Plaintiff is capable and comfortable making the payments of $500 per month. Plaintiff testified that that was true; she WAS comfortable with that monthly payment amount. The evidence was that Mr. Pryzbylski was not a regular participant in transactions put together by Mr. Pabley. He had only been induced to enter one other one, and that one was a failure, too, from his perspective. In sum, the court finds that Mr. Pryzbylski did not himself violate the Mortgage Rescue Fraud Act, and was not the proximate cause of any damages Plaintiff sustained. Nor was there proof of any misrepresentation by Mr. Pryzbylski or reliance thereon to support the separate claim under the

Consumer Fraud Act.

As to Defendants Pabley and Capital Foreclosure Solutions, however, the situation is quite different.

There is no question that Pabley/Capital acted as a "distressed property consultant" as defined by Section 5 of the Act. Section 50(a)(2) of the Act as it read at the time of this transaction made it a violation for a distressed property consultant "to charge, collect, or receive" any fee or other compensation for any reason that "exceeds two monthly mortgage payments of principal and interest." It was uncontested that Plaintiff's monthly mortgage payments had been $876.00. Two times $876.00 equals $1,752.00.

The evidence establishes that Pabley took far in excess of that amount as fee or compensation. One of the documents the Plaintiff signed at closing was captioned "Capital Foreclosure Solutions Purchase Price Estimate." This form does not identify anyone as the purchaser, but it does show a fee at the rate of 75% going to Capital Solution, in the amount of $26,345.77 and a fee at the rate of 25% going to something called "United Home Solutions," in the amount of $8,781.92. Pabley testified that United Homes made Capital's solicitations for Capital and had brought Plaintiff to Capital. Ms. Raines testified that these were in fact fees paid out of the proceeds of the closing and that she, Ms. Raines, received half of Capital's fees.

In fact Pabley / Capital took much more. The parties have stipulated that the market value of Plaintiff's home on January 31, 2007 was $232,000. The HUD-1 Settlement statement from the closing shows a sale price to Mr. Pryzbylski of $230,000. It shows a pay off amount for Plaintiff's existing mortgage in the amount of $115,758.94, which in normal understanding would mean that Plaintiff's equity in the house was $114,241.06 (230,000 – 115,758.94). However, the settlement statement also shows a second mortgage being paid off – to Capital Foreclosure – in the amount

of $102,535.31 and, sure enough, a mortgage in favor of Capital Foreclosure is one of the documents Plaintiff signed at closing. There is no note related to this mortgage. Rather, the body of the mortgage refers to a written "Agreement for Development of Residential Property" and recites that Plaintiff, identified in the mortgage document as "Party to the Agreement," is indebted to Capital Foreclosure for payment of fees and performance of obligations as set out in the referenced Agreement.

There was no "Agreement for Development of Residential Property" introduced into evidence. In his testimony, Pabley "explained" that the mortgage was taken to secure expenses Capital paid on Plaintiff's behalf. He referred, not to an "Agreement for Development" as referenced in the mortgage, but to the "Purchase Price Estimate" signed on the day of closing, to show what expenses Capital had paid to result in the $102,535.31 pay off. On that "Purchase Price Estimate, Plaintiff's "equity" in her property is shown as $114,881.06; various "estimated costs" were itemized, for a total of $68,253.37; and the $35,127.69 in fees paid to Capital Foreclosure as consultant and its finder, United Homes is shown. There is also a figure of $35.127.70 shown as "remaining dollars." Among the "estimated costs" on this document was the sum of $9,200, identified as "security deposit." Mr. Pabley testified that he is still using this $9,200 to this day – to pay his attorney's fees for defending the present litigation.

Also among the "estimated costs" was $21,600, which Pabley said was given as a lump sum to Mr. Pryzbylski toward rent for the next twelve months, so that Plaintiff only had to come up with $500 per month to meet the total "rent" owed. Actually, there was no lease between Plaintiff and Mr. Pryzbylski. Instead, there were Articles of Agreement for Deed, and the parties to that Agreement were not Plaintiff and Pryzbylski (the owner as of January 31, 2007), but Plaintiff and Capital Foreclosure. No deed from Plaintiff to Capital Foreclosure having been offered into

evidence, the ability of Capital to enter Articles of Agreement for deed, as Seller, was unexplained. Those articles did show an obligation by Plaintiff to make monthly payments of $2,300.00, but these payments were described as being "not to reduce the principal balance on the purchase price," but "to defer debt service and to provide owner with a return on its investment."

Other discrepancies abound. In the "Purchase Price Estimate," for example, one of the items shown as an expense by Capital secured by its "Second Mortgage" was attorneys' fees in the amount of $1,050.00. The HUD-1 statement shows attorneys' fees of $1000.00 paid to Kahan Law Office and $450.00 legal fees paid to Adam Bossov. Both sets of attorneys' fees were included in the seller's settlement charges on the HUD-1 form; yet they were taken again as expenses justifying a "pay off" of $102, 535.31 of Capital's second mortgage. The duplicate charges for two attorneys is even more remarkable in that the parties to this purchase of real estate were supposedly Plaintiff and Mr. Pryzbylski, and each of them testified credibly that they had no idea they were represented by counsel. Ms. Raines testified that attorney Bossov shares office space with Pabley, so "they" asked him to be Pryzbylski's lawyer. Attorney Kahan testified at trial. He did not say he represented the Plaintiff. He said he represented Capital Foreclosure.

In sum, it is very clear that Pabley and Capital Foreclosure, by taking as fees and compensation far in excess of two times Plaintiff's pre-existing monthly mortgage payments, violated Section 50(a)(2) of the Mortgage Rescue Fraud Act. It is also apparent that, by taking a mortgage interest to secure the payment of compensation, they violated Section 50(a)(3) of the Act.

The Mortgage Rescue Fraud Act, in Section 50(a)(6) also makes it a violation for a distressed property consultant to "take any power of attorney from another for any purpose, except to inspect documents as provided by law." Admitted into evidence was a power of attorney signed

by the Plaintiff on January 1, 2007. It appoints as her attorney "any representative of Capital Foreclosure Solutions" and is given "to facilitate the completion of the release of existing liens [on the subject property] . . . and to facilitate the sale of such property to or at the direction of Capital Foreclosure Solutions." The document further states, "The power is however given as a general power so that there is no question about the scope of authority granted to Capital Foreclosure Solutions, Inc. being sufficient in all ways to accomplish that result." This power of attorney is of interest because of all the documents signed by the Plaintiff both before and at the closing, there is only one as to which she said the signature purporting to be hers was not. This was an "Agreement for the Sale of Real Estate" purportedly between the Plaintiff and Mr. Pryzbylski, and the signature above Plaintiff's name is very conspicuously not the same as the signature on all the other documents.

It is not necessary for the court to determine whether Pabley and Capital also functioned as a "distressed property purchaser" as defined by the Act, because the court finds that their violations as "distressed property consultant" alone were the proximate cause of the loss to the Plaintiff. Accordingly, per Section 55 of the Act, the rights and remedies granted to a consumer by the Consumer Fraud Act are available to Plaintiff here.

Decision as to Remedy

Although both the Mortgage Rescue Fraud Act (55(b)) and the Consumer Fraud Act (815 ILCS 505a(c)) provide that the court may employ equitable remedies to address violations, the court has determined that the appropriate remedy here is damages. Having studied the HUD-1 settlement statement and the "Capital Foreclosure Solutions Purchase Price Estimate;" having listened to the testimony especially of Mr. Pabley; as well as having heard the arguments of counsel, the court concludes that the Plaintiff has suffered damages in the full amount of the equity

in her home that was taken from the closing and dispersed to others. It was the violation of the prohibition against taking a fee interest in the property that enabled Pabley/Captial to take the major part of Plaintiff's equity by denominating a payment to themselves as a pay off of a second mortgage; excess fees account for the rest. The total equity was $114,241.00. It is uncontested that Plaintiff was given $5000.00 in cash at the closing. With the deduction for that amount, Plaintiff's damages proximately caused by Pabley and Capital Foreclosure's violation of the Act are $109,241.00.

Pabley argues that Plaintiff was not actually damaged in that amount, because the transaction did permit her to live in her house for a period of many months without paying either rent or mortgage payments. Apparently the argument is that some sort of set-off should be taken for this "advantage" the Plaintiff gained. Pabley has not made any claim for set-off, however, and the court determines that no such claim is available to him or to Capital. Under the common law, set-off is available only when there are demands mutual in character and existing between the same parties. *Harding v. Kuessner*, 172 Ill. 125, 128 (1898). To claim a set-off, debts must be in the same right and between the same parties. *Super Stop Petroleum, Inc.. v. Clark Retail Enterprises Inc.*, 308 B.R. 869, 896 (N. D. IL 2004). Here Pabley and Capital never gave Plaintiff any money to alleviate the burden of rent or mortgage payments. They only took and used her money. They have no claim or potential for a claim for set-off. Further, while it may be argued that some of her money that they took from the closing was used for her advantage, thus to reduce damages in some measure, the evidence does not assist in this regard. The documents are inconsistent and certainly not self-explanatory. Mr. Pabley, who attempted to explain them, was glib and consistently lacking in credibility, brashly asserting expertise and knowledge of facts that he simply did not have. In short, the court has no reliable way of determining from the evidence

that Plaintiff's actual damages, incurred by reason of their violation of the Act, are anything but $109,241.00.

The court notes that Defendant US Bank had plead a counterclaim against the Plaintiffs. This Defendant argues that Plaintiff made a negligent representation to its predecessor lender when she signed an ALTA statement saying under oath that at the time of closing there were no unrecorded contracts or options to purchase the land. US Bank argues that this was a misrepresentation because the Articles of Agreement were such a contract. US Bank offered into evidence a stipulation between itself and its mortgagor, Mr. Pryzbylski. The stipulation is as to the amount owed by Mr. Pryzbylski to his lender for principal and interest on the note, advances toward current real estate taxes, and premiums for property insurance. The court is of the opinion that these figures cannot serve as the measure of any damages US Bank may have sustained by reason of misstatements by Plaintiff on the ALTA form. The amounts owed by Mr. Pryzbylski will be the subject of the mortgage foreclosure proceeding currently pending. One of the results of the present ruling is that US Bank's mortgage interest in the property has not been invalidated. Therefore it will be able to proceed by way of its foreclosure suit to recoup most if not all of the amounts owed. So the amount of actual damages is not ascertainable. Further, the evidence of proximate cause on this counterclaim was weak. The only testimony was that if the Articles of Agreement had been disclosed on the ALTA form, the "closer" could not consummate the closing without talking to the lender. This is insufficient to establish, as argued, that the ALTA form was the proximate cause of the lender's decision to make this secured loan. In short, the court finds that US Bank has not proved its counterclaim against the Plaintiff.

ENTRY OF JUDGMENT

IT IS HEREBY ORDERED THAT:

1. Judgment is entered in favor of the Plaintiff, [redacted] Hill, and against Defendants Capital Foreclosure Solutions, Inc. and Keith Pabley, jointly and severally, in the amount of $109, 241.00 on Counts III, IV, and VII of the Amended Complaint, Count III being for violation of the Mortgage Rescue Fraud Act.
2. Judgment is entered in favor of Defendant Gerald Pryzbylski and against the Plaintiff, [redacted] Hill, on Counts I, II, III, IV, VI, VII, and X of the Amended Complaint.
3. Judgment is entered against the Plaintiff and in favor of Defendants Capital Foreclosure Solutions, Inc. and Keith Pabley on Count X of the Amended Complaint.
4. Judgment is entered against the Plaintiff and in favor of Defendant US Bank on Counts I and VII of the Amended Complaint.
5. Judgment is entered against Counter-Plaintiff, US Bank, and in favor of Counter-Defendant, [redacted] Hill, on both counts of its counterclaim.

ENTERED
JUDGE [illegible] 1732
OCT 14 2010
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTER: _____

JUDGE