

VERMONT SUPERIOR COURT
Windham Unit
7 Court Street
Newfane VT 05345
802-365-7979
www.vermontjudiciary.org



CIVIL DIVISION
Case No. 20-CV-00294

Marc Cote v. Greater Falls Pharmacy et al

Decision on Counterclaim Defendant Marc Cote's Partial Motion to Dismiss
Counterclaims

The plaintiff/counterclaim defendant Marc Cote has moved to dismiss the following claims in the defendants/counter-complainants Greater Falls Pharmacy, Michelle and Donald Laurendeau's counter-complaint, under V.R.C.P. 12(b)(6): Count 1, Fraud, Counter III- Violation of Vermont Licensed Lender Law, and Count IV- Violation of the Vermont Securities Act. The defendants/ counterclaim-plaintiffs oppose this motion. The plaintiff/counterclaim defendant will be referred to as Mr. Cote, and the defendants/counterclaimants will be referred to as GFP and the Laurendeaus in this decision, for brevity and convenience.

The court notes first that a motion to dismiss a party's claims, alleging that the party has failed to state any valid claims or demands for relief, "should not be granted unless it is beyond doubt 'that there exist no facts or circumstances that would entitle the plaintiff to relief.'" *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999) (citation omitted). On review, Vermont courts assume the truth of all the claimant's factual allegations and reasonable inferences from the claimant's pleadings and construe the opponent's contravening allegations as false. See *id.* at 48-49.

GFP and the Laurendeaus assert in Count I of their countercomplaint (Fraud), that Mr. Cote acted fraudulently in connection with the Laurendeaus' purchase of a pharmacy business from him by presenting them with a promissory note and a stock transfer agreement that contained inconsistent terms, by falsely assuring the Laurendeaus that the existing contracts with vendors would "transfer seamlessly," by failing to disclose UCC financing statements securing the assets of the business, by failing to disclose that he had provided personal guarantees to many of the business's vendors, that he made all of these misrepresentations and/or omissions intentionally or with reckless disregard of the facts, and that the Laurendeaus relied on Mr. Cote's misrepresentations to their detriment.

In Count III (Violation of Vermont Licensed Lender Law, 8 V.S.A. § 2200 et seq.), GFP and the Laurendeaus assert that Mr. Cote loaned GFP and the Laurendeaus over \$890,000 by a promissory note in October 2018, that the Vermont Licensed Lender Law requires that a person not "engage in the business of making loans" without a license, and that Mr. Cote acted knowingly and willfully in violating the Act, and should therefore be barred from collecting any payment on the loan.

In Count IV (Violation of Vermont Securities Act, 9 V.S.A. § 5101 et seq.), GFP and the Laurendeaus assert that Mr. Cote sold the Laurendeaus the stock of the Greater Falls Pharmacy under a stock transfer

agreement; that the stock is a security as defined in the Vermont Securities Act, and that it is unlawful for a person to engage in fraud in connection with such a sale under the Act.

The court concludes that Count III, alleging violation of the Licensed Lender Law, should be dismissed, but that counts I and IV are fact intensive, and should not be resolved through a motion to dismiss. The court is unable to conclude that it is beyond doubt that the counterclaimants cannot demonstrate that they are entitled to relief as to Counts I and IV.

As to Count III, under the Licensed Lender law, Chapter 73 of the financial services statute requiring that lenders be licensed is entitled “Licensed Lenders, Mortgage Brokers, Mortgage Loan Originators, Sales Finance Companies, and Loan Solicitation Companies.” The chapter is primarily addressed to mortgage loans, although it does have broader applicability. It does not apply to commercial loans of \$1 million or more. 8 V.S.A. § 2201. The statute provides that that without first obtaining a license a “person shall not [] [e]ngage in the business of making loans of money, credit, goods, or things in action and charge, contract for, or receive on any such loan interest, a finance charge, discount, or consideration therefor.” 8 V.S.A. § 2201(a) (2018). The court concludes that there is no claim that Mr. Cote has engaged in the business of making loans, and that the law therefore does not apply to him. *In re Birch Wood Inc.*, No. 18-10184, 2020 WL 5604681, at *2 (Bankr. D. Vt. Apr. 29, 2020).

The statute does not define “engage in the business of making loans,” but it does define “engage in the business of a mortgage loan originator”, as follows:

“Engage in the business of a mortgage loan originator” means to act as, or to hold oneself out as acting as, or to represent to the public that one can provide the services of a mortgage loan originator, in a commercial context, and with some degree of habitualness or repetition. Habitualness or repetition is met if either the individual who acts as a mortgage loan originator does so with a degree of habitualness or repetition or the source of the prospective financing provides such financing or performs other phases of origination of residential mortgage loans with a degree of habitualness or repetition. Acting in a commercial context is met if either the individual or an entity for which the individual acts does so for the purpose of obtaining profit rather than exclusively for governmental or family purposes.

8 V.S.A. § 2200(6) (2018)(emphasis added). Presumably, the Legislature would not use the same specific language—“engage in the business”—twice in a statute without intending the language to be interpreted similarly. According to the statute, to engage in a business is “to act as, or hold oneself out as acting as, or to represent to the public that one can provide” particular services, “in a commercial context, and with some degree of habitualness or repetition.” *Id.* Here, there is no allegation in the counterclaim that Cote held himself out as a lender or that he made any other loans.

This judicial officer granted summary judgment in a similar case in 2011. In that case, the court granted summary judgment to a counterclaim defendant who had financed the sale of a resort lodge because the evidence established that the party had only financed the one transaction at issue in the foreclosure action. As the court stated then:

[F]or purposes of § 2201(a)(1), a person does not “engage in the business of making loans of money” merely by making an isolated loan or two for the sake of convenience or accommodation to a friend or customer. Rather, a person “engages in the business of making loans of money” by entering into a series of acts that may fairly lead one to the conclusion that the person is involved in an ongoing occupation of money-lending.

Hawk Resorts Intern., L.P. v. Colburn, No. 90-2-10 Wrcv, 2011 WL 8472940 (Vt. Super. Mar. 23, 2011) (citations omitted). Citing *Hawk Resorts* and case law from other jurisdictions, a federal court held that a seller who financed the sales of wind turbines also was not covered by the licensing law, when the purpose of the note was a single, isolated loan motivated at least in part by the sale of the turbines. The seller was not acting in “in furtherance of a business of providing loans,” but to pursue development of a particular site and sell turbines. *Nordic Windpower USA, Inc. v. Jacksonville Energy Park, LLC*, No. 5:12-CV-5, 2012 WL 1388357, at *11 (D. Vt. Apr. 19, 2012).

The court still believes that this is an accurate statement of the law. There is no allegation or claim that Mr. Cote engaged in “a series of acts that may fairly lead one to the conclusion that the person is involved in an ongoing occupation of money-lending.” The Licensed Lender Law therefore does not apply to him, and Count III of the counter-claimants’ complaint is therefore dismissed. Mr. Cote’s motion for partial dismissal is otherwise denied.

It is so ordered.

A handwritten signature in black ink, appearing to read 'K.A.H.', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Katherine A. Hayes
Superior Judge
October 6, 2021