STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 274-12-11 Oecv

Randolph National Bank
Plaintiff

v.

Edward Luce, Judy Luce,
and Tewksbury Country Store, Inc.
Defendants

Decision on Plaintiff's Motion for Summary Judgment

Plaintiff Randolph National Bank seeks foreclosure of a general store owned by defendants Edward and Judy Luce. Defendants argue that foreclosure is inequitable because the bank gave them bad financial advice and concealed other information in order to induce them to purchase the store. Defendants also argue that the bank negligently failed to complete an environmental assessment that would have shown the presence of contamination on the property. Plaintiff seeks summary judgment on the affirmative defenses and counterclaims.

Defendants object that they have not had an opportunity for discovery because the present motion for summary judgment was filed two weeks after they filed their answer and counterclaims. With that objection in mind, the material facts may be summarized as follows. The prior owners of the store borrowed money from the bank and fell behind on their payments. At about the same time, defendants began discussing investment opportunities with the bank. Defendants now allege that the bank orchestrated the deal by steering them into the purchase of the unprofitable store. In particular, defendants allege that the bank induced them to purchase the store by providing them with bad financial advice, concealing information about the unprofitability of the store, and by concealing the bank's own "conflict of interest" in the transaction.

The bank moves for summary judgment on the strength of the general rule that lenders do not owe any fiduciary duties to their borrowers. *Fuller v. Banknorth Mortg. Co.*, 173 Vt. 488, 490–91 (2001) (mem.); *McGee v. Vermont Federal Bank, FSB*, 169 Vt. 529, 530 (1999) (mem.); *Capital Impact Corp. v. Munro*, 162 Vt. 6, 9–10 (1994); *Hughes v. Holt*, 140 Vt. 38, 40 (1981). In so moving, however, the bank has not fully addressed defendants' argument that their case falls within the exception to the general rule, cited in each of the aforementioned cases, which is that fiduciary duties may be found when a borrower places special trust and confidence in the lender during the course of a particular transaction. Nor has either party fully grappled with the facts or law applicable to the merits of the exception. See generally *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *Barnett Bank v. Hooper*, 498 So.2d 923 (Fla. 1986); *Deist v. Wachholz*, 678 P.2d 188 (Mont. 1984); *Garrett v. BankWest, Inc.*, 459 N.W.2d 833 (S.D. 1990); Hunt, *The Price of Trust: An Examination of Fiduciary Duty and the Lender-Borrower Relationship*, 29 Wake Forest L. Rev. 719 (1994) (cited for its scholarly review, and not necessarily for its advocacy of particular positions). As such, the bank has not persuaded the court that it is entitled to judgment as a matter of law at this time on the claims for fraud, fraudulent concealment, breach of fiduciary duties, breach of the duty of

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good faith and fair dealing, and unjust enrichment. The bank may renew its motion for summary judgment after an adequate opportunity for discovery. *Poplaski v. Lamphere*, 152 Vt. 251, 255 (1989).

Defendants have also argued that foreclosure is inequitable because the bank negligently failed to complete an environmental assessment that was required by the terms of the loan guarantee offered by the Small Business Administration. Defendants theorize that if the bank had used due care in completing the assessment, the bank would have discovered that the property was on a state registry of contaminated sites, and thus defendants never would have purchased the store.

Defendants' theory overlooks the fact that the environmental assessment is included as a condition in the SBA loan authorization for the protection of the SBA as guarantor, rather than for the protection of the borrower. The loan authorization itself contains language to the effect that the contract is "between Lender and SBA and creates no third party rights or benefits to Borrower." P. Ex. 7. Identical language is contained in the borrower's certification. P. Ex. 14. The plain language of these agreements precludes defendants' theory that the contract conditions were intended to benefit them. See *Morrisville Lumber Co., Inc. v. Okcuoglu*, 148 Vt. 180, 184 (1987) (explaining that "[w]hether or not a party is a third-party beneficiary is based on the intention of the original contracting parties").

Defendants argue that the acknowledgments are ambiguous and unenforceable in light of the declared purpose of the SBA, which is to protect the interests of small businesses. Defendants theorize, without any supporting citations, that the statements of purpose set forth in the SBA's enabling statute and governing regulations give them a right to enforce the conditions of the loan authorization despite the express contract language to the contrary. A number of cases, however, have squarely rejected such a theory on the grounds that the guarantees mean what they say: borrowers are *not* intended beneficiaries of the guarantees between the SBA and its lenders, and borrowers are *not* entitled to assert any rights or causes of action based on the precatory statements of purpose in the SBA enabling statute and governing regulations. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 699 (8th Cir. 2003); *Concrete Tie of San Diego, Inc. v. Liberty Constr., Inc.*, 107 F.3d 1368, 1371–72 (9th Cir. 1997); see also *Fleet Bank of Maine v. Harriman*, 1998 ME 275, ¶¶ 5–10, 721 A.2d 658 (same principles with respect to other federal loan guarantees). Defendants have not proposed any alternative legal theory of liability with respect to the bank's completion of the environmental assessments. As such, the bank is entitled to summary judgment on the claim of negligence.

ORDER

For the foregoing reasons, Plaintiff's Motion for Summary Judgment (MPR #1), filed March 5, 2012, is ***granted*** as to the claim of negligence and is otherwise ***denied without prejudice***. The parties shall file an ADR/discovery stipulation within thirty days.

Dated at Woodstock, Vermont this 16 day of October, 2012.

Harold E. Eaton, Jr.
Superior Court Judge