

STATE OF MAINE  
CUMBERLAND, ss

NANCY RAMSEY,  
Plaintiff

v.

H & R BLOCK, OUR TOWN MORTGAGE,  
LLC., AL STAPLES, HILLCREST ASSOCS.,  
WILLIAM CHAPMAN, BAXTER TITLE  
CO., JAMES R. LEMIEUX

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. CV-09-482  
REC-CUM- 12/23/2009

ORDER ON  
DEFENDANTS  
LEMIEUX'S AND  
BAXTER TITLE  
COMPANY'S  
MOTION TO DISMISS

#### **BEFORE THE COURT**

Defendants, Attorney James R. Lemieux and Baxter Title Company, move to dismiss Plaintiff Nancy Ramsey's claim against Defendants for "Breach of Fiduciary Duty and Duty of Care," pursuant to Rule 12(b)(6) of the Maine Rules of Civil Procedure.

#### **BACKGROUND**

Nancy Ramsey's claims relate to a transaction in which she mortgaged her primary residence to finance the purchase of a rental property. During the transaction Ramsey was not represented by counsel. All of the defendants were involved in the transaction: Al Staples and Our Town Mortgage, LLC guided Ramsey in obtaining financing; William Chapman and Hillcrest Associates appraised Ramsey's primary residence so she could use her primary residence as equity for the mortgage on the rental property; H & R Block provided the

mortgage; and James Lemieux and Baxter Title Company performed the closing on the rental property.

According to Ramsey, the facts are as follows. Ramsey asserts that in July 2006 she approached Al Staples, a mortgage broker who had arranged a home loan in the past for her. Ramsey was interested in purchasing a rental property in order to supplement her income. Ramsey alleges she asked Staples for guidance and that she trusted Staples would advise her as to what was best for her financially. Staples encouraged Ramsey to re-finance the mortgage on her primary residence so she could use her equity in her primary residence to purchase the rental property. After her first meeting with Staples, Ramsey signed a purchase contract for an apartment building on July 18, 2006. Ramsey later returned to Staples to obtain a mortgage to finance the purchase of the apartment building. Staples recommended an adjustable rate mortgage. Chapman and Hillcrest Associates appraised Ramsey's primary residence. The original appraisal value was too low for Ramsey to obtain the loan selected by Staples. At Staples' request, Chapman and Hillcrest increased the appraised value so loan could be approved.

Unknown to Ramsey, H &R Block (d/b/a Option One Mortgage Corporation) had a program, which provided mortgage brokers with an incentive to place borrowers into high priced loans, even when the same borrowers qualified for lower priced loans. The incentive program provided brokers a "yield spread premium" ("YSP"). The amount Staples was being paid by H & R Block through the YSP was directly related to the interest rate, and type of loan Ramsey took out. Ramsey alleges that nobody explained to her that the worse the deal was for her, the better the deal was for Staples. According to

Ramsey, the YSP program paid Staples \$4,200, as a "Broker Fee," and a "Processing Fee" of \$712. The closing on the rental property was conducted on August 14, 2006. Attorney James Lemieux and Baxter Title Company were hired by the lender to administer the closing. Ramsey states she "did not select Baxter Title Company or James Lemieux to close the loan." Ramsey alleges that she was rushed and under pressure because Baxter Title Company had another closing scheduled immediately after hers.

Ramsey filed her original complaint on September 1, 2009. She filed her First Amended Complaint on September 18, 2009. Count VII claims "Breach of Fiduciary Duty and Duty of Care" against Baxter Title Company and James Lemieux. Count VIII demands an assessment of punitive damages against all the Defendants. Ramsey alleges that despite their relationship with the lender, Baxter Title Company and James Lemieux had a confidential and special relationship with Ramsey and owed her a fiduciary duty to ensure that proper standards of care were followed in the transaction. Specifically, Ramsey alleges that Baxter Title Company and Lemieux breached their duties by (1) failing to explain the YSP program between the lender and Staples; (2) by failing to explain all of the documents to Ramsey and the risk the transaction posed to Ramsey's primary residence; and (3) by rushing Ramsey through the closing so that she did not have a final opportunity to reconsider the transaction, its structure, and its costs.

## **DISCUSSION**

### **I. Standard of Review**

A Motion to Dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of

the complaint must be taken as admitted.” *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a Motion to Dismiss, this Court examines “the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory.” *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only “when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Id.* (quoting *Hall v. Bd. of Empl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). This is a question of law. *Bean v. Cummings*, 2008 ME 18, ¶ 7, 939 A.2d 676, 679.

## **II. Claim of Breach of a Fiduciary Duty**

Plaintiff has failed to state facts to support the existence of a fiduciary relationship between herself and Baxter Title Company or James Lemieux. “One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” *Bryan R. v. Watchtower Bible and Tract Society of New York, Inc.*, 1999 ME 144, ¶ 15, 738 A.2d 839, 845. The important elements of a fiduciary relationship are: “(1) the actual placing of trust and confidence in fact by one party in another, and (2) a great disparity of position and influence between the parties at issue.” *Id.* at ¶ 19, 738 A.2d at 846. As described in *Bryan R.*:

Some of the indicia of a fiduciary relationship include the acting of one person for another; the having of influence over one person by another; the inequality of the parties; and the dependence of one person on another. Fiduciary duties arise for example, between attorneys and clients, guardians and wards, and principals and agents.

*Id.* at ¶ 18, 738 A.2d at 846 n.9. A general allegation of a confidential relationship is not a sufficient basis for establishing the existence of a fiduciary relationship.

*Id.* at ¶ 20, 738 A.2d at 846. A court “must have before it specific facts regarding the nature of the relationship that is alleged to have given rise to a fiduciary duty in order to determine whether a duty may exist at law.” *Id.*

Ramsey admits in her Complaint that she did not select Baxter Title Company or James Lemieux to perform the closing, and that the Defendants represented the lenders in the transaction. Lemieux was not Ramsey’s attorney. He was the lender’s attorney and represented the lender’s interests. Ramsey contends she was owed a fiduciary duty. Ramsey cites the following from a Decision and Order by the Board of Overseers of the Bar:

[T]he Court so finds that it is imperative for the administration of justice and for the protection of the public, that the legal community at large is aware of an attorney’s ethical duty to borrowers in a mortgage transaction. Regardless of the attorney’s representation of a bank in a given transaction, as in this case, the attorney also owes duties to the mortgagor, despite the involvement of other non-attorney professionals.

*Bd. of Overseers of the Bar v. Condon*, BAR-08-7 at p. 3. The court refuses to adopt this holding. First, disciplinary action orders from single justices of the Maine Supreme Judicial Court have limited value as judicial precedent. Moreover, the attorney in *Condon* acted as the closing agent selected by both the bank and the borrowers in the transaction. On the facts asserted, Ramsey claim of “Breach of Fiduciary Duty and Duty of Care” against Baxter Title Company and Lemieux fails and should be dismissed.

### **III. Punitive Damages**

Ramsey’s claim for punitive damages against Baxter Title Company and Lemieux should also be dismissed. Punitive damages may only be imposed

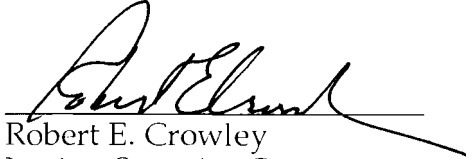
where compensatory or actual damages are awarded based on the defendant's tortious conduct. Simmons, Zillman & Gregory, *Maine Tort Law* § 19.07 at 689 (1999 ed.) Additionally, punitive damages "are available only where the plaintiff proves by clear and convincing evidence that the defendant acted with malice." *Id.* Because specific facts have not been pled showing a fiduciary relationship existed, there is no underlying tort upon which punitive damages could be awarded, and no facts are pled that suggest that Baxter Title Company and Lemieux acted with malice. The punitive damages claim should also be dismissed.

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Therefore, the entry is:

Defendants Baxter Title Company's and Lemieux's Motion to Dismiss is GRANTED.

Dated at Portland, Maine this 23<sup>RD</sup> day of December, 2009.

  
Robert E. Crowley  
Justice, Superior Court

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