

STATE OF VERMONT  
WINDSOR COUNTY

Home & Loan Center  
Plaintiff

v.

Richard Corum  
Defendant

SMALL CLAIMS COURT  
Docket No. 683-8-09 Wrsc

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for hearing on December 21, 2009. Peter Becker was present on behalf of the Plaintiff. Defendant was present, pro se. Based upon the evidence at hearing, the Court makes the following findings, conclusions and order:

FINDINGS OF FACT

Plaintiff undertook to obtain funding for Defendant to refinance Defendant's home in Norwich, Vermont. Defendant complained about Plaintiff's loan processing actions to the Vermont Department of Banking, Insurance, Securities and Health Care Administration (BISHCA). Plaintiff claims the statements made by Defendant in his complaint to BISHCA are false and defamatory. Plaintiff claims that Provident Funding terminated its relationship with Plaintiff due to Defendant's complaint, resulting in lost commissions. Defendant has filed a counterclaim seeking damages as a result of having to pay a higher interest rate than he was originally quoted, due, he claims, to negligence on the part of Plaintiff in not closing the loan on time. Defendant claims he is a victim of "bait and switch."

The Plaintiff locked Defendant into a loan to refinance his home at a rate of 4.75% from the time of lock in on May 11 until May 27, 2009. It was anticipated that Defendant would be able to close on the loan by May 27, 2009. Defendant was dealing primarily with a representative of Plaintiff, one Lewis, during the loan processing period. Defendant claims Lewis assured him that Plaintiff had the information needed to close the loan and only belatedly indicated necessary information was missing. Lewis did not testify at the hearing.

For several reasons, the loan did not close on or before May 27, 2009. The parties blame one another for this failure. Plaintiff claims information on the application was incorrect and required correction, preventing the loan from closing on time. Defendant claims the Plaintiff was dilatory and was responsible for failing to get the loan closed on time. After the loan did not close by May 27, 2009, Defendant continued in his

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JAN 28 2010

relationship with Plaintiff, ultimately closing on a loan at a rate of 5.25% on June 26, 2009.

Defendant initially filed a complaint with BISHCA on July 3, 2009 against Provident Funding, with whom Plaintiff had placed the loan. Subsequently, Defendant filed a similar complaint against Plaintiff on July 20, 2009. It is this latter complaint which gives rise to Plaintiff's action for defamation. Plaintiff says that the complaint filed with BISHCA contained a number of lies and was done with malice. There is no evidence of any determination of the merits of the complaint by BISHCA.

The letter of complaint outlines the history of the transaction from the Defendant's point of view. Plaintiff disputes many of the statements made in the letter, most of which were between Defendant and Lewis on behalf of Plaintiff. At the core of the delay were issues concerning the manner in which title to the property was to be held and the extent of an escrow. Plaintiff cites to inaccuracies in the loan application as evidence that Defendant has been "caught in a lie."

The letter of complaint was a legitimate exercise of Defendant's right to complain about treatment he felt did not meet the appropriate standards for businesses under BISHCA regulation. Many of the statements attributed to Plaintiff in the letter were made by Lewis who was not present to dispute them. The course of dealing outlined by Defendant created the impression in his mind that the failure to close the loan "on time" was a result of the performance of Plaintiff. There is certainly competing evidence on this point, including, *inter alia*, confusion created by inaccuracies in the application filled out by Defendant relating to the existence of a tenancy by the entirety. However, the fact that Plaintiff has explained the reasons for delay in the loan closing, some or all of which may be attributable to Defendant, does not mean Defendant's complaint to BISHCA was false or defamatory. That the Plaintiff disagrees with Defendant's view of the transaction does not render Defendant's statements defamatory.

Without question, the Defendant's closing did not go smoothly. Each side blames the other for the problems. The "fault" for not closing by the "lock in" date appears to be shared. Defendant's complaint to BISHCA was not done with malice, but rather Defendant was exercising his right to file a complaint over what he perceived to be improper conduct by Plaintiff.

Further, Plaintiff claims the letter of complaint caused Provident Funding to cancel two transactions with Plaintiff, resulting in loss of commissions. The evidence on this claim is insufficient. The only evidence that Provident cancelled other loans as a result of Defendant's letter is the statement of Peter Becker, relaying what he had been told concerning other transactions by a representative of Provident. The Court does not find this evidence convincing.

The Defendant's claim for damages as a result of the higher loan rate must also fail. Despite having difficulties with Plaintiff, which Defendant claims caused him to lose the 4.75% interest rate, Defendant elected to continue his relationship with Plaintiff.

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JAN 28 2010

and closed at a later time at a higher rate. Defendant was under no obligation to do so. Defendant was fully aware prior to the actual closing that the interest rate would be 5.25%. Defendant does not allege that he failed to understand the existence of the higher interest rate. Indeed, he was well aware of it before deciding to close in late June. Defendant chose to proceed with a loan closing at a higher rate than had been originally quoted. He cannot now claim as damages all or some of the interest differential.

## CONCLUSIONS OF LAW

### A. Plaintiff's defamation claim against Defendant

Plaintiff claims that the statements Defendant made in his complaint to BISHCA were defamatory. The following elements are necessary to prove a defamation claim in Vermont:

(1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

*Crump v. P & C Food Markets, Inc.*, 154 Vt. 284, 291 (1990).

In the instant case, Defendant's letter to BISHCA was a privileged publication defeating Plaintiff's claim. "Any person has a qualified privilege to make statements to law enforcement or regulatory agencies regarding the conduct of others, where the person making the statement believes in good faith that the statement is true and indicates that a statutory standard administered by the agency may have been violated." *Truman v. Browne*, 2001 ME 182, ¶ 15, 788 A.2d 168 (citing Restatement (Second) Torts § 598 (1977)).

This standard is likely to be adopted by the Vermont Supreme Court, which has repeatedly cited to the Restatement with approval when deciding defamation cases. See *Crump* 154 Vt. at 292, 294; *Ryan v. Herald Ass'n, Inc.*, 152 Vt. 275, 282 (1989); see generally *Lent v. Huntoon*, 143 Vt. 539 (1983). The Court has cited the Restatement particularly with regard to privileged publications. See *Lent*, 143 Vt. at 549-50; *Crump*, 154 Vt. at 292.

Defendant wrote his complaint to BISHCA, which is a regulatory agency authorized to take action against Plaintiff if the defamatory matter is true. The statements Defendant made to BISHCA were based on his belief that Plaintiff had violated the agency's rules. Regardless of the veracity of Defendant's statements, Plaintiff can only defeat Defendant's conditional privilege by demonstrating malice on the part of Defendant. See *Lent*, 143 Vt. at 549. The court finds no malice in this case, and therefore, Plaintiff's defamation claim cannot be sustained.

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JAN 28 2010

Furthermore, to prevail on a defamation claim, Plaintiff must prove some actual harm. However, Mr. Becker's evidence was insufficient to establish this last element of a defamation claim. Accordingly, judgment is for Defendant on Plaintiff's defamation claim.

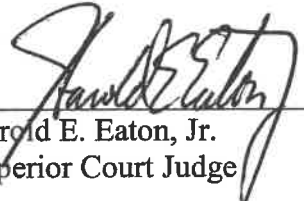
B. Defendant's breach of contract claim against Plaintiff

In Defendant's counterclaim, he alleged that he suffered damages as a result of Plaintiff's delay in closing the loan. The initial agreement between the parties called for a loan with a 4.75% interest rate and a lock-in date of May 27, 2009. When the parties were unable to close on the first loan, the parties entered into a second loan agreement with a 5.25% interest rate and a lock-in date of June 26, 2009. The consummation of the second loan agreement discharged Plaintiff's duty under the first agreement and precludes Defendant from suing under the first agreement. "[W]here there is a covenant to perform a certain thing at a certain time, if performance of another thing, or performance at a different time, be accepted in lieu of the other, it is an answer to an action for the non-performance of the thing stipulated." *Porter v. Stewart*, 2 Aik. 417, 427, 1828 WL 582 (Vt. 1828); see also Restatement (Second) Contracts § 278(1) (1981) ("If an obligee accepts in satisfaction of the obligor's duty a performance offered by the obligor that differs from what is due, the duty is discharged."). Accordingly, judgment is for Plaintiff on Defendant's breach of contract claim.

ORDER

Judgment is for Defendant on Plaintiff's defamation claim, and judgment is for Plaintiff on Defendant's breach of contract counterclaim.

Dated at Woodstock, Vermont this 28 day of January 2010.

  
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Harold E. Eaton, Jr.  
Superior Court Judge

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STATE OF VERMONT  
WINDSOR COUNTY, SS

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Plaintiff

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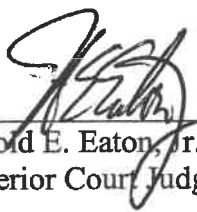
Richard Corum  
Defendant

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JUDGMENT

Based upon the Order of even date, judgment is hereby entered for Defendant on Plaintiff's claims and for Plaintiff on Defendant's counterclaim.

Dated at Woodstock this 28th day of January, 2010.

  
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Harold E. Eaton, Jr.  
Superior Court Judge

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