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VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 261-5-12 Wrcv

J.D. Farrow Associates, LLC, et al.
Plaintiff

v.

Ledyard National Bank, Daniel Emanuele, and Miller & Candon, LLC
Defendants

DECISION ON MOTION TO DISMISS

Defendants Ledyard National Bank (LNB) and Emanuele have filed a motion to dismiss the amended complaint against them alleging consumer fraud, negligent misrepresentation, fraudulent inducement to contract, breach of contract, and breach of the covenant of good faith and fair dealing.

This suit arises out of damage occasioned by Tropical Storm Irene, which resulted in flood damage to the West Hartford General Store, which had been purchased by J.D. Farrow Associates in June 2010. The purchase was financed through a loan with LNB, which is secured by a mortgage on the subject premises. Mr. Emanuele is a loan officer with LNB who handled this transaction.

Plaintiffs assert that LNB, through Mr. Emanuele, falsely told J.D. Associates that they "did not need" flood insurance on the subject premises and that as a result, J.D. Associates did not purchase any flood insurance. Plaintiffs assert that flood insurance was needed and Plaintiffs further allege that LNB breached the mortgage contract, and the covenant of good faith and fair dealing, by wrongly instructing Plaintiffs they did not need flood insurance.[1]

LNB and Emanuele claim the Plaintiffs' complaint is not well-pleaded, as the documents referenced in the complaint do not say what Plaintiff's allege they say. Specifically, they have produced the mortgage documents, flood hazard determination, and notice of flood insurance which were part of the closing on this loan.

[1] For purposes of this motion, the Court has considered "needed" and "required" as being interchangeable in the context of Plaintiffs' allegations about flood insurance. Whether a claim would be stated if there was no dispute that flood insurance was not required has not been considered as it appears outside the Plaintiffs' claim for relief. In other words, Plaintiffs' complaint is taken as based upon the premise that the property was, in fact, within the special flood zone and therefore flood insurance was required to be purchased rather than merely available for purchase. Such being the case, the allegations about the impact of the representations on the "decision" not to buy flood insurance are curious(see ¶ 19). If the insurance was required, there was no decision to make about purchasing it.

Defendants' motion to dismiss is premised upon the fact that the documents referenced in Plaintiffs' complaint do not support their allegations. Therefore, Defendants argue, the complaint is not "well-pleaded" and is subject to dismissal.

Vermont is a notice pleading state, requiring that a complaint only be stated with sufficient specificity to put the defendant(s) on fair notice of the claim and the ground upon which it rests. *Lane v. Town of Grafton*, 166 Vt. 148 (1997). Here, the Plaintiffs assert that the documents prepared and presented at closing were not accurate and negligently prepared, and that the information relayed by Emaneule was likewise not accurate and negligently made.

Defendants are correct that the Court may consider documents referenced in the complaint and attached here by the Defendants if the Plaintiffs' claim is based in whole or in part on the documents. *Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 10 n.4, 186 Vt. 605 (mem.). However, Plaintiffs' claim does not depend upon the accuracy of the documents: plaintiffs rather claim specifically that the representations in the documents regarding flood insurance were inaccurate. In other words, Plaintiffs allege that if Defendants had done their job properly, flood insurance would have been required, and the documents would have been read differently. For this reason, Plaintiffs' allegations regarding the accuracy of the document are fairly considered on the motion to dismiss.

The factual merit of Plaintiffs' claims is not at issue on a motion to dismiss for failure to state a claim. Motions to dismiss are not favored, and are rarely granted. *Gilman v. Maine Mutual Fire Ins. Co.*, 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.). The purpose of a motion to dismiss is to test the law of the case, not the facts which underlie the complaint. *Kane v. Lamothe*, 2007 VT 91, ¶ 14, 182 Vt. 241. In considering a motion to dismiss, the court assumes all factual allegations in the complaint to be true and gives the benefit of all reasonable inferences to the non-moving party. *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). A motion to dismiss should not be granted unless it is beyond doubt that there exist no facts or circumstances which would entitle the plaintiff to relief. *Powers v. Office of Child Support*, 173 Vt. 390 (2002); *Assoc. of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446–47 (1985).

The Court can not conclude at the early stages of this matter that the Plaintiffs have pled no set of facts or circumstances that would entitle them to relief. Given the exacting standard applied to motions to dismiss for failure to state a claim, the motion must be denied.

ORDER

The motion to dismiss by LNB and Emanuele is DENIED.

Dated at Woodstock this 13th day of September, 2012.

Harold E. Eaton, Jr.
Civil Division Judge

FILED

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