

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

IVAN EICHER, et al,	)	DOC. 1004 NO. 521
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER
	)	
MID AMERICA FINANCIAL	)	
INVESTMENT CORPORATION, et al,	)	
	)	
Defendants.	)	

THIS MATTER CAME ON FOR TRIAL on May 15<sup>th</sup> through May 23, 2002, and June 17<sup>th</sup> through June 28, 2002. Plaintiffs were represented by Mark C. Laughlin and Andrea F. Scioli, of Frasier, Stryker, Meusey, Olsen, Boyer and Bloch, P.C.; Milo Mungaard and Robert Sandford of the Nebraska Appleseed Center; and Catherine Mayhern of the Creighton Legal Clinic. Defendants were represented by Betty Egan and Mark Weber of Wallentine, of O'Toole, McQuillan & Gordon. Evidence was adduced, arguments received, and briefs were subsequently submitted by both parties. This Court being fully advised in the premises hereby sets forth its findings and order.

**BACKGROUND**

The basis of the lawsuit as alleged by the Plaintiffs is that the Defendants fraudulently induced the Plaintiffs to sell their houses to the Defendant, Mid America Financial Investment Corporation (hereinafter referred to as Mid America). Each Plaintiff contends that his or her transaction with Mid America was a loan, whereas Mid America contends that it was a sale. Plaintiffs were a part of Mid America's "Loan Assistance Program" in which a homeowner would be in arrearage on their home mortgage loan, the foreclosure sale was imminent, time was of the essence, and Mid America would agree to pay the amount required by the mortgage company to stop the foreclosure and reinstate the mortgage. In return, Mid America would own the house and become the landlord, the homeowner would now be the tenant, and would pay rent to stay in the house. The homeowner would usually have the "right of first refusal" to purchase the house from Mid America if the homeowner had been timely in all monthly payments, and the house was for sale.

Defendants assert that they were assisting the Plaintiffs in being able to stay in their house and repurchase their house in the future. According to the Defendants, if it wouldn't have been for Mid America, the foreclosure would have gone through and each of the Plaintiffs would have been foreclosed and would have received nothing from the foreclosure.

Plaintiffs contend that they believed that they were merely entering into a loan agreement as promised and represented by the Defendants and all they had to do was payoff the loan amount plus interest. They further contend that they were never told that this was a sale, as the only representations made to them were as a loan.

Plaintiffs sued under the theories of fraud, unjust enrichment, and the Nebraska Consumer Protection Act. Defendants deny these allegations and state that the transactions were quite simple and straight forward, that they explained in detail the transaction to each of the Plaintiffs, and that each Plaintiffs freely, voluntarily, and knowingly entered into their respective transaction.

During the trial, Plaintiffs attorneys moved to dismiss the action of Plaintiff, Jerry Gills, as Gills did not appear for the trial. This motion was sustained.

Prior to trial, Defendants moved for Partial Summary Judgment as to the Plaintiff, William Street. The basis of the Defendant's motion for Partial Summary Judgment was that Mr. Street had filed bankruptcy and the same facts were litigated in the bankruptcy court as were alleged in Mr. Street's Petition in this matter. As such, it was Defendant's contention that Street should be precluded from pursuing this matter due to the legal doctrines of issues of collateral estoppel and res judicata. That motion is sustained as the facts and issues litigated in the bankruptcy court are identical to the facts and issues of this case. As such, Mr. Street's action is dismissed.

As to the remaining Plaintiffs: Ivan Eicher and Delores Eicher, Patrick Sweeney and Lois Sweeney, Emmett Gulley, Steven W. Starman, Renee Righter, Jennifer Frans Griess, and Don Novachich, the Court finds in their favor due to the fraudulent actions by the Defendants, and hereby rescinds the transactions involved in these matters. The following sets for the specific findings and damages awarded to each of these Plaintiffs. The Court finds that David Welton proved all elements of fraud and a violation of the Nebraska *Consumer Protection Act*, except that he failed to prove he was damaged.

In order to maintain an action for fraud in this matter, each Plaintiff must prove as follows: that a representation was made to him or her by the Defendants, that the representation was false, that the representation was known to be false when made, that the representation was made with the intention that the Plaintiff would rely upon it, that the Plaintiff did reasonably rely upon it, and that the Plaintiff suffered damages as a result. This basis for fraud is well set forth in the Nebraska case of *Grone v. Lincoln Mutual Life Insurance Company*, 230 Neb. 144, 430 N.W.2d 507 (1988).

### SPECIFIC FINDINGS OF FACT

The Court finds that each of these conditions for fraud was proved by each of the Plaintiffs against the Defendants with the exception that Plaintiff Welton proved all allegations except as to the damage element. The Court further finds that the Defendants were involved in a civil conspiracy to defraud each of the Plaintiffs and that as a result the Defendants are jointly and severally liable to each of the Plaintiffs as set forth herein. The Court also finds that the Defendants violated the Nebraska Consumer Protection Act as to each of the Plaintiffs that are awarded damages herein.

The Court further finds that the testimony of each of the Plaintiffs was credible and the Court relied upon their testimony. The Court further finds that the testimonies of the Defendants, Scott W. Bloemer and Alayna Hollingshead were not credible. The Court accepted the testimony of the Plaintiffs and did not accept the testimony of the Defendants in factual matters that were at issue.

The Court further finds that each of the Plaintiffs was fraudulently induced to signing the documents which were represented by the Defendants as loans, that the Defendants knew that these representations were false, that they knew that these representations were false when they were made, that the Defendants made these representations with the intention of each of the Plaintiffs relying upon them, that each of the Plaintiffs did rely upon these representations and that each of the Plaintiff suffered damages as a result. The Court further finds that the actions of the Defendants were in violation of the Nebraska Consumer Protection Act.

That the Court further finds that in each of the transactions involved in this matter where the Plaintiff still has possession of the residence, the conveyances are hereby rescinded and the property is hereby conveyed to that Plaintiff by this order along with

additional damages. To those Plaintiffs that are no longer in possession of their residence in question, damages are awarded as set forth herein.

### **DAMAGES**

In awarding damages, the Court attempted to place the parties in their original position prior to the transaction. In some cases this means returning the property to the Plaintiff from the Defendants and giving the Defendants credit for those amounts, which they proved benefited that Plaintiff.

### **DAMAGES AWARDED TO IVAN EICHER AND DELORES EICHER**

This property is located at 6956 Florence Boulevard, Omaha, Douglas County, Nebraska with a legal description of Lot 1 and Lot 2, Parkwood Addition, an Addition to the City of Omaha.

The following is the relevant information in this matter:

- a. Date of transaction: July 7, 1998;
- b. Amount to reinstate to prevent foreclosure: \$4,700.00;
- c. Mortgage balance: \$37,000.00;
- d. Fair market value of house: \$74,000.00;
- e. Monthly mortgage payment to mortgage company: \$554.01;
- f. Total amount paid by Plaintiff to Mid America: \$25,246.47;
- g. Total amount paid by Mid America to mortgage company, which includes re-instatement fee: \$21,644.36;
- h. Insurance proceeds paid to Mid America that were not used on the residence of this Plaintiff: \$1,088.00;
- i. Amount owed by Defendants to these Plaintiffs: \$1,690.11.

It should be noted with regard to the Eichers that the total amount to reinstate the mortgage was \$4,700.00. Of this \$4,700.00, Plaintiffs paid \$3,000.00 to Mid America. Thus, Defendants attempted to purchase the house valued at \$74,000.00 with an approximate \$37,000.00 mortgage balance for \$1,700.00.

Mid America is ordered to remove any and all liens or other encumbrances of any kind placed on the Eicher property after July 7, 1998.

The property herein is hereby conveyed to Ivan Eicher and Delores Eicher, and judgment is hereby entered in favor of Ivan Eicher and Delores Eicher against each of the Defendants, jointly and severally in the amount of \$1,690.11.

**DAMAGES AWARDED TO PATRICK AND LOIS SWEENEY**

This property is located at 4523 Crown Point Avenue, Omaha, Douglas County, Nebraska with a legal description of Lot 62, Laurel Park, an Addition to the City of Omaha.

The following is the relevant information in this matter:

- a. Date of transaction: September 25, 1997;
- b. Amount to reinstate to prevent foreclosure: \$2,500.00;
- c. Mortgage balance: \$4,500.00;
- d. Fair market value of house: \$40,000.00;
- e. Monthly mortgage payment to mortgage company: \$150.00;
- f. Total amount paid by Plaintiff to Mid America: \$22,863.00;
- g. Total amount paid by Mid America to mortgage company, which includes re-instatement fee: \$4,500.00;
- h. Amount owed by Defendants to these Plaintiffs: \$18,363.00

Mid America is ordered to remove any and all liens or other encumbrances of any kind placed on the Sweeney property after September 25, 1997.

The property herein is hereby conveyed to Patrick Sweeney and Lois Sweeney, and judgment is hereby entered in favor of Patrick Sweeney and Lois Sweeney against each of the Defendants, jointly and severally in the amount of \$18,363.00.

**DAMAGES AWARDED TO EMMETT GULLEY**

The following is the relevant information in this matter.

- a. Date of transaction: January 17, 1998;
- b. Amount to reinstate to prevent foreclosure: \$3,000.00;
- c. Mortgage balance: \$8,000.00;
- d. Sale price of house by Defendant: \$73,000.00;
- e. Monthly mortgage payment to mortgage company: \$250.00;

- f. Total amount paid by Plaintiff to Mid America: \$5,895.00;
- g. Total amount paid by Mid America to mortgage company, which includes re-instatement fee: \$6,400.00;
- h. Amount owed by Defendants to this Plaintiff: \$64,645.00.

It should be noted in the Gulley matter, Defendants advised Plaintiff if he would pay \$2,000.00 they would stop the eviction of Plaintiff's ex-wife and son. Plaintiff paid the \$2,000.00; however, Defendant Hollinghead advised that this \$2,000.00 was going to be applied to Plaintiff's ex-wife's car delinquency. The Court regards the \$2,000.00 as payment for the house in question.

Judgment is hereby entered in favor of Emmett Gulley against each of the Defendants, jointly and severally in the amount of \$64,645.00.

#### **DAMAGES AWARDED TO STEVEN W. STARMAN**

This property located at 3206 North 76<sup>th</sup> Street, Omaha, Douglas County, Nebraska, with a legal description of the N 60 Feet of the S 100 Feet of Lot 1 and 2, Block 78, Benson, an addition to the City of Omaha.

The following is the relevant information in this matter.

- a. Date of transaction: March 31, 1998;
- b. Amount to reinstate to prevent foreclosure: \$7,600.00;
- c. Mortgage balance: \$62,500.00;
- d. Fair market value of house: \$85,000.00;
- e. Monthly mortgage payment to mortgage company: \$740.00;
- f. Total amount paid by Plaintiff to Mid America: \$41,983.00;
- g. Total amount paid by Mid America to mortgage company, which includes re-instatement fee: \$37,940.00;
- h. Insurance proceeds paid to Mid America that were not used on the residence of this Plaintiff: \$1,604.00;
- i. Amount owed by Defendants to this Plaintiff: \$5,647.00.

Mid America is ordered to remove any and all liens or other encumbrances of any kind placed on the Starman property after March 31, 1998.

The property herein is hereby conveyed to Steven W. Starman, and judgment is entered in favor of Steven W. Starman against each of the Defendants, jointly and severally, in the amount of \$5,647.00.

#### **DAVID WELTON**

Although the Court finds that David Welton entered into the transaction by fraud of the Defendants, the Court finds that Mr. Welton did not incur any damages by the fraudulent actions of the Defendants. After the mortgage foreclosure was stopped by Mid America in April of 1999 for approximately \$2,000.00, Plaintiff resided in the residence and paid Defendant approximately \$500.00 per month. In March of 2001, Plaintiff moved out of this residence and moved into the residence of his mother. Soon thereafter, Plaintiff quit making payments to Mid America and then Mid America quit making the mortgage payments to the mortgage company, WMC of California. The mortgage company then proceeded with foreclosure. The Plaintiff was notified of the foreclosure and the foreclosure sale was completed by the mortgage company. The Plaintiff had a number of personal property in the residence at the time of the foreclosure, which he did not recover. Any responsibility for that property would not have been with Defendants. As such, Plaintiff incurred no damages in this matter and judgment is not awarded to him as a result of the fraudulent actions of the Defendants.

#### **DAMAGES AWARDED TO DON NOVACHICH**

The following is the relevant information in this matter.

- a. Date of Transaction: June 7, 2000;
- b. Amount to reinstate mortgage to prevent foreclosure: \$3,820.00;
- c. Amount of mortgage balance: \$16,700.00;
- d. Amount house was sold by Defendant: \$35,000.00;
- e. Monthly payment to Mortgage Company: \$212.00;
- f. Total amount paid by the Plaintiff to Mid America: \$0;
- g. Total amount paid by Mid America to mortgage company: \$5,117.67;
- h. Total amount Mid America paid to Plaintiff: \$702.36;

- i. Personal property lost by Plaintiff due to the removal of Plaintiff from his residence by the Defendant: \$3,492.00;
- j. Amount owed by the Defendants to Plaintiff: \$16,389.97.

In this particular case, although Plaintiff may not have been part of the Defendant's Mortgage Assistance Program, he was a victim of fraud by the Defendants. Plaintiff could not read and many times discussions by the Defendants with the Plaintiff were in the bar and when Plaintiff had been drinking and possibly intoxicated. Defendants promised Plaintiff he would have six months free rent, however, the Defendants evicted him after 5 1/8 months. This was also a breach of the contract. After Plaintiff was evicted, the house was sold for \$35,000.00 and deducted from that amount is the amount Defendant's paid Plaintiff of \$702.36, the reinstated amount of \$3,820.03, mortgage payments of six months to the mortgage company of \$1,297.64, and the mortgage balance of \$16,700.00. This results in a profit of \$12,897.87. This added to the property lost of \$3,492.00 results in the damages awarded of \$16,389.97.

Judgment is hereby entered in favor of this Plaintiff against the Defendants, jointly and severally, in the amount of \$16,389.97.

#### **DAMAGES AWARDED TO RENEE RIGHTER**

The Righter property is located at 8923 Valley Street, Omaha, Douglas County, Nebraska, with a legal description of Lot 122, Westridge Addition, an Addition to the City of Omah.

The following is the relevant information in this matter:

- a. Date of transaction: May 30, 2000;
- b. Amount to reinstate mortgage from foreclosure: \$7173.34;
- c. Fair market value of house: \$90,000.00;
- d. Monthly mortgage payment to mortgage company: \$673.00;
- e. Total amounts paid Plaintiff to Mid America: \$14,768.76;
- f. Total amounts paid Mid America to mortgage company, which includes reinstatement fee: \$16,595.3;
- g. Amount owed by Plaintiff to Mid America: \$1,826.58.

In determining the amounts owed in this matter, the Court calculated the payments made by Mid America from June, 2000 through July, 2001, which was 14 weeks multiplied by the monthly mortgage payment of \$673.00. This resulted in a total amount of \$9,422.00. This was added to the reinstatement amount of \$7,173.34, which resulted in a total amount paid by Mid America to the mortgage company of \$16,595.34. Evidence was that Ms. Righter began paying her mortgage company directly on November 1, 2001, and that Mid America had not paid the mortgage for the months of August, September and October of 2001.

The property herein is hereby conveyed to Renee Righter.

Mid America is hereby ordered to remove any and all liens or other encumbrances of any kind placed on the Righter Property after May 3, 2000.

The amount owed by Renee Righter to Mid America is \$1,826.58.

#### **DAMAGES AWARDED TO LORI HILL**

The following is the relevant information in this matter.

- a. Date of transaction: January 5, 2000;
- b. Amount to reinstate mortgage from foreclosure: \$4,307.04;
- c. Amount of mortgage balance: \$29,659.84;
- d. Sale price of house by Mid America: \$77,000.00;
- e. Monthly mortgage payment to mortgage company: \$225.00;
- f. Total amounts paid by Plaintiff to Mid America: \$839.72;
- g. Total amounts paid by Mid America to mortgage company, which includes the reinstatement fee: \$33,966.88;
- h. Amount owed by Defendants to Plaintiff: \$43,873.00;
- i. Personal property lost by Plaintiff due to Plaintiff's removal from her residence by Defendants: \$5,000.00.

This transaction took place on January 5, 2000, and the Plaintiff evicted in March of 2000 even though the Plaintiff had the amount of money as required by Mid America to stay in the property. Mid America would not accept that amount. Mid America sold the property for \$77,000.00 and there was evidence that the rehab and holding charges were \$37,646. The Court did not accept this evidence, as there was no specific evidence

as to what the rehab charges were or what the holding charges were. The Plaintiff testified that she quit paying Mid America because her mortgage company, WMC, advised her that the mortgage payments were not being made. Plaintiff contacted Defendant regarding this nonpayment, and no one got back to her.

Judgment is hereby entered in favor of Plaintiff against the Defendants, jointly and severally, in the amount of \$48,873.00.

#### **DAMAGES AWARDED TO JENNIFER FRANS GRIESS**

This property is located at 4509 South 40<sup>th</sup> Street, Omaha, Douglas County, Nebraska and 4509½ South 40<sup>th</sup> Street, Omaha, Douglas County, Nebraska, with a legal description of South 44 feet of Lot 2, Block 3, First Addition to Mount Douglas, an Addition to the City of Omaha.

The following is the relevant information in this matter:

- a. Date of transaction: May 12, 2000;
- b. Amount to reinstate mortgage from foreclosure: \$7,179.00;
- c. Amount of mortgage balance: \$51,000;
- d. Fair market value of house: \$77,000.00;
- e. Monthly mortgage payment to mortgage company: \$585.00;
- f. Total amounts paid by Plaintiff to Mid America: \$16,380.00;
- g. Total amounts paid by Mid America to mortgage company, which includes reinstate fee: \$16,539;
- h. Insurance proceeds paid to Mid America that were not used on this residence: \$13,942.00;
- i. Amount owed by Defendants to Plaintiff: \$13,783.00.

The Court calculated the payments made by Mid America to the mortgage company by finding that the payments were made from June 2000 through September 2001. This totaled \$9,360.00 plus the reinstate fee of \$7,179.00, which resulted in a total amount of paid of \$16,539.00.

Mid America is hereby ordered to remove any and all liens or other encumbrances of any kind placed on the Griess Property after May 12, 2000.

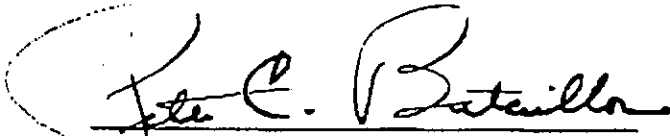
The property herein is hereby conveyed to Jennifer Frans Griess, and judgment is entered in favor of Jennifer Frans Griess against the Defendants, jointly and severally, in the amount of \$13,783.00.

Each of the Plaintiffs that were awarded judgment herein shall recover their costs in this action. The Court also finds that these Plaintiffs that are awarded judgments were also injured pursuant to the Nebraska *Consumer Protection Act*. Damages are awarded under the act in the form of attorney fees and these fees shall remain open and shall be set for hearing on the afternoon of June 13, 2003, commencing at 1:30 p.m., at which time the Plaintiff may present evidence as to attorney fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the judgments and damages as set forth above are hereby granted. Plaintiffs are awarded their costs in this matter and as to the judgment under the Nebraska *Consumer Protection Act*, the issue of Plaintiffs' attorney fees is set for further hearing on the afternoon of June 13, 2003, commencing at 1:30 p.m..

Dated this 28<sup>th</sup> of April, 2003.

BY THE COURT:

  
Peter C. Bataillon