IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROBERT E. BROWN and SHIRLEY H. BROWN,	)	
Plaintiffs,	)	
v.	)	Civ. No. 04-617-SLR
INTERBAY FUNDING, LLC, and LAGRECA & QUINN REAL ESTATE SERVICES, INC.,	)	
Defendants.	)	

Robert E. Brown and Shirley H. Brown, Wilmington, Delaware. Pro Se.

David L. Finger, Esquire of Finger & Slanina, Wilmington, Delaware. Counsel for Defendant Interbay Funding, LLC. Of Counsel: David M. Souders and Sandra L. Brickel of Weiner Brodsky Sidman Kider, Washington, D.C.

Carol J. Antoff, Esquire of Reger & Rizzo, Wilmington, Delaware. Counsel for Defendant Lagreca & Quinn Real Estate Services, Inc.

MEMORANDUM OPINION

Dated: November 8, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On June 28, 2004, plaintiffs Robert E. Brown and Shirley H. Brown filed this action against defendants Interbay Funding, LLC ("Interbay") and Lagreca & Quinn Real Estate Services ("Lagreca & Quinn") alleging discrimination in violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § § 1691 et seq., and the Fair Housing Act, 42 U.S.C. § § 3601 et seq.; negligence; fraud; violations of the Federal Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § § 3331 et seq.; and violations of the Uniform Appraisal Standards of Professional Appraisal Practice. (D.I. 1) Pending before the court are plaintiffs' motion for sanctions under Federal Rule of Civil Procedure 11 (D.I. 22) and Interbay's motion to dismiss. (D.I. 8) For the following reasons, the court denies plaintiffs motion for sanctions and grants Interbay's motion to dismiss.

II. BACKGROUND

On March 11, 2004, plaintiffs contracted to purchase three parcels of property located at 2617-2619-2625 Market Street, Wilmington, Delaware ("property"). (D.I. 1) One parcel contains a two-story, semi-detached commercial building; the other two are paved parking lots. (D.I. 11 at Ex. A) The building is a dwelling, built in 1915, that has been converted into a beauty salon. Id. Plaintiffs intended to use the commercial property to expand their restaurant business. (D.I. 9 at 4)

Plaintiffs applied for a mortgage loan through Janet Madrick, a broker for Sunset Mortgage Company. Id. A loan application was then submitted to Interbay, the mortgage lender. Id. Interbay approved the loan application subject to an appraisal of the property, to assure that there was sufficient collateral for the loan. Id. Interbay contracted with Lagreca & Quinn to perform the appraisal. Id. at Ex. A. The agreement required plaintiffs to pay $2,500 for the appraisal.

Based on other properties within the same zip code, plaintiffs expected the property to be valued "around the $200,000 range." (D.I. 1 at 3) Lagreca & Quinn valued the property at $140,000. (D.I. 9 at Ex. A) After the appraisal, Interbay adjusted plaintiffs' mortgage, agreeing to finance 65% of the purchase price instead of 80% and requiring plaintiffs to make a down payment of 35% of the purchase price instead of 20%. (D.I. 9 at 5)

After finding out that the terms of the mortgage had changed, plaintiffs had their bank rescind the $2,500 that had been transferred to Lagreca & Quinn because they disputed the accuracy of the appraisal.[1] (D.I. 1 at 4) Plaintiffs alleged that Lagreca & Quinn only appraised one of the lots and compared

[1]There is a dispute regarding when plaintiffs actually received a copy of the appraisal. Plaintiffs allege Interbay refused to provide them a copy upon request, but Interbay insists they received one.

the property to those outside the appropriate area. (D.I. 11 at 8, D.I. 9 at 5) Initially, Interbay agreed to have all three parcels reappraised based on plaintiffs' arguments, but later informed plaintiffs that the original appraisal had taken the two paved lots into consideration. The appraisal considered paved parking lots as utility added to the parcel with the commercial building. (D.I. 9, Ex. A at 18) Because none of the lots used for comparison had on-site parking, Lagreca & Quinn assigned a higher value to the parcel with the commercial building, as opposed to valuing the two paved lots independently.[2] Id.

III. PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS

Federal Rule of Civil Procedure 11 allows a court to sanction a party or attorneys under limited circumstances. A court can award sanctions if a party or attorney has presented a motion for an "improper purpose," the claims or defenses put forth in a motion are frivolous, the claims in a motion are not likely to be supported by the evidence after investigation, or a party wrongfully denies a factual allegation. See Fed. R. Civ. P. 11(b) (2004).

Plaintiffs allege defendants wrongfully denied factual allegations in their answer because defendants denied discriminating against them. (D.I. 22 at 5) A finding that

[2]The result was a value based on 1,875 square feet, the size of the parcel with the building, as opposed to 6,980 square feet, the size of all three parcels.

defendants wrongfully denied plaintiffs' allegations in their answer would require the court to first find that defendants discriminated against plaintiffs. Thus far, defendants have alleged a sufficient factual basis for denying plaintiffs' allegations; therefore, defendants did not necessarily misrepresent the issue to the court when they denied plaintiffs' allegations.

Plaintiffs also allege defendants misrepresented a document to this court because they failed to include a page of the document. (D.I. 22 at 2) The allegedly omitted page is a page of a fax sent by Interbay to plaintiffs to explain the appraisal. (Id. at Ex. 2) It is not a page of the appraisal. There is no evidence of bad faith on the part of the defendants. Therefore, the court declines to sanction defendants or their attorneys for the alleged omission.

IV. INTERBAY'S MOTION TO DISMISS

Interbay claims that plaintiffs failed to assert a cause of action against it because plaintiffs do not allege that Interbay performed the discriminatory appraisal. Plaintiffs argue that Interbay is responsible for Lagreca & Quinn's discrimination based on principles of agency.

A. Standard of Review

Because the parties have referred to matters outside the pleadings, Interbay's motion to dismiss shall be treated as a motion for summary judgment.[3] See Fed. R. Civ. P. 12(b)(6). A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and

[3]Interbay included both a copy of the appraisal and its engagement letter to Lagreca & Quinn among its papers.

all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

B. Interbay's Reliance on the Appraisal

The ECOA prohibits discrimination by a creditor "against any applicant, with respect to any aspect of a credit transaction . . . based on race . . . ." 15 U.S.C. § 1691 (a). Likewise, the FHA provides:

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a). Federal rules prohibit lenders from relying on an appraisal that they know, or should know, is discriminatory

in violation of the FHA or the ECOA. See 12 C.F.R. § 528.2a (2004).

The court is not prepared to decide on the record presently before it whether the appraisal was discriminatory and, if so, whether Interbay knew or should have known that the appraisal was discriminatory. For example, the court has no evidence relating to valuation, i.e., whether valuing the single parcel with the building and the utility of on-site parking (instead of all three parcels individually) was appropriate. As such, the court denies Interbay's motion for summary judgment without prejudice to renew at the completion of discovery upon a more developed factual record.

C. Interbay's Relationship with Lagreca & Quinn

Plaintiffs claim that Interbay is liable for the discriminatory appraisal because Lagreca & Quinn was acting as its agent. Agency relationships require the agreement that one party will act on behalf of another and the "understanding that the principal is to be in control . . . ." See Restatement (Second) of Agency § 1 cmt. b (1958). "It is the element of continuous subjection to the will of the principal which distinguishes the . . . agency agreement from other agreements." Id. Without this level of control, an entity who contracts to perform a service for another is merely an independent contractor. See id. at § 2.

Interbay contracted with Lagreca & Quinn to provide an "independent appraisal" report. (D.I. 19 at Ex. 2) In the letter dated March 30, 2004, Lagreca & Quinn indicated it was submitting the appraisal on the property at issue "[i]n fulfillment of [its] agreement as outlined in the Letter of Engagement." (D.I. 11 at Ex. A) Interbay was not entitled to use the appraisal for any use other than that specified in the agreement. Id. Although the agreement placed certain requirements on the appraisal, Interbay was not in control of the process. Lagreca & Quinn used its own tools and employees to appraise the property. In addition, Interbay was not responsible for paying Lagreca & Quinn for the appraisal, as plaintiffs paid for it. The court concludes that Lagreca & Quinn was acting as an independent contractor because its conduct was not controlled by Interbay. Because there is no agency relationship, Interbay is not liable for any alleged discrimination by Lagreca & Quinn.

V. CONCLUSION

Plaintiffs' motion for Rule 11 sanctions is denied. Interbay's motion to dismiss is granted in part and denied in part. Interbay's motion is granted with respect to plaintiffs' claims that it is liable for Lagreca & Quinn's appraisal because of an agency relationship. Interbay's motion is denied with respect to plaintiffs' claim that it relied on a discriminatory

appraisal in violation of 12 C.F.R. § 528.2a. An order consistent with this memorandum opinion shall issue.