

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

William W. Hilleshiem and Judy
J. Hilleshiem,

Plaintiffs,

vs.

Source Lending Corporation, and
Bank United, FSB,

Defendants.

**ORDER GRANTING SUMMARY
JUDGMENT AND THE AWARD
OF REASONABLE ATTORNEY
FEES AND COSTS**

Court File No. 27-CV- 08-7612

The above-entitled matter came on before the Honorable Marilyn Brown Rosenbaum on January 7, 2009, for hearing on Plaintiffs' Motion for Summary Judgment as against Defendant Source Lending Corporation, and to Dismiss Counts V, VI, and VII as against Defendant Source Lending Corporation.

Jane N. Bowman, Esq., appeared on behalf of Plaintiffs.

There was no appearance on behalf of Defendant Source Lending Corporation.

There was no appearance on behalf of Defendant Bank United, FSB.

Based upon the files, records and proceedings herein, and being fully informed in the premises, the Court makes the following:

ORDER

1. Plaintiffs' Motion for Summary Judgment as to Defendant Source Lending Corporation is granted. There exist no genuine issues of material fact and Plaintiffs are entitled to judgment as a matter of law as to Counts II through IV of Plaintiffs' First Amended Complaint.

2. Defendant Source Lending Corporation specifically violated Minn. Stat. § 53.13, subd. 1(24) in October 2007, and is liable to Plaintiffs in the amount of \$52,400.39.

3. Defendant Source Lending Corporation specifically violated Minn. Stat. § 53.13, subd. 1(25) in October 2007, and is liable to Plaintiffs in the amount of \$52,400.39.

4. Defendant Source Lending Corporation violated the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1, and is liable to Plaintiffs in the amount of \$42,300.00.

5. Pursuant to Minn. Stat. § 58.18, subd. 1(4) and the Order dated September 8, 2008, Plaintiffs shall be awarded reasonable attorney fees and costs in the amount of \$14,600.00.

6. Plaintiffs' letter dated January 7, 2009 shall be treated as a Motion to Voluntarily Dismiss Counts V, VI, and VII as against Defendant Source Lending Corporation only, and this Motion is granted.


7. The attached Memorandum is incorporated herein.

ORDER FOR JUDGMENT

Plaintiffs William W. Hilleshiem and Judy J. Hilleshiem shall recover against Defendant Source Lending Corporation, the amount of \$147,100.78, plus \$14,600.00 as reasonable attorney fees and costs.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: January 7, 2009


The Honorable Marilyn Brown Rosenbaum
Judge of District Court

MEMORANDUM

PROCEDURAL HISTORY

Plaintiffs William W. Hilleshiem and Judy J. Hilleshiem filed this lawsuit against Source Lending Corporation (“Source Lending”) and Bank United, FSB (“Bank United”), seeking damages and other relief arising from Defendants’ predatory lending practices.

Plaintiffs’ First Amended Complaint alleges: Count I – Originating a Mortgage Loan with Points and Fees in Excess of 5%, Minn. Stat. § 58.137, subd. 1 as against Source Lending; Count II – Failure to Verify Homeowners’ Ability to Pay, Minn. Stat. § 58.13, subd. 1(24) as against Source Lending; Count III – Churning, Minn. Stat. § 58.13, subd. 1(25) as against Source Lending; Count IV – Violation of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1 as against Source Lending; Count V – Declaratory Judgment, Avoidance of Contract, Illegal Contract as against Source Lending and Bank United; Count VI – Declaratory Judgment, Avoidance of Contract, Economic Duress as against Source Lending and Bank United; and Count VII – Declaratory Judgment, Avoidance of Contract, Fraud as against Source Lending and Bank United.

Pursuant to Minn. R. Civ. P. 68.01(c), Source Lending served Plaintiffs with a damages-only Offer of Judgment as to Count I, in the amount of \$11,187.03, which Plaintiffs accepted on July 25, 2008. On September 8, 2008, the Court awarded Plaintiffs reasonable attorney fees as to Count I in the amount of \$3,403.00. Subsequently, Defendant Source Lending’s counsel withdrew from representation. A corporation must be represented by an attorney pursuant to Minn. Stat. § 491A.02. *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992). Source Lending has failed to appear with attorney representation.

Source Lending has failed to respond to Plaintiffs’ Second Set of Requests for Admissions, as required by Minn. R. Civ. P. 36.01. Plaintiffs now move for summary judgment as to the remaining Counts II through IV against Defendant Source Lending. Source Lending has failed to respond to Plaintiffs’ Motion for summary judgment by filing submissions as required by Minn. R. Civ. P. 56.05 and Minn. Gen. R. Prac. 115.03.

STATEMENT OF UNDISPUTED FACTS

The Memorandum in Support of Plaintiffs' Motion for Summary Judgment provides a recitation of undisputed material facts based upon, the Affidavit of Jane N. Bowman and Plaintiffs' Second Set of Requests for Admissions. Source Lending has failed to answer Plaintiffs' Second Set of Request for Admissions, and the admissions are deemed admitted pursuant to Minn. R. Civ. P. 36.01. The additional facts presented in the argument sections of the Memorandum in Support of Plaintiffs' Motion for Summary Judgment are incorporated herein and will not be repeated.

STANDARD OF REVIEW

Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56. See *Hinrichs v. Farmers Co-op. Grain & Seed Ass'n*, 333 N.W.2d 639 (Minn. 1983); see also *Lindgren v. Sparks*, 58 N.W.2d 317 (Minn. 1953). A material fact that will preclude issuance of a summary judgment is one that "will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976).

Summary judgment is the proper remedy where the facts in a case are not in dispute and where the decision is made on questions of law only. *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892 (Minn. 1965); *Greaton v. Enich*, 185 N.W.2d 876 (Minn. 1971). "Although summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed to afford a substitute for a trial where there are issues to be determined." *Ahlm v. Rooney*, 143 N.W.2d 65, 68 (Minn. 1966) (citing *Sauter v. Sauter*, 70 N.W.2d 351 (Minn. 1955) and *Bustad v. Bustad*, 116 N.W.2d 552, 556 (Minn. 1962)). "[T]he purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Abdallah, Inc. v. Martin*, 65 N.W.2d 641, 646 (Minn. 1954) (citing *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627 (1944)). "A motion for summary judgment should be denied if reasonable persons might draw different conclusions from the evidence presented." *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633 (Minn. 1978) (citing *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 595 (Minn. 1957)).

A party moving for summary judgment has the burden of showing that there are no genuine issues as to any material facts; "the nonmoving party has the benefit of that view of the

evidence which is most favorable to him.” *Sauter*, 70 N.W.2d at 353. Where affidavits are submitted in support of a motion for summary judgment, the nonmoving party cannot simply rely on general statements in a complaint; the “adverse party must present specific facts showing a genuine issue for trial unless, of course, the facts asserted by the moving party fail to adequately negate any issue of fact raised by the pleading.” *Ahlm*, 143 N.W.2d at 68 (cited and emphasized in *First Fiduciary Corp. v. Blanco*, 276 N.W.2d 30, 32-3 (Minn. 1979)). In addition, “all inferences from circumstantial evidence and all doubts must be resolved against the movant, without undertaking to determine credibility.” *Forsblad v. Jepson*, 195 N.W.2d 429, 430 (Minn. 1972). “[I]f any doubt exists as to the existence of a genuine issue as to a material fact, the doubt must be resolved in favor of finding that the fact issue exists.” *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974). Even if the record “leads one to suspect that it is unlikely [that a party] will prevail upon trial, that fact is not a sufficient basis for refusing [that party] his day in court with respect to issues which are not shown to be sham, frivolous or so unsubstantial that it would obviously be futile to try them.” *Dempsey v. Jaroscak*, 188 N.W.2d 779, 783 (Minn. 1971) (quoting *Whisler v. Findeisen*, 160 N.W.2d 153, 155 (Minn. 1968)).

When a motion for summary judgment is made and supported as required by Rule 56, “an adverse party may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” Minn. R. Civ. P. 56.05. In addition, Minn. Gen. R. Prac. 115.03 provides:

Dispositive Motions.

(a) No motion shall be heard until the moving party pays any required motion filing fee, serves a copy of the following documents on opposing counsel and files the original with the court administrator at least 28 days prior to the hearing:

- (1) Notice of motion and motion;
- (2) Proposed order;
- (3) Any affidavits and exhibits to be submitted in conjunction with the motion; and
- (4) Memorandum of law.

(b) The party responding to the motion shall serve a copy of the following documents on opposing counsel and shall file the originals with the Court Administrator at least 9 days prior to the hearing:

- (1) Memorandum of law; and
- (2) Supplementary affidavits and exhibits.

....

(d) Additional Requirement for Summary Judgment Motions.

For summary judgment motions, the memorandum of law shall include:

- (1) A statement by the moving party of the issues involved which are the grounds for the motion for summary judgment;
- (2) A statement identifying all documents (such as depositions or excerpts thereof, pleadings, exhibits, admissions, interrogatory answers, and affidavits) which comprise the record on which the motion is made. Opposing parties shall identify in their responding Memorandum of Law any additional documents on which they rely;
- (3) A recital by the moving party of the material facts as to which there is no genuine dispute, with a specific citation to that part of the record supporting each fact, such as deposition page and line or page and paragraph of an exhibit. A party opposing the motion shall, in like manner, make a recital of any material facts claimed to be in dispute; and
- (4) The party's argument and authorities. These additional requirements apply also to a motion under Minn. R. Civ. P. 12 if factually based. Part (3) is excluded from the page limitations of this rule.

Defendant Source Lending has failed to file a response to Plaintiffs' Motion for Summary Judgment and has failed to appear with an attorney as required by *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992).

DECISION

- 1. **Count II - Failure to Verify Homeowners' Ability to Pay, Minn. Stat. § 58.13, subd. 1(24), and Count III - Churning, Minn. Stat. § 58.13, subd. 1(25)**

Minn. Stat. § 58.13, subd. 1 provides, in relevant part:

- (a) No person acting as a residential mortgage originator or servicer . . . shall:

....

(24) make, provide, or arrange for a residential mortgage loan without verifying the borrower's reasonable ability to pay the scheduled payments of the following, as applicable: principal; interest; real estate taxes; homeowner's insurance, assessments, and mortgage insurance premiums For all residential mortgage loans, the borrower's income and financial resources must be

verified by tax returns, payroll receipts, bank records, or other similarly reliable documents.

. . . . The mortgage originator's analysis of the borrower's reasonable ability to repay may include, but is not limited to, consideration of the following items, if verified: (1) the borrower's current and expected income; (2) current and expected cash flow; (3) net worth and other financial resources other than the consumer's equity in the dwelling that secures the loan; (4) current financial obligations; (5) property taxes and insurance; (6) assessments on the property; (7) employment status; (8) credit history; (9) debt-to-income ratio; (10) credit scores; (11) tax returns; (12) pension statements; and (13) employment payment records, provided that no mortgage originator shall disregard facts and circumstances that indicate that the financial or other information submitted by the consumer is inaccurate or incomplete. A statement by the borrower to the residential mortgage originator or exempt person of the borrower's income and resources or sole reliance on any single item listed above is not sufficient to establish the existence of the income or resources when verifying the reasonable ability to pay.

(25) engage in "churning." As used in this section, "churning" means knowingly or intentionally making, providing, or arranging for a residential mortgage loan when the new residential mortgage loan does not provide a reasonable, tangible net benefit to the borrower considering all of the circumstances including the terms of both the new and refinanced loans, the cost of the new loan, and the borrower's circumstances;

....

Source Lending is a residential mortgage originator or servicer pursuant to Minn. Stat. § 58.04, and, by admission, is a mortgage broker. As to each of Counts II and III, Plaintiffs seek to recover actual, incidental, and consequential damages in the amount of \$42,300.00 in lost equity and statutory damages in the amount of \$10,100.39 in lender fees.

Actual, incidental, and consequential damages have been properly computed on the basis of lost equity. If Plaintiffs had retained their original mortgage, as of October 2008, the remaining principal balance would have been approximately \$124,950.00. Due to Source Lending's inducement to refinance their mortgage home loan twice, Plaintiffs are currently liable for approximately \$167,250.00 on the existing mortgage. Had they not refinanced, Plaintiffs' monthly payments would have been approximately \$1,100.00

per month. Now Plaintiffs' payments are approximately \$1,300.00 per month. Plaintiffs' also paid \$10,100.39 in lender fees. Plaintiffs should recover \$42,300.00 in lost equity, and statutory damages in the amount of \$10,100.39 in lender fees as to each of Count II and Count III. Source Lending violated Minn. Stat. § 58.13, subd 1(24) when it did not verify Plaintiffs' income or ability to pay, and summary judgment should be granted as to Count II of Plaintiffs' First Amended Complaint. Plaintiffs did not receive a tangible net benefit from refinancing, Source lending violated Minn. Stat. § 58.13 subd. 1(25), and summary judgment should be granted as to Count III of Plaintiffs' First Amended Complaint.

2. Count IV - Violation of the Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1

Minn. Stat. § 325F.69 provides, in relevant part:

Subdivision 1. Fraud, misrepresentation, deceptive practices.

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided in section 325F.70.

A representative of Source Lending contacted Plaintiffs in June 2007 to discuss refinancing of the existing mortgage on Plaintiffs' residential property. The representative told Plaintiffs that if they refinanced twice with Source Lending, their monthly payments would be \$500.00, and that if they made four monthly mortgage payments of \$1,320.00, their credit score would increase, allowing them to complete the refinancing. In fact, the monthly payments were not \$500.00, and making four large monthly mortgage payments would not have a significant, positive impact on a credit score. These were false statements, made with the intent that Plaintiffs rely on them, and summary judgment should be granted as to Count IV of Plaintiffs' First Amended Complaint. On Count IV, Plaintiffs should recover \$42,300.00 in damages for lost equity.

3. Damages

Minn. Stat. § 58.18 provides:

Subdivision 1. Remedies. A borrower injured by a violation of the standards, duties, prohibitions, or requirements of sections 58.13, 58.136, 58.137, 58.16, and 58.161 shall have a private right of action and the court shall award:

- (1) actual, incidental, and consequential damages;
- (2) statutory damages equal to the amount of all lender fees included in the amount of the principal of the residential mortgage loan as defined in section 58.137;
-
- (4) court costs and reasonable attorney fees.

Subd. 2. Private attorney general statute. A borrower injured by a violation of the standards, duties, prohibitions, or requirements of sections 58.13, 58.136, 58.137, 58.16, and 58.161 also may bring an action under section 8.31. A private right of action by a borrower under this chapter is in the public interest.

Subd. 3. Remedies cumulative. The remedies provided in this section are cumulative and do not restrict any other right or remedy otherwise available to the borrower.

Subd. 4. Exemption. This section does not apply to a residential mortgage loan originated by a federal or state chartered bank, savings bank, or credit union.

Plaintiffs' remedies are cumulative and Plaintiffs should recover separately for each of Counts II, III, and IV.

4. Attorney Fees and Costs

Plaintiffs seek to recover \$3,367.50 for reasonable attorney fees and costs, plus \$11,232.50 claimed as the attorney fees remaining when the Court issued its Order dated September 8, 2008 Order.

After further review of the records submitted, attorney fees of \$3,367.50 are reasonable for the additional work related to bringing this Motion. The time and labor

required, the nature and difficulty of the responsibility assumed, the amount involved and the results obtained, the fees customarily charged, and the experience, reputation and ability of counsel all warrant an award of additional attorney fees of \$3,367.50 pursuant to Minn. Stat. § 58.18, subd. 1(4). *State v. Paulson*, 290 Minn. 371, 373 (1971).

The Court's Order dated September 8, 2008, provided that Plaintiffs would be entitled to an award of additional attorney fees for work expended on Counts II through IV. As Plaintiffs have now succeeded on the merits as to these Counts, they are entitled to the remainder of the attorney fees in the amount of \$11,232.50, for a total award of reasonable attorney fees and costs of \$14,600.00.

MBR

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

William W. Hilleshiem and Judy
J. Hilleshiem,

Plaintiffs,

vs.

Source Lending Corporation, and
Bank United, FSB,

Defendants.

**AMENDED ORDER
GRANTING SUMMARY
JUDGMENT AND THE AWARD
OF REASONABLE ATTORNEY
FEES AND COSTS**

Court File No. 27-CV- 08-7612

Based upon the files, records and proceedings herein, and to correct the statutory provisions cited in Paragraphs (2) and (3) of the Court's Order Granting Summary Judgment and the Award of Reasonable Attorney Fees and Costs, dated January 7, 2009, the Court makes the following:

AMENDED ORDER

- 1. Paragraph 2 shall be amended as follows:

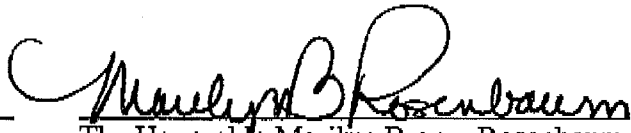
Defendant Source Lending Corporation specifically violated Minn. Stat. § 58.13, subd. 1(24) in October 2007, and is liable to Plaintiffs in the amount of \$52,400.39.

- 2. Paragraph 3 shall be amended as follows:

Defendant Source Lending Corporation specifically violated Minn. Stat. § 58.13, subd. 1(25) in October 2007, and is liable to Plaintiffs in the amount of \$52,400.39.

Dated:

January 13 2009



The Honorable Marilyn Brown Rosenbaum
Judge of District Court