

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHRISTINE CLARK
a/k/a Christine Camm

Case No. 95-13621 K

Debtor

CHRISTINE CLARK
a/k/a Christine Camm

Plaintiff

-vs-

AP 97-1364 K

KENSINGTON BAILEY NEIGHBORHOOD
HOUSING SERVICES

Defendant

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Attorney for Defendant

DECISION AND ORDER DENYING MOTION TO DISMISS

Although the Complaint makes a number of illogical leaps in concluding that the mortgage must be stricken and the claim of Kensington Bailey Neighborhood Housing Services

is an unsecured claim, it undoubtedly alleges facts which, if proven, may at least give rise to liability in damages. This is because there appears to be no written understanding between the Plaintiff and the Defendant regarding the matters at issue.

Until all the facts are presented at trial, it is impossible to determine whether the various actions of the Defendant beyond merely guaranteeing the availability of funds, were (1) benefits promised to the Plaintiff, as she argues or instead were (2) “none of the Plaintiff’s business,” as essentially lies at the core of the Defendant’s “we paid money; we have a mortgage” defense.

It is implicit in the Plaintiff’s arguments that the Defendant promised to assist her by finding a competent contractor, by exercising the Defendant’s rights under the written “Specifications” for the Plaintiff’s benefit, and by assisting her in her disputes with the contractor. Trial would establish whether such promises were made and whether the Defendant breached those promises and left the Plaintiff to fend, unsuccessfully,¹ for herself.

On the other hand, the facts might establish that despite the documented involvement of Neighborhood Housing Services representative Bruce Simmons, it had been made clear to the Plaintiff from the beginning that everything that the Defendant does in connection with home improvements is for the Defendant’s protection only - to insure that the improvements will bring the property up in value to a value that will support the mortgage lien. Maybe it was made perfectly clear to the Plaintiff that she was on her own as to disputes with the

¹The state court record is too sparse to determine whether any defenses that Neighborhood Housing Services might have raised had it defended its borrower, were in fact adjudicated. Consequently, that action says nothing as between this Plaintiff and this Defendant, except that Niagara Housing Services has had to satisfy the judgment.

contractor, and that she had no rights as to the Specifications that otherwise seemed to provide assurances of quality workmanship, timeliness, withholding of payment, etc. for her benefit.

Obviously, the fact that there appears to be no document that would obviate the need to ascertain the complete relationship by means of discovery and trial, must be laid at the feet of the Defendant. A simple "Assistance Agreement" would have eliminated such a dispute. It might have said "Other than loaning you money, and protecting ourselves, you are on your own. Getting satisfactory work is your own problem, and you must pay us whatever we pay the contractor whether you like the work or not." It might have said something entirely different.

Because this is a Motion to Dismiss, not a post-discovery Motion for Summary Judgment, the Court is required to assume *arguendo* that the facts will be found in the Plaintiff's favor. And although the Complaint might confuse the remedies of damages and setoff with other remedies, there is a sufficient allegation of facts that leave might eventually be given to amend the Complaint to conform the theory of recovery to the evidence produced.

In sum, the Motion to Dismiss must be denied because it cannot be said that the Plaintiff could not prevail even if the facts she alleges are proven. Discovery must proceed to determine who said what to whom, and when. The deadline for discovery shall be February 9, 2000. Counsel shall appear on February 16, 2000 at 11:30 a.m. to report on readiness for trial.

SO ORDERED.

Dated: Buffalo, New York
November 12, 1999

/s/Michael J. Kaplan

U.S.B.J.