IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EMILIO G. CORTEZ AND PATRICIA A. CORTEZ	:	
	:	
v.	:	**CIVIL ACTION**
	:	
KEYSTONE BANK, INC., a/k/a KEYSTONE BANK, N.A. t/d/b/a FRANKFORD BANK a/k/a KEYSTONE BANK	:	
and	:	**NO. 98-2457**
FRANKFORD BANK NATIONAL ASSOCIATION, t/d/b/a FRANKFORD BANK a/k/a KEYSTONE BANK	:	

M E M O R A N D U M

WALDMAN, J. **May 2, 2000**

I. Introduction

This case arises from plaintiffs' rather unusual use of an open-ended home equity line of credit they obtained from Keystone Bank, N.A ("Keystone").[1] Plaintiffs allege that over a two and a half year period Keystone improperly assessed interest charges on the line of credit and refused timely to respond to their complaints about this practice. They seek an abatement of the charges and damages allegedly incurred as a result of the practice. Plaintiffs assert claims for violation of the Real

[1] It appears that the only true defendant is Keystone Bank, N.A., erroneously named in the Complaint as Keystone Bank, Inc. Frankford Bank was consolidated into Keystone in late 1995 and does not exist as a distinct entity. It appears that Keystone continued to operate some branches and conduct some business under the Frankford name after the consolidation. It is undisputed, however, that it is Keystone which is responsible for the conduct complained of in this case although it has never moved to amend or correct the caption.

Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601 et seq., breach of contract, negligence, gross negligence and fraud.

Defendant has filed counterclaims for breach of contract and misrepresentation. It seeks to recover interest charges assessed against plaintiffs which they have refused to pay.

The court has subject matter jurisdiction over the RESPA claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

Presently before the court is Keystone's motion for summary judgment on each of plaintiffs' claims and on Keystone's counterclaim for breach of contract.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." See Anderson, 477 U.S. at 248. All reasonable inferences from the record must be drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. See Anderson, 479 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the evidence of record as uncontroverted or otherwise viewed in the light most favorable to plaintiffs, the pertinent facts are as follow.

On January 5, 1996, plaintiffs secured a $90,000 home equity line of credit with Keystone.[2] The terms of the loan agreement (the "Agreement") provided that the bank would use the "average daily balance" method of calculating the balance on which finance charges would be assessed. The Agreement further provided that calculation of the average daily balance would be

[2] It appears that this was done at a branch still operated under the Frankford name.

based on the actual daily balances as follows:

> To get the actual daily balance, the Lender takes the beginning balance on the Account each day and adds any new advances of credit or other charges posted to the Account that day; then the Lender subtracts any payments or credits posted to the Account that day and, if applicable, any unpaid Finance Charges, unpaid insurance premiums, unpaid late charges and unpaid annual fees. The result is the "actual daily balance" for that day.

The Agreement also provides that:

> The Finance Charge on each advance of credit on the Account will begin to accrue from the day the advance of credit is posted to the Account. The Finance Charge continues until the outstanding principal balance is paid in full. There is no time during which credit is extended without the Borrower incurring a Finance Charge.

A Truth in Lending Disclosure Statement in the Agreement describes the borrowers' billing error rights using the language of the Truth in Lending Act ("TILA") and referring to the Fair Credit Billing Act, a sub-section of TILA. The Agreement provides that the lender "must acknowledge [the borrowers'] letter [of inquiry] within 30 days, unless [the lender has] corrected the error by then," and that the lender "must either correct the error or explain why [the lender] believe[s] the bill was correct."[3]

The Agreement provides that the "Agreement, including Disclosure Statement, any Rider [t]hereto, the Mortgage, and the Application Form related to [the] loan contain the entire

[3] The Agreement explicitly provides that it "shall be governed by the laws of the Commonwealth of Pennsylvania except to the extent that such laws have been pre-empted or superseded by federal law."

agreement between Lender and Borrower."[4] At the time plaintiffs completed the application for the $90,000 line of credit, they were provided with a Servicing Disclosure Statement explaining that the loan was covered by the provisions of RESPA and describing the complaint resolution process with specific reference to Section 6 of RESPA, 12 U.S.C. § 2605. Plaintiffs signed the disclosure form to acknowledge that they read the form and understood its contents. Plaintiffs also received and signed a Supplemental Home Equity Loan Disclosure which described the closing process and the consequences of failing to make payments.

From January 1996 until Keystone revoked the line of credit in September 1998, Mr. Cortez routinely engaged in rather unusual weekly transactions. On virtually each Friday, Mr. Cortez would appear at a branch of Mellon/PSFS Bank and request that an advance in the full amount available on plaintiff's line of credit with Mellon be deposited into a money market account at Mellon. On the same day, Mr. Cortez would go to a branch of Keystone and request an advance on the Keystone line of credit to be transferred into a money market account which plaintiffs also maintained with Keystone. Later that day, Mr. Cortez would

[4] At the time plaintiffs signed the Agreement, they attended a formal settlement at which they signed an open-end mortgage on their principal dwelling to secure future advances on the line of credit covered by the Agreement. It appears that another line of credit maintained by plaintiffs at Mellon/PSFS Bank was secured by a prior mortgage on their home.

return to Mellon and present a check drawn on the Keystone money market account in the same amount as the advance on the Mellon line of credit. Mr. Cortez would then go back to Keystone and present a check drawn on the Mellon money market account in payment of the advance on the Keystone line of credit.

Keystone immediately credited the checks presented by Mr. Cortez in payment of the amounts drawn that day on the line of credit, even though the checks would not clear until sometime the following week. Keystone also recognized the advances on the line of credit on the same day they were requested and thus made the funds transferred from the line of credit available for immediate use in plaintiffs' money market account. The intended result was that the advances on plaintiffs' line of credit would be paid in full almost simultaneously with Mr. Cortez's withdrawals while the checks drawn on plaintiffs' money market accounts would not be accessed for satisfaction until early the following week. It also appears that the bank had the benefit of the use of the funds in plaintiffs' money market account each weekend.

Keystone assessed interest charges on plaintiffs' line of credit for each of these transactions under the average and actual daily balance standard. Instead of first recognizing the advances and then crediting plaintiffs' loan account with the payments drawn on their Mellon account, Keystone's automated system first added interest charges to the loan account, then posted plaintiffs' payment to the account and then acknowledged the advance on the line of credit.[5]

Because plaintiffs' payment was credited first, Keystone's automated system recognized a surplus in their loan account and suspended the payment. Keystone then refunded plaintiffs' "prepayment" by mail prior to recognizing the loan advance taken earlier that day. As a result, plaintiffs incurred interest charges until they received the overpayment and applied the refund check to their outstanding balance. It appears that at some point Keystone eliminated this refund practice and simply held prepayments until the bank's suspense accounts were reconciled with outstanding line of credit balances the following business day or later.

Plaintiffs previously maintained a $50,000 home equity line of credit at Frankford Bank, Keystone's predecessor, from 1992 through 1995. Mr. Cortez conducted weekly transactions with that line of credit similar to those at issue in this case, except that payments were made directly from the respective lines

[5] The testimony of Beth Brown, a Keystone processing clerk, that during the period in which plaintiffs maintained the line of credit with Keystone the automated computer system could not process account activity in any other order is uncontroverted.

of credit rather than through other deposit accounts.[6]

Frankford assessed interest charges on the account under the average and actual daily balance standard. Instead of first recognizing the advances and then crediting plaintiffs' loan account with the payment drawn on their Mellon account, however, Frankford's automated system posted plaintiffs' payment to the account and subsequently acknowledged the advance on the line of credit.[7] Because plaintiffs' payment was credited first, Frankford recognized a surplus in plaintiffs' loan account. That prepayment was suspended by Frankford's automated system. The following day, the account would indicate an outstanding balance. Within the next several business days, a loan operator would apply the suspended payment, which showed on the account as

[6] Mr. Cortez suggested in his deposition that the transactions using the Frankford line of credit were different as they were not same-day transactions. Mr. Cortez stated that he would draw on one line of credit, then two days later pay that balance with a draw on the other bank's line of credit. He claims that somehow this cycle of transactions was designed eventually to pay off the debt on the original line of credit. Mr. Cortez stated that Frankford assessed improper interest charges when it failed to recognize a Friday draw on its line of credit in payment to Mellon before crediting an earlier payment to Frankford. The parties do not address this type of transaction in their briefs, and the record otherwise suggests that at least a substantial portion of plaintiffs' Frankford transactions were same-day transactions similar to those here at issue.

[7] Throughout much of 1995, the advance taken on the line of credit, which appears on the account ledgers as a "special check," was not acknowledged until the business day following the date of the actual transaction.

“refund due,” to the outstanding balance on the line of credit. In the interim, Frankford would assess interest charges on the outstanding balance.

Upon receiving monthly notice of these charges, Mr. Cortez would contact Joy Ditre, a Frankford loan operations supervisor, to assert that the charges were erroneous. Ms. Ditre routinely responded by reversing the interest charges.

In late 1995, when Frankford consolidated with Keystone, the loan operations of the banks were centralized and Ms. Ditre’s position was eliminated. Someone in bank management then instructed plaintiffs’ branch to stop reversing the interest charges.

Keystone’s Manager of Special Assets, Gary Golden, was assigned to investigate plaintiffs’ line of credit activity. Mr. Golden concluded that plaintiffs’ conduct constituted a manipulation of the line of credit as a means of obtaining interest-free loans, but that the activity did not appear to be the sort of contractual default which would merit closing the account. Because plaintiffs did not maintain a deposit account at the time, no investigation of possible check kiting was undertaken. Mr. Golden proposed that Keystone institute a bank-wide policy of refunding by check any line of credit prepayments greater than some determined amount rather than applying such payments as a credit to the account.[8] Such a policy, he reasoned, would eliminate the instant access to funds which makes such activity potentially profitable.

Keystone implemented Mr. Golden's proposed refund policy and plaintiffs objected to Keystone's ensuing refusal thereafter to reverse outstanding interest charges. Nevertheless, Mr. Cortez continued his weekly same-day transactions and plaintiffs subsequently obtained the $90,000 line of credit after agreeing to pay the $165.16 in disputed interest charges on the old line of credit. Plaintiffs understood at the time Keystone's position regarding interest charges, but Mr. Cortez expected that Keystone would soon return to the previous practice of reversing interest charges or acquire a computer system which would calculate interest charges according to his understanding of the terms of the Agreement.

Once Keystone ceased the reversal of interest charges, Mr. Cortez commenced a series of complaints. Between January 1996 and the summer of 1998, Mr. Cortez complained about the interest charges in at least nine different letters. In at least three such letters which predate his receipt of any response, Mr. Cortez expressly referenced the borrower inquiry provision of RESPA in language mirroring that in the disclosure statement

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[8] Mr. Golden suggested the threshold amount should be $500, but it is unclear what amount the bank adopted.

provided by the bank at the time of the January 5, 1996 settlement. Mr. Cortez also registered several complaints by telephone and in personal visits.

In late 1995, Mr. Cortez complained to an employee at the Havertown branch about Keystone's assessment of interest charges. He then telephoned a number of Keystone employees at the bank's main offices, including Gary Golden.

On January 5, 1996, the day plaintiffs opened the new expanded line of credit, Mr. Cortez hand-delivered a letter to Peter Bendistes, the bank branch manager, in which he disputed the interests charges and stated "I hope we can work something out to our mutual satisfaction."

On February 9, 1996, Mr. Cortez sent a letter to Margaret Leimkuhler, then Keystone's senior relationship market banker and later Vice President and Chief Administrative Officer, disputing the interest charges and asserting that pursuant to RESPA, Keystone should have responded to his January 5, 1996 letter within twenty days. Ms. Leimkuhler forwarded Mr. Cortez's correspondence to Alan Corson, the executive who had replaced Gary Golden as the designated contact for Mr. Cortez.

On March 16, 1996, Mr. Cortez sent letters to James Kauffman and to Consumer Affairs of the Comptroller of the Currency. In each he disputed the interest charges assessed both on his Keystone account and on the $50,000 line of credit previously maintained at Frankford.

On March 19, 1996, Mr. Corson submitted a "Credit Memorandum" to Robert Allen, Keystone's Vice President and Regional Manager for Commercial Lending, regarding plaintiffs' account activity and the bank's handling of the advances and payments. Mr. Corson referenced Mr. Cortez's letter of March 16th and suggested that staff involved with the account meet with Keystone management and legal staff to contemplate how best to address the situation. Mr. Corson expressly stated that "[t]he current issue is a RESPA one."

On June 19, 1996, a Consumer Affairs Specialist with the Comptroller of the Currency sent a letter addressed to Frankford Bank, asking that someone respond to Mr. Cortez's inquiries and send a copy of the response to the Comptroller by July 16, 1996. On July 15, 1996, Mr. Allen responded by letter to Mr. Cortez's inquiries. Mr. Allen referred to the "[t]here is no time" language in the Agreement and explained that the interest charges applied to the account were accurate and in compliance with the Agreement. Mr. Allen also commented on the unusual nature of the account activity and suggested a personal meeting to determine how best to accommodate plaintiffs' needs.

Mr. Cortez then met with Mr. Allen. Mr. Cortez suggested that the assessment of interest charges was likely the result of a computer error. No acceptable understanding was reached. Mr. Allen told Mr. Cortez, "I guess we agree to disagree" and suggested that plaintiffs take their business to another bank. Plaintiffs did not. They maintained their account at Keystone, Mr. Cortez continued his weekly transactions and continued writing letters to Keystone complaining about the interest charges and requesting written responses to each within twenty days.

Keystone related the outstanding charges to credit reporting agencies. Mr. Cortez testified that as a result, plaintiffs were denied two credit cards, an increased credit limit on a third card and an unsecured line of credit from another bank.

In September 1998, two checks written by Mr. Cortez on an account at United Savings Bank as payment on the line of credit were returned to Keystone Bank marked “refer to maker.” By the time the first check was returned to Keystone, plaintiffs had taken two more advances on the line of credit which caused the account to be overdrawn three times the amount for which it had been approved and secured. Keystone ultimately determined that there were sufficient funds to cover the two returned checks. Keystone nevertheless feared that the bank was exposed to financial risk in light of the unusual nature of plaintiffs' transactions and their refusal to pay interest.

On September 23, 1998, Keystone informed plaintiffs’ that it believed their account activity and refusal to pay interest charges constituted a breach of the Agreement which justified Keystone in closing plaintiffs’ account. The outstanding balance of assessed interest charges is approximately $8,700.

V. **Discussion**

A. BREACH OF CONTRACT

In count I of their Complaint, plaintiffs claim that Keystone Bank "breached the home equity line of credit agreement by improperly assessing interest charges in violation of the terms of the contract." Keystone Bank argues that the interest charges were assessed according to the express language of the Agreement and were proper.

The objective in the interpretation of any contract is the determination of the intention of the parties to the agreement. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 613 (3d Cir. 1995); Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 389-90 (Pa. 1986). Under Pennsylvania law, that intention is ascertained from the document itself when its terms are clear and unambiguous. See Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp., 40 F.3d 1416, 1424 (3d Cir. 1994); Hutchison, 519 A.2d at 390. The determination of intention from an unambiguous writing is a question of law for the court. See Mellon Bank, N.A. v. Aetna Bus. Credit, Inc., 619 F.2d 1001, 1011 n.10 (3d Cir. 1980).

Where there exists an ambiguity in the express language of the agreement, the intention of the parties may be determined from extrinsic evidence. See Resolution Trust Corp. v. Urban Redevelopment Auth., 638 A.2d 972, 975 (Pa. 1994); Hutchison, 519 A.2d at 390. An ambiguous writing is subject to interpretation by the fact finder. See Resolution Trust Corp., 638 A.2d at 975; Hutchison, 519 A.2d at 390.

A court must thus first determine as a matter of law whether the written contract terms are clear or ambiguous. See Mellon Bank, 619 F.2d at 1011. "A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Allegheny Int'l, 40 F.3d at 1424 (quoting Hutchison, 519 A.2d at 390 (citations omitted)). In making this determination, the court considers the contract as a whole and the context in which it was made. See Hullett v. Towers, Perrin, Forster & Crosby, Inc., 38 F.3d 107, 111 (3d Cir. 1997). The court considers "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." Id. (quoting Mellon Bank, 619 F.2d at 1011). The language itself is paramount. The court considers the proffered evidence to "determine if there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of differing meanings." Id. (emphasis added).

The credit agreement between the parties clearly states that interest will be charged based on an average and actual daily balance standard. It explains that the actual daily balance is determined by first adding any new advances of credit or other charges posted to the account to the beginning balance on the account each day and subtracting, among other amounts, any payments or credits posted to the account that day. The Agreement further states that "[t]here is no time during which credit is extended without the Borrower incurring a Finance Charge."

Plaintiffs contend that the "[t]here is no time" language was intended to make clear that unlike credit cards or some unsecured lines of credit, there was no grace period between access of the credit line and accrual of interest. Keystone counters that the "[t]here is no time" language shows an intention to apply a minimum of one day's interest on any credit line advance even when the account is paid in full on the same day as the funds are accessed.

It appears that neither interpretation is unreasonable. The Agreement is patently unclear regarding what interest charge would be applied in the situation at issue, i.e., when the borrower takes and repays an advance on the same day, causing the actual daily balance to be zero if calculated pursuant to the precise language in the Agreement. Given this ambiguity, the prior course of dealing between the parties is pertinent.

Plaintiffs' prior line of credit with Keystone's predecessor was handled in a manner consistent with their reading of the Agreement. Over a substantial period of time, a loan operations supervisor regularly reversed interest charges assessed against plaintiffs' line of credit account. One could find from the record that plaintiffs believed the assessment of interest was a computer driven error and would be rectified by a return to the manual reversal of interest charges. It also appears from the record that Keystone's automated system in fact processed payments and advances in an order that does not comport with express language of the Agreement.

Keystone contends that once it stopped the practice of reversing charges and required payment of the outstanding assessed interest as a condition of opening a new expanded line of credit, plaintiffs were aware of the bank's interpretation of the pertinent contract terms. Keystone contends that its interpretation of the "[t]here is no time" language should be given effect because plaintiffs knew this was the meaning in fact given by Keystone to the term. Keystone relies on Emor, Inc. v. Cyprus Mines Corp., 467 F.2d 770 (3d Cir. 1972) and Sun Co. v. Pennsylvania Turnpike Comm'n, 708 A.2d 875 (Pa. Cmwlth. 1998). Crucial to the decisions in those cases, however, was the absence of any protest or other expression of disagreement by the party to be bound regarding the other party's understanding of the agreement. See Emor, 467 F.2d at 776; Sun Co., 708 A.2d at 880.

One could reasonably attribute to each party in this case the knowledge of the other's interpretation of the pertinent contractual language. Plaintiffs aver they paid the outstanding $165 in disputed interest charges only because it was a nominal amount to secure an additional $40,000 of credit and not because they acceded to the bank's interpretation of the "[t]here is no time" language. Mr. Cortez persisted in his disagreement with Keystone's view regarding interest charges. On the same day the agreement was made, Mr. Cortez hand delivered a letter to the bank protesting the assessment of any interest on same-day transactions. Indeed, where each party knows or has reason to know that the other attaches a materially different meaning to a contract term, there may be no mutual assent and no contract at all. See Local Motion, Inc. v. Niescher, 105 F.3d 1278, 1280 (9th Cir. 1997); Centron DPL Co. v. Tilden Fin. Corp., 965 F.2d 673, 675 (8th Cir. 1992); Mioni v. Bessemer Cement Co., 1986 WL 13814, *7 (W.D. Pa. Oct. 10, 1986); Restatement (Second) of Contracts § 20(1).[9]

Keystone has not established that it is entitled to judgment as a matter of law on plaintiffs' breach of contract claim. For the same reasons, Keystone has not demonstrated that it is entitled to summary judgment on its breach of contract counterclaim which is premised on plaintiffs' obligation to pay the disputed finance charges.

B. NEGLIGENCE, GROSS NEGLIGENCE AND RECKLESSNESS

In Count II of their Complaint, plaintiffs allege that Keystone "negligently" assessed the disputed interest charges in breach of a "fiduciary duty." In Count III, plaintiffs allege that Keystone assessed the interest charges "recklessly" and "with gross negligence."

Keystone argues that the "gist of the action" and economic loss doctrines preclude plaintiffs from recovering in

[9]In the circumstances, it would have been rather easy and prudent for Keystone to have conditioned the extension of credit on an express, written acceptance by plaintiffs of the bank's preferred interpretation or application of the disputed language. It did not do so, and there is no competent evidence of record that plaintiffs ever expressly assented to the bank's interpretation of that language.

tort for any improper assessment of interest charges arising from the contractual agreement between the parties.

The "gist of the action" doctrine bars claims for allegedly tortious conduct where the gist of the conduct alleged sounds in contract rather than tort. See Quorum Health Resources, Inc. v. Carbon-Schuylkill Community Hosp., Inc., 49 F. Supp. 2d 430, 432 (E.D. Pa. 1999); Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999); Factory Market, Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 392-94 (E.D. Pa. 1997); Redevelopment Auth. of Cambria v. Int'l Insurance Co., 685 A.2d 581, 590 (Pa. Super. 1996); Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 663 A.2d 753, 757 (Pa. Super. 1995). A dispute which is essentially contractual in nature cannot be resolved under tort law merely because a plaintiff alleges that the breach of a contract was the result of negligence, gross negligence or even wanton and wilful behavior. See Sunquest, 40 F. Supp. 2d at 651; Phico, 663 A.2d at 757. The only exception to this rule is where the contract is collateral to primarily tortious conduct. See Quorum Health Resources, 49 F. Supp. 2d at 432; Sunquest, 40 F. Supp. 2d at 651.

Plaintiffs' negligence and recklessness claims arise directly from the precise conduct they claim constitutes a breach of the express language of the credit agreement and on which they base their breach of contract claim. The contract claim here clearly is not collateral. Plaintiffs' allegations of wrongful assessment of interest charges sound in contract and not tort.

Keystone's duties to plaintiffs arose solely from the parties' agreement.

The economic loss doctrine precludes recovery of economic losses in tort by a plaintiff whose entitlement to such recovery "flows only from a contract." Duquesne Light Co., 66 F.3d at 618; Factory Market, 987 F. Supp. at 395. The doctrine recognizes that tort law "is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." Id. at 395-96 (quoting Palco Linings, Inc. v. Pavex, Inc., 755 F. Supp. 1269, 1271 (M.D. Pa. 1990). To determine whether the economic loss doctrine precludes recovery, the court must consider whether the damages plaintiffs seek to recover "were in the contemplation of the parties at the origination of the agreement." Id. at 396 (quoting Auger v. Stouffer Corp., 1993 WL 364622, *3 (E.D. Pa. Aug. 31, 1993)). Plaintiffs essentially seek an abatement or restitution to which they claim entitlement pursuant to express terms of a contractual agreement.

Insofar as plaintiffs suggest that Keystone breached a fiduciary duty owed to them beyond any contractual obligation, the short answer is that the bank had no such duty.

A fiduciary duty arises from a special relationship of trust and confidence in which there is "confidence reposed by one side [and] domination and influence exercised by the other." Antinoph v. Laverell Reynolds Sec., Inc., 703 F. Supp. 1185, 1188

(E.D. Pa. 1989) (citation omitted). See also Tyler v. O'Neill, 994 F. Supp. 603, 611 (E.D. Pa. 1998), aff'd, 189 F.3d 465 (3d Cir. 1999), cert. denied, 120 S. Ct. 981 (2000). Pennsylvania law follows the "well recognized principle that a lender is not a fiduciary of the borrower" unless the lender gains "substantial control" over the borrower's business affairs. Smith v. Berg, 2000 WL 365949, *5 (E.D. Pa. April 10, 2000). See also GE Capital Mortgage Servs., Inc. v. Pinnacle Mortgage, 897 F. Supp. 854, 862 (E.D. Pa. 1995). There is no evidence whatsoever that Keystone gained such control over plaintiffs' affairs or that the parties had other than a conventional borrower and lender relationship.

Plaintiffs' negligence, gross negligence and recklessness claims cannot withstand summary judgment under the gist of the action or economic loss doctrines.

C. FRAUD

In Count V, plaintiffs assert a common law fraud claim. Plaintiffs do not allege that they were induced by any fraudulent misrepresentation not embodied by the terms of the contract itself or that they were misled into believing that a term would be included which was excluded upon execution of the agreement. See Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996) (discussing fraud in the inducement and fraud in the execution). Plaintiffs allege only that Keystone "induced" plaintiffs to conduct business with defendant "via the representations made in the aforesaid contract" itself and that defendants assessment of interest charges was “fraudulent.”

Even accepting the recharacterization of this claim in plaintiffs’ brief that Keystone entered into the contract with “no intention” of abiding by its terms and assuming that the claim is not precluded by the gist of the action or economic loss doctrines, plaintiffs have failed to sustain a fraud claim.[10]

To sustain a common law fraud claim, plaintiffs must prove that defendant made a misrepresentation with knowledge of its falsity or reckless disregard for its truth or falsity and with the intent of misleading plaintiffs to rely on it; that plaintiffs justifiably relied on such misrepresentation; and, that plaintiffs were damaged as a proximate result. See Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991). Each element must be proven by clear and convincing evidence. See Wittekamp v. Gulf & Western, Inc., 991 F.2d 1127, 1142 (3d Cir.), cert. denied, 510 U.S. 927 (1993); Sewak v. Lockhart, 699 A.2d 755, 759 (Pa. Super. 1997).

Under Pennsylvania law, a broken promise to do or

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[10]See Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 2000 WL 233199, *14 (W.D. Pa. Feb. 25, 2000) (economic loss doctrine inapplicable to tort claim based on intentionally false representation); North Am. Roofing & Sheet Metal Co. v. Building & Constr. Trades Council, 2000 WL 230214, *7 (E.D. Pa. Feb. 29, 2000); Sunquest, 40 F. Supp. 2d at 658; Auger, 1993 WL 364622, at *5; Palco Linings, 755 F. Supp. at 1274. But see Coram Healthcare Corp. v. Aetna U.S. Healthcare, Inc., 2000 WL 230347, *1 (E.D. Pa. Feb.23, 2000) (suggesting gist of the action doctrine would preclude fraud claim but relying on absence of evidence of fraud to grant summary judgment); Sneberger v. BTI Americas, Inc., 1998 WL 826992, *7-8 (E.D. Pa. Nov. 30, 1998) (applying economic loss doctrine to intentional misrepresentation claim); Sun Co. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 371 (E.D. Pa. 1996) (same).

refrain from doing something in the future does not constitute a fraud. See Mellon Bank Corp. v. First Union Real Estate, 951 F.2d 1399, 1409 (3d Cir. 1991). A statement of present intention which is false when uttered may, however, constitute a fraudulent misrepresentation of fact. See Coram Healthcare, 2000 WL 230347, at *1; Killian v. McColloch, 850 F. Supp. 1239, 1255 (E.D. Pa. 1994).

One cannot reasonably find by clear and convincing evidence from the competent evidence of record that Keystone intended at the time of execution not to perform under the credit agreement as defendant genuinely interpreted it.

D. RESPA

In count IV of their Complaint, plaintiffs allege that Keystone violated billing error provisions of RESPA by failing to respond timely to plaintiffs' written requests to remedy the allegedly improper assessment of interest charges. Keystone asserts that RESPA is inapplicable to the home equity line of credit which is governed instead by the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq.

The principal purpose of RESPA is to protect home buyers from material nondisclosures in settlement statements and abusive practices in the settlement process. See Rawlings v. Dovenmuehle Mortgage, Inc., 64 F. Supp. 2d 1156, 1165-66 (M.D. Ala. 1999); Bieber v. Sovereign Bank, 1996 WL 278813, *5 (E.D. Pa. May 23, 1996). By its terms, however, RESPA applies not only to the actual settlement process but also to the "servicing" of any “federally related mortgage loan.” 12 U.S.C. § 2602(1). Under RESPA, the servicer of a “federally related mortgage loan,” which includes a loan secured by a “subordinate lien,” is required to provide a written response within twenty days of receiving a “qualified written request” for information about the servicing of such a loan unless the action requested is taken within that period. See 12 U.S.C. § 2605(e)(1).[11]

RESPA also requires the servicer to take corrective action within sixty days of receiving the request or to conduct an investigation and provide the borrower with a written

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[11]A federally-related mortgage loan “includes any loan (other than temporary financing such as a construction loan) which--

> is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property.

12 U.S.C. § 2602(1) (emphasis added).

A qualified written request is “written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that–

> (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
>
> (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B).

The term “servicing” means “receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan” and “making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.”

explanation of the reasons for the action and the name and telephone number of an employee of the servicer to whom the borrower can direct any further inquiry on the matter. See 12 U.S.C. § 2605(e)(2). RESPA forbids a servicer from providing information regarding any overdue payment to any consumer reporting agency during the sixty day period. See 12 U.S.C. § 2605(e)(3).

RESPA explicitly provides for individual causes of action and allows for actual damages, as well as statutory damages upon a showing of a pattern or practice of noncompliance with the duty to respond to borrower inquiries. See 12 U.S.C. § 2605(f).[12]

[12]The term "pattern or practice" in a federal statute is not a term of art but rather is defined according to the usual meaning of the words. See Sperling v. Hoffman-LaRoch, Inc., 924 F. Supp. 1346, 1357 (D.N.J. 1996) (discussing use of term in the ADEA). The term suggests a standard or routine way of operating. See Newton v. United Cos. Fin. Corp., 24 F. Supp. 2d 444, 456 (E.D. Pa. 1998) (term as used in TILA refers to "wide-ranging and institutionalized practices"). See also First Nat'l Bank v. Office of Comp'r Of Currency, 956 F. 2d 1456, 1461-62n (8th Cir. 1992) (failure to make interest rate disclosure required by TILA to 691 borrowers over two years constitutes pattern or practice).

A failure to provide subsequent responses to each of a series of repetitive inquiries form a borrower also does not constitute a pattern or practice. Under TILA, a creditor need not respond to subsequent billing error notices which simply reassert an error "substantially the same" as that contained in a previous qualified written request to which the creditor has appropriately responded. See 15 U.S.C. § 1666(a); 12 C.F.R. § 226.13(h). Although there is no express parallel provision regarding RESPA, the premise is so basic and sound that it must be presumed to apply to borrower inquiries under that statute as well. It is extremely unlikely that Congress intended to subject any lender to an endless cycle of liability for declining to respond seriatim to successive letters merely restating the same disagreement.

The inquiries sent by Mr. Cortez to Keystone Bank involved a line of credit secured by a "subordinate" lien on plaintiffs' dwelling and thus involved a "federally related mortgage loan." At least some of those inquiries clearly identified the borrower and account number and included a statement of the reasons why plaintiffs believed Keystone had erroneously applied their payments and assessed interest charges on the account. Such inquiries are "qualified written request[s]." Those inquiries involve the "servicing" of the loan as they relate to the manner in which Keystone applied payments of principal and interest received from plaintiffs.

Keystone correctly notes that HUD Regulation X exempts home equity lines of credit from RESPA coverage in certain situations. See 24 C.F.R. § 3500.6(a)(2) (exempting refinancing loans, closed-end loans secured by subordinate liens, reverse mortgages and non-purchase money loans from requirement that lender provide special information booklet); § 3500.7(f) (exempting open-end home equity lines of credit covered by TILA and Regulation Z from good faith estimate of settlement costs requirement); § 3500.8(a) (exempting open-end home equity lines of credit covered by TILA and Regulation Z from use of HUD settlement statement).

Unlike the statute, the borrower inquiry provision of Regulation X applies only to certain federally related mortgage loans secured by a first lien, which by definition excludes from its coverage "subordinate lien loans or open-end lines of credit (home equity plans) covered by the Truth in Lending Act and Regulation Z, including open-end lines of credit secured by a first lien." 24 C.F.R. § 3500.21(a), (e).

TILA applies to open-end home equity lines of credit. See 15 U.S.C. §§ 1637a & 1647. The Fair Credit Billing Act, 15 U.S.C. § 1666 et seq. ("FCBA"), a sub-section of TILA, applies whenever a creditor provides an obligor with "a statement of the obligor's account in connection with an extension of credit." 15 U.S.C. § 1666(a). If the obligor believes that the statement contains a billing error which he wishes to contest, he must send to the creditor written notice of the amount of the error and the reasons he believes there is an error. See id. The FCBA imposes on the creditor a procedure to follow in response to notice of a billing error, including written acknowledgment that the notice has been received. See id. § 1666(a)(3)(A).

The language in Regulation X which exempts from coverage under RESPA home equity lines of credit covered by TILA and Regulation Z, however, directly conflicts with the language in RESPA which expressly extends a lender's duties to borrower inquiries regarding the "servicing" of any "federally related mortgage loan." 12 U.S.C. § 2605(e)(1)(A). Insofar as an agency regulation conflicts with the statute under which it was promulgated, the regulation is ineffective. See LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Zone Management Comm'n, 866 F.2d 616, 623 (3d Cir. 1989). The language in the borrower inquiry provision of RESPA clearly and unconditionally states that the provision applies to any "federally related mortgage loan" which RESPA unambiguously defines.[13]

That TILA may apply to aspects of plaintiffs' line of credit does not preclude application of RESPA. Both statutes are remedial in nature and both impose certain duties to respond to borrower complaints and other inquiries. See Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998) (TILA is remedial statute); Rawlings v. Dovenmuehle Mortgage, Inc., 64 F. Supp. 2d 1156, 1165-66 (M.D. Ala. 1999) (holding RESPA to be

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[13] Plaintiffs argue that there is no conflict between the statute and the regulation because it is plausible to read § 3500.21(e) as applying only in the context of mortgage servicing transfers. The court can locate no support in the legislative history or case law to support such a reading. The statutory and regulatory provisions do not themselves support such a reading. The statute, like Regulation X, sets forth lender responsibilities regarding borrower inquiries in a provision that otherwise addresses the duties of transferor and transferee servicers. Regulation X actually suggests that the borrower inquiry portion of the provision is not limited to inquiries involving the transfer of loan servicing. See 24 C.F.R. § 3500.21(e)(2)(ii) ("A written request does not constitute a qualified written request if it is delivered to a servicer more than 1 year after either the date of transfer of servicing or the date that the mortgage servicing loan amount was paid in full, whichever date is applicable.") (emphasis added). Use of the term "applicable" rather than "earlier" or "later" date suggests that the payment in full contingency is not limited to mortgages which were transferred to a second or subsequent servicer.

To read the regulation as limited to mortgage servicing transfers, one must reasonably read the statute to be so limited as the statutory borrower inquiry requirements similarly appear in a section which otherwise addresses duties of mortgage servicing transferors and transferees. Yet, the language of the statutory provision, which expressly applies to "any servicer of a federally related mortgage loan," suggests no such limitation (emphasis added).

remedial in nature and emphasizing 1990 enactment of borrower inquiry provision); Bieber v. Sovereign Bank, 1996 WL 278813, *5 (E.D. Pa. May 23, 1996) (RESPA is remedial statute). "When there are two federal statutes on the same subject, the rule is to give effect to both if possible." Pittston Co. v. United States, 199 F.3d 694, 702-04 (4th Cir. 1999). See also Bracciale v. City of Phila., 1997 WL 672263, *5 (E.D. Pa. Oct. 29, 1997).

The legislative histories of the statutes and amendments are silent as to how to reconcile the complaint resolution provisions of RESPA and TILA, and there is no case law on point.

The borrower inquiry provision in RESPA is slightly more restrictive in its time component than that in the billing error notice provision of TILA. See 12 U.S.C. 2605(e); 15 U.S.C. 1666(a). Both statutes provide for "actual" and statutory damages, as well as costs and attorney's fees. See 12 U.S.C. 2605(f); 15 U.S.C. § 1640(a)(1), (a)(2)(A)(I), (a)(3), (g).[14] The RESPA borrower inquiry provision applies not only to billing error inquiries but to any request for information relating to the servicing of a federally related mortgage loan, while the billing error notice provision of TILA applies only to billing errors. See 12 U.S.C. 2605(e); 15 U.S.C. 1666(a). RESPA, however, applies only to loans and lines of credit secured by

[14] TILA provides a slight additional benefit in that a lender who fails to comply with the billing error notice provision is precluded from collecting up to the first $50 in disputed charges. See 15 U.S.C. 1666(e).

liens on property, while TILA applies to a variety of consumer credit devices.

This last comparison suggests that, if anything, it is the RESPA complaint resolution provision which is more closely associated with the instant controversy. Congress amended RESPA in 1990 to add a borrower inquiry provision and in 1992 to extend its application to loans secured by subordinate liens despite the enactment of TILA and the FCBA many years earlier. Congress itself did not limit the amendments to transactions uncovered by TILA.

Both statutes are consumer protection statutes. That provisions of two statutes may be applicable in particular circumstances does not alone justify ignoring or recasting either. The remedial purposes of neither statute is frustrated by application of the RESPA borrower inquiry provision in the particular circumstances of this case.[15]

Keystone argues that in any event there was no billing error and thus plaintiffs have failed to show any harm as a result of any failure to comply with RESPA.

As noted, there exists an issue as to whether Keystone properly assessed the interest charges in question. It follows that there is an issue as to whether Keystone failed within sixty

[15]Plaintiffs stress not unfairly that the bank provided RESPA information in the application process and that Mr. Cortez cited to it in several written complaints without a protest or disclaimer from the bank. A bank official perceived the issue raised in the Cortez letter of March 16, 1996 to be "a RESPA one."

days after receiving a qualified written request from Mr. Cortez to "make appropriate corrections." 12 U.S.C. § 2605(e)(2). If so, Keystone would be liable for any resulting damages including any denial of credit because of the reporting of such charges as delinquent to credit reporting agencies. See 12 U.S.C. § 2605(f)(1)(A). Also, insofar as Keystone failed within twenty days to acknowledge in writing the receipt of a qualified written request from Mr. Cortez or within sixty days to provide plaintiffs with a written explanation or clarification of the reasons why Keystone believed the account to be correct, plaintiffs may recover any actual damages resulting from such failure. See 12 U.S.C. § 2605(e)(1)(A), (f)(1)(A).

Actual damages encompass compensation for any pecuniary loss including such things as time spent away from employment while preparing correspondence to the loan servicer, and expenses for preparing, photocopying and obtaining certified copies of correspondence. See Rawlings, 64 F. Supp. 2d at 1164. Plaintiffs have presented competent evidence that their available credit was decreased by the amount of outstanding interest charges on the account during any given week and they were thus unable to earn interest on other accounts. Insofar as a denial of access to the full amount of the credit line resulted from an improper failure to correct the assessment of interest charges, this would constitute actual damages for which Keystone could be liable.

Plaintiffs have asserted a cognizable RESPA claim and it does not clearly appear from the record presented that they will be unable to sustain it. Keystone thus is not entitled to summary judgment on this claim.

V. Conclusion

For the foregoing reasons, plaintiffs have failed to sustain their state law negligence, gross negligence, recklessness and fraud claims. Accordingly, defendant's motion for summary judgment is granted as to these claims.

There is evidence which, when construed in a light most favorable to plaintiffs, could reasonably support a finding of liability on their breach of contract and RESPA claims. Accordingly, defendant's motion for summary judgment as to these claims is denied. It follows that defendant is not entitled to summary judgment on its mirror claim for breach of contract and its motion for summary judgment on that claim is also denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EMILIO G. CORTEZ AND PATRICIA A. CORTEZ	:	
	:	**CIVIL ACTION**
v.	:	
	:	**NO. 98-2457**
KEYSTONE BANK, INC., t/d/b/a FRANKFORD BANK a/k/a KEYSTONE BANK and FRANKFORD BANK NATIONAL ASSOCIATION, t/d/b/a FRANKFORD BANK a/k/a KEYSTONE BANK	:	

ORDER

AND NOW, this day of May, 2000, upon consideration of defendant Keystone Bank's Motion for Summary Judgment (Doc. #13) and plaintiffs' response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to the claims in Counts II, III and V of plaintiffs' Complaint and is otherwise **DENIED.**

BY THE COURT:

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JAY C. WALDMAN, J.