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

KIMBERTON CHASE REALTY CORPORATION, GREGORY R. NOONAN, ESQUIRE, and BIYI OYEFULE, M.D.	: CIVIL ACTION
v.	:
MAIN LINE BANK, WALTER E. SCOTT, JR. and JOSEPH DUFFY	: No.97-2767

MEMORANDUM

Shapiro, Norma L., J. November 3, 1997

This cause of action arises out of an alleged promise to provide financing for a real estate development, the subsequent failure to deliver on that promise and provide the essential financing, and the resulting damages. Now before the court are defendants Main Line Bank's and Joseph Duffy's Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6) and for Failure to Join a Party under Rule 19. Because, taking all the plaintiffs' factual allegations as true, relief cannot be granted on some of the claims, the motion will be granted in part and denied in part.

I. Facts

In August, 1991, Gregory R. Noonan, Esq., a lawyer with the firm of DeYoung, Walfish & Noonan, P.C. ("Noonan") became acquainted with Walter E. Scott, Jr. ("Scott"), an employee of Hart Mortgage Company ("Hart") and subsequently Main Line Bank ("Main Line"). Scott represented himself to Noonan as a skilled commercial lender, mortgage broker, and financier who graduated with a Bachelor of Arts degree ("B.A.") in Finance from Villanova University in 1983. At different times after August 1, 1991, Scott obtained loan commitments and issued loans to various clients of Noonan's law firm. The commitments undertaken by Scott in connection with these loans were verbal and never written. On March 1, 1996, Noonan and Scott met with Greg Truskey (“Truskey”) at the site of a nine lot subdivision in Kimberton, Pennsylvania known as Kimberton Chase -- Phase II ("Project") to discuss purchase, development, construction, and financing. It was agreed that after plaintiffs purchased the land, Truskey would serve as the Project's general contractor.

Between March 1, 1996 and March 18, 1996, Noonan told Scott that both Noonan and Biyi Oyefule, M.D. (“Oyefule”) would serve as signatories for the loan to finance the Project. Scott informed Noonan that 95% of the Project could be financed through Hart and/or its affiliates. Noonan, Oyefule, and Robert Ruggerio (“Ruggerio”), the third principal of Kimberton, relied on Scott’s representations that he was qualified as an expert in lending and finance and that he graduated from Villanova with a B.A. in Finance. Based on these representations, Noonan sought Scott's services, and provided Scott with the only copy of the loan package. Noonan inadvertently failed to keep a copy himself. On March 19, 1996, Noonan sent Scott a letter requesting a loan commitment no later than April 4, 1996 for the purchase and development of the Project and listed May 1, 1996 as the deadline for closing. This letter also asked Scott to provide Noonan with a copy of the entire loan package and requested that Scott personally handle the Project's loan. Plaintiffs put a $60,000 deposit on the Project ("Deposit"). At the expiration of a "due diligence period," the deposit would become non-refundable.

Between March 19, 1996 and April 2, 1996, Scott assured Noonan that the loan processing procedure was proceeding smoothly and 95% financing for the Project was easily attainable. During this period, Scott was reminded that the due diligence period had expired, the deposit was no longer refundable, and Noonan wanted a copy of the entire loan package to enable him to request loans from other financiers if necessary.[1] Two letters dated April 17, 1996 and April 18, 1996 again requested the loan package and a loan commitment. The letters also stated that the closing date for purchasing the Project's land could be postponed until June 1, 1996. On April 19, 1996, Scott came to Noonan's office and assured Noonan the loan process would be expedited. During this meeting, Scott revealed that he was not handling the loan processing and could not produce a detailed description of the loan package. Scott also told Noonan that First Financial Savings Bank ("First Financial") would supply 95% of the

[1] The "loan package" contained: "the agreement of sale of real estate including addendums [sic], a survey map of [the Project], zoning approvals for [the Project], a marketing plan with Re/Max Main Line to act as the exclusive agents for the project, a Phase I Environmental Site Assessment, tax returns and financial information for all individuals involved in the [Project], and curriculum vitaes [sic] for the individuals involved." (Compl. ¶ 39(iv)) ("Loan Package").

financing for the Project, and Dr. Sheldon Novak ("Novak"), one of Scott's clients, would furnish the difference, if any. On April 30, 1996, Noonan wrote Truskey that Scott would arrange the necessary financing in excess of the $60,000 Deposit.

By letter dated May 2, 1996, Noonan informed Scott that the closing date had been postponed to May 15, 1996 and again asked Scott to provide a copy of the Loan Package, because without it Noonan could not look elsewhere for a loan. Noonan also asked Scott to arrange the necessary funding from First Financial and Novak in time for the May 15, 1996 closing date. Between March 1, 1996 and May 8, 1996, neither Main Line nor Scott contacted either Kimberton Chase Realty Company ("Kimberton"), Noonan, Oyefule, or Truskey regarding: (1) the procedure employed when processing the loan; (2) the need for additional information or documentation in connection with processing the loan; (3) a copy of the Loan Package; or (4) problems lending to plaintiffs.

As a result of Scott's inaction, on May 13, 1996, Noonan requested assistance from Lee Sappol, president of Hart Mortgage. Sappol informed Noonan that Main Line had purchased Hart Mortgage and Sappol was no longer president. Sappol referred Noonan to Joseph Duffy ("Duffy"), vice president of Main Line, who supervised the operations Main Line had acquired from Hart Mortgage. Noonan, speaking with Duffy on the telephone on May 20, 1996, asked that Main Line finance the Project. Duffy responded to Noonan in a letter the next day, but never again contacted Noonan. On June 10, 1996, Scott sent Noonan what appeared to be an "adverse action letter" informing Noonan that Kimberton would not receive the loan request because Novak was not in a position to finance the deal personally. According to Scott, Novak could not obtain support from his sources because the financial information presented by plaintiffs fluctuated constantly. In August, 1996, Noonan learned that Scott never attended Villanova University.

In August, 1996, Novak informed Noonan that: (1) Scott never approached Novak for the purposes of providing financing for Kimberton; (2) there was never any correspondence between Scott and Novak regarding Kimberton; (3) the only communication between Novak and Scott regarding Kimberton was a one and one half page document Scott sent Novak one day before Scott wrote the June 10, 1996 "adverse action letter;" and (4) Scott's statement that "Mr. Novak was hindered in presenting the deal to his sources because the financial information as presented by you and your clients constantly fluctuated" was "false and an intentional misrepresentation by Scott."

In the same month, Noonan also contacted Howard Seidman, a former associate of Scott at both Hart Mortgage and Main Line. Seidman told Noonan that: (1) Scott requested Seidman's help with the Kimberton loan in May, 1996; (2) Seidman put Scott in contact with one of Seidman's lenders (the "Source") because Scott told him that the loan was a "construction loan for a conventional, commercial loan," and Seidman was in charge of conventional loans at Hart and Main Line; (3) the Source informed Seidman in June, 1996 that Scott's representation of the loan as a construction loan was incorrect; (4) in requesting funding, Scott supplied the Source with nothing more than a two page document describing the Project; (5) Seidman was embarrassed by Scott's interaction with the Source; (6) had Seidman known of the true nature of the loan request, he would not have made the referral; and (6) as a result of Scott's interaction with the Source, Seidman would no longer provide assistance to Scott in connection with the Project.

Plaintiffs lost their $60,000 deposit, and claim defendants' failure to return the Loan Package prior to June 10, 1996 precluded plaintiffs from applying for alternative financing for the Project from other institutions. The complaint alleges that at no time was Main Line, Scott and/or Duffy “ever in a position or ever intended to lend Plaintiffs . . . those sums necessary to purchase, develop, construct and/or sell the [Project's] lots, with 95% financing, even though commitments were made to do so."

The Complaint alleges (1) violations of the Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691-1691e (West 1982 & Supp. 1994) ("ECOA") (Count I); (2) violations of the Unfair Trade Practice and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1-202-9.2 (West 1993 & Supp. 1997)(“UTPCPL”) (Count II); (3) violations of the "Loan Broker Trade Practices,” 37 Pa. Code § 305 (1993)(“LBTP”) (Count III); (4) breach of contract (Count

IV); (5) material and intentional misrepresentation (Count V); (6) promissory estoppel (Count VI); (7) negligence (Count VII); and (8) punitive damages (Count VIII).

II. Standard of Review

A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) only if plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.. When deciding a motion to dismiss for failure to state a claim, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party" Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

III. Discussion

A. ECOA Claim

The Complaint alleges "[t]he 'adverse action' letter issued by Scott on June 10, 1996, declining the loan for [Kimberton] contained false and fraudulent reasons as to why [Main Line], Scott and/or Duffy declined said loan, in violation of Section 202.9 of regulation B of the [ECOA]."

Defendants, moving to dismiss the ECOA claim, argue that the Complaint fails to allege plaintiffs made a loan application to either Duffy or Main Line that would create an obligation under ECOA. According to defendants, the Complaint does not allege an ECOA violation against First Financial, which actually denied plaintiffs' request, and the Complaint does not refer to an adverse action letter from First Financial.

While the main purpose of ECOA is to "promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age," 12 C.F.R. § 202.1(b) (1997),[2] an ECOA regulation "also requires creditors to notify applicants of action taken on their applications." Id. Section 202.9 of Regulation B, 12 C.F.R. §§ 202.1-202.14 (1997), provides: "A creditor shall notify an applicant of action taken within (i) 30 days after receiving a completed application concerning the creditor's approval of, counteroffer to, or adverse action on the application; (ii) 30 days after taking adverse action on an incomplete application, unless notice is provided in accordance with paragraph (c) of this section . . . ." 12 C.F.R. § 202.9(a)(i)-(ii) (1997). A "creditor" is "a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit. The term includes a

[2] "As originally passed in 1974, Title VII, the ECOA, prohibited discrimination by any creditor against any applicant . . . on the basis of sex or marital status . . . . Congress later amended the ECOA to add prohibitions against discrimination on the basis of race, color, religion, national origin, and age." Brothers v. First Leasing, 724 F.2d 789, 791 (9th Cir. 1984) (citations omitted).

creditor's assignee, transferee, or subrogee who so participates." 12 C.F.R. § 202.2(l).

The dispute involves the word “participates” in this section. Defendants maintain that First Financial and Novak -- not defendants Main Line, Scott, and Duffy -- actually denied the application. According to defendants, First Financial sent plaintiffs the adverse action letter that should be the subject of this lawsuit. Defendants argue the allegation that Scott's letter of June 10, 1996 contained “false and fraudulent reasons” for the denial can only relate to Novak's refusal to provide a loan commitment. Defendants argue that neither Duffy, Main Line, nor Scott “participated” in the actual decision to extend credit, so they cannot be creditors for purposes of adverse action notification. Plaintiffs argue that the Complaint clearly states a loan was being processed through and had been committed to by Scott and Main Line, so defendants are creditors within ECOA because they “participated” in the actual decision to extend or deny credit.

Defendants Scott and Main Line both meet the level of participation required of a “creditor” under Regulation B.   The plaintiffs allege Scott promised that First Financial and Novak would lend the Project money to the plaintiffs, and participated in the credit decision to some degree: he asked for clarification of information provided to him, gave the loan package to lenders, made requests for information and updated financial statements, provided recommendations and guidance, and set up meetings. The evidence of Scott's involvement is sufficient to find that he may have "regularly participated" in the decision to extend or deny credit, and survive a 12(b)(6) motion to dismiss.

Plaintiff also contends Main Line participated in the decision. In a letter to Noonan on May 21, 1997, Main Line Bank acknowledged that Scott was the "contact person" concerning Noonan's "loan request." Scott allegedly represented his affiliates would finance the venture, and Main Line recognized Noonan's loan request; viewed in the light most favorable to the plaintiff both Scott and Main Line are creditors under Regulation B, because in the ordinary course of business they may have "regularly participate[d] in the decision of whether or not to extend credit." While the plaintiff may not ultimately prove Main Line is a creditor under Regulation B, or that Main Line violated Regulation B, Main Line is not entitled to a dismissal of this claim on a Rule 12(b)(6) motion.

The complaint alleges Duffy's only participation was one phone call and one letter. The purpose of the call and the letter was to reaffirm Scott's role as contact person, and "to ensure that no further physical threats were to be made to [the] staff at the Bank." Complaint, Exhibit 13. Individuals within lending institutions may be creditors, even without evidence they actually participated in the decision. <u>See</u> <u>United States v. American Future Systems</u>, 571 F. Supp. 551, 561 (E.D. Pa. 1983) ("creditor" status appropriate because the individual was "the chief operating officer and 97% stockholder" of the lending institution; "the bulk of [the institution's lending was] not generally extended based on a review of individual creditworthiness."). Construing all allegations in the complaint and all reasonable inferences therefrom in favor of the plaintiff, Duffy's involvement in Main Line's activities was not sufficient to be a creditor under Regulation B: Duffy did not participate in the credit decision, nor was he sufficiently involved in Main Line credit decisions to be considered a "creditor." Duffy's motion as to Count I is granted, and that count against Duffy is dismissed.

B. Material and Intentional Misrepresentation

Count V of the Complaint states:

> The representations made by Scott that (i) he graduated with a Bachelor of Arts in Finance in 1983 from Villanova, (ii) that he had secured 95% financing for Kimberton Chase, (iii) that Scott had secured Novak as a swing or bridge financier if needed, (iv) that Scott was qualified as an expert in lending and finance, (v) that the loan for Kimberton Chase was being processed and everything was moving forward, (vi) that 95% financing for Kimberton Chase would be expedited, (vii) that Novak would cover any short fall from 95% financing if First Financial could not lend such amount, (viii) that Scott would provide financing for any sums needed in excess of $60,000 for Kimberton Chase, were all intentional material misrepresentations which were relied upon by the Plaintiffs, all to their own detriment.
> (Compl. ¶ 59).

Defendants maintain these statements could not have caused any injury to plaintiffs. Plaintiffs claim that they relied on Scott's misrepresentations to their detriment.

To recover on a claim of fraud a plaintiff must prove the following elements: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994) (footnote omitted).

The complaint establishes five of the required elements. The misrepresentations complained of are clear. The materiality to the transaction of some of the misrepresentations is clear. The element of falsity or recklessness as to falsity with regard to Scott's statements regarding his education and expertise is satisfied. Scott's representations about financing for the project may or may not have been false or recklessly made. It is well settled in Pennsylvania that, "promises to do future acts do not constitute a valid fraud claim." Wood v. R.R. Donnelley & Sones Co., 888 F.2d 313, 318 (3d Cir. 1989). Only if Scott's statement was one "of present intention which [was] false when uttered" would it constitute "a fraudulent misrepresentation of fact." Brentwater Homes, Inc. v. Weibley, 369 A.2d 1172, 1175 (Pa. 1977). Construing the allegations in the light most favorable to the plaintiff, those representations may have been false or based on reckless disregard of their veracity. Plaintiff's loss of their down payment and anticipated profits may have been proximately based on their reliance on the misrepresentations regarding financing.[3]

Plaintiffs argue that they justifiably relied on Noonan's previous experience that "on a number of occasions" Scott had "obtained loan commitments and issued loans to various clientele of Noonan." (Compl. ¶ 13). Plaintiffs brought Scott the loan package on March 1, 1996, in the interest of closing a loan by May 1, 1996. The plaintiffs, sending a series of letters to Scott through May 22, 1996, continued to rely on Scott's oral representations of the loan prospects. At the same time, plaintiffs moved the closing date on the Project first to May 15, 1996, then to June 1, 1996. In determining whether plaintiffs continued reliance was reasonable, the Pennsylvania Supreme Court has held that the character, intelligence, experience, age and mental and physical condition of the parties must be considered. Emery v. Third National Bank of Pittsburgh, 171 A. 881 (Pa. 1934).

As experienced business people with a history of obtaining loans, plaintiffs were "sophisticated commercial

[3] Plaintiffs did not suffer any loss as a proximate result of Scott's statements about his education and experience. The plaintiffs admit that they dealt with Scott because he "had, on a number of occasions, . . . obtained loan commitments and issued loans to various clientele of Noonan." (Complaint ¶ 13.). The proximate loss was, if at all, related to Scott's history of arranging loans and his representations about financing for the Kimberton Chase loan.

[businesspeople]", Mellon Bank Corp. v. First Union Real Estate, 951 F.2d 1399, 1409 (3d Cir. 1991), and could not be considered to be operating under the "handicap of inexperience." Siskin v. Cohen 70 A.2d 293, (Pa. 1950). Plaintiffs have not demonstrated "justifiable reliance" on defendant Scott's oral assertions regarding the loans. City of Rome v. Glanton, 958 F. Supp. 1026, 1038 (E.D. Pa. 1997). Plaintiffs knew they had no written loan commitment. Upon not receiving one, plaintiffs could have created another loan package, and pursued alternative financing options. The fraud count will be dismissed.

C. UTPCPL Claim

Count II of plaintiffs' Complaint alleges that defendants' "actions are . . . in violation of the catchall provision of the Unfair Trade Practices and Consumer Protection Laws of Pennsylvania." (Compl. ¶ 50). The "catchall" provision prohibits: "[e]ngaging in any other fraudulent conduct which creates a likelihood of confusion or of misunderstanding." Pa. Stat. Ann. tit. 73, § 202-2 (West 1993).

"To be actionable under the catchall provision . . . the confusion or misunderstanding created must be fraudulent. Specifically, to recover under the catchall provision, the elements of common law fraud must be proven. These elements include a material misrepresentation of existing fact, scienter, justifiable reliance on the misrepresentation, and damages." Hammer v. Nikol, 659 A.2d 617, 620 (Pa. Commw. Ct. 1995) (citations omitted); see Burke v. Yingling, 666 A.2d 288, 291

(Pa. Super. Ct. 1995) ("The general purpose of the UTPCPL is to protect the public from fraud and unfair and deceptive business practices") (citation omitted). The plaintiffs state no cause of action for fraud, because of lack of justified reliance. Therefore, the claim based on UTPCPL will be dismissed as well.

D. Breach of Contract

Count IV of the Complaint alleges breach of contract. "When Scott told Noonan that Scott could provide the 95% financing for Kimberton Chase, Noonan accepted said offer on behalf of himself, KCRC and Oyefule which constitutes a binding contract. Because [Main Line], Scott and Duffy all failed to provide 95% financing for the Kimberton Chase project, which inaction constitutes a breach of contract, the Plaintiffs suffered those damages aforementioned." (Compl. ¶¶ 56-57).

Defendants first claim that the Complaint fails to allege Duffy and Main Line were even parties to the supposed contract, and that the contract is barred by the statute of frauds. Plaintiffs claim that Duffy and Main Line are responsible for Scott's actions under agency principles, and that this action falls within an exception to the statute of frauds.

1. STATUTE OF FRAUDS

The Pennsylvania Statute of Frauds, Pa. Stat. tit. 33, § 1 (West 1997), requires that a contract be in writing. See Temp-Way Corp. v. Continental Bank, 139 B.R. 299, 320 (E.D. Pa. 1992) ("[a]n agreement to lend money to be secured by a mortgage on real property . . . is subject to the Pennsylvania statute of frauds, and, thus, must be in writing") (citation omitted); Linsker v. Savings of America, 710 F. Supp. 598, 600 (E.D. Pa. 1989) ("[a]n oral agreement to lend money to a borrower in consideration for a mortgage must be in writing pursuant to the statute of frauds") (citation omitted); Bozzi v. Greater Delaware Valley Sav. and Loan Assocs., 389 A.2d 122, 123 (Pa. Super. Ct. 1978) (oral promise to lend money in return for a mortgage on a property to be purchased with the borrowed money is unenforceable under the statute of frauds).

Plaintiffs claim a recognized exception to the statute of frauds. "Although, in general, the statute of frauds acts as a bar to the enforcement of oral agreements, it is well settled that such agreements may be taken out of the statute of frauds if there is evidence to establish that the agreement was made. This rule promotes the underlying purposes of the statute of frauds: to prevent perjury and fraud and to prevent parties from escaping their legal obligations." Stelwagon Mfg. Co. v. Tarmac Roofing, 63 F.3d 1267, 1276 (3d Cir. 1995) (citations omitted). Plaintiffs rely on a series of letters from Noonan in which he states, inter alia, that Scott agreed to obtain 95% financing for the Project. Although plaintiff’s assertion in these letters that defendants actually made a contract would not normally be sufficient to establish the contract was made, it cannot be determined on a 12(b) motion whether an exception to the statute of frauds can be established. Plaintiffs claim might fit within a statute of frauds exception, and this count cannot be dismissed at this time.

2. Agency and Respondeat Superior

Under Pennsylvania law it is “well settled that a principal, disclosed or undisclosed, is liable for the acts and contracts . . . of his agent within the scope of the agent’s authority.” Toll v. Pioneer Sample Book Co., 94 A.2d 764, 765 (Pa. 1953). If the principal, Main Line, exercised sufficient control over the agent, Scott, the agent’s misrepresentations to the plaintiffs become “representations made in the scope of [Scott’s] apparent authority and [bind] his principal, regardless of whether [the principal] knew of the statements.” Aiello v. Ed Saxe Real Estate, Inc., 499 A.2d 282, 288 (Pa. 1985).

Main Line purchased Hart, for whom Scott worked. (Compl. ¶ 31) Main Line exercised sufficient control over Scott for him to be considered its agent after the purchase. Making contracts for loan financing was within his authority. As its agent, Main Line was liable for his conduct. It is unclear which acts occurred after the purchase; the terms of acquisition are not of record, so it is not possible to determine if Main Line assumed Hart’s liabilities. The complaint sufficiently alleges that Scott made an oral contract as Main Line’s agent, and this count against Main Line cannot be dismissed on a 12(b)(6) motion.

Plaintiffs also assert that Duffy is individually responsible for the Scott’s alleged breach of contract, because “Scott was acting . . . as . . . [an] agent . . . of . . .

Duffy." (Compl. ¶ 7). Duffy was the Vice President of a bank that purchased the organization for which Scott worked. When Main Line acquired Hart Mortgage, Duffy and Scott both became agents of Main Line.

The Restatement (Second) of Agency states:

> The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control.
> Restatement (Second) of Agency § 1 cmt.a (1958).

In processing loan applications through Hart and Main Line, Scott did not consent to act on Duffy's behalf. Nor did Duffy indicate that Scott was to act for him. As Vice President of Main Line, Duffy was simply its agent. See Gillian v. Consolidated Foods Corp, 227 A.2d 858 (Pa. 1967). While the acts of an agent, Scott, might be imputed to the employer, Main Line, they cannot be imputed to another agent, Duffy. As the Supreme Court of Pennsylvania has stated, "the right to supervise, even as to the work and the manner of performance, is not sufficient; otherwise a supervisory employee would be liable for the negligent act of another employee though he would not be the superior or master of that employee in the sense the law means it." Yorston v. Pennell, 153 A.2d 255 (Pa. 1959). Duffy's role as Vice President of Main Line did make Scott his agent. This count for breach of contract will be dismissed against Duffy.

E. Promissory Estoppel

Count VI presents a claim for promissory estoppel:

> Assuming, arguendo, that his Court finds that no contract existed between the Plaintiffs and Defendants, Defendants should be estopped from denying the promise by Scott that 95% financing had been secured and the promise should be enforced since (I) the Plaintiffs committed $60,000 of deposit monies as non-refundable in reliance on this promise, and (ii) the Plaintiffs were unable to find alternative financing for Kimberton Chase since the Defendants failed to return a copy of the loan package prior to June 10, 1996, all to the detriment of Plaintiffs.
>
> All of the Defendants were notified of Plaintiffs' $60,000 non-refundable commitment made in reliance of Scott's misrepresentations in a sufficient amount of time for any or all of them to finance the Kimberton Chase project. Injustice can be avoided only by enforcement of the promise. (Compl. ¶¶ 61-62).

Plaintiffs claim they reasonably relied on the promises of Scott, who had the apparent authority of Duffy and Main Line.

The elements for a cause of action for promissory estoppel are: "(1) misleading words, conduct or silence by the party against whom the estoppel is asserted, (2) unambiguous proof of reasonable reliance on the misrepresentation by the party seeking to assert the estoppel, and (3) no duty of inquiry on the party seeking to assert estoppel." Thomas v. E.B. Jermyn Lodge No. 2, 693 A.2d 974, 977 (Pa. Super. Ct. 1997) (citation omitted). Plaintiffs can not establish reasonable reliance on the misrepresentations. Plaintiffs have failed to demonstrate the required elements of promissory estoppel, and this claim will be dismissed.

F. The Loan Brokers Trade Practices Act

Count III of plaintiffs' Complaint alleges "the actions of Defendants were in violation of Loan Broker Trade Practices, 37 Pa. Code § 305 (1995) ("LBTP"). As such, the Defendants are deemed to be in violation of the UTPCPL." (Compl. ¶ 53). Under LBTP, a "loan broker" is a "person, copartnership, association or corporation engaged in providing services for the purpose of procuring or attempting to procure a loan on behalf of a borrower where a fee or other valuable consideration is charged for the services." 37 Pa. Code. § 305.2 (1995). LBTP provides, in relevant part:

> (a) With respect to a loan broker, the following are considered unfair methods of competition and unfair or deceptive acts or practices:
>
> (1) Employing a device, scheme or article to defraud.
>
> (2) Making false or misleading statements of fact or omitting material facts in order to make a statement not misleading.
>
> (3) Engaging in an act, practice or course of conduct which creates a likelihood of confusion or misunderstanding.
>
> (4) Failing to use due diligence and make reasonable efforts to procure a loan on behalf of a borrower.
> . . .
> 37 Pa. Code. § 305.3 (1995).

Defendants Main Line and Duffy argue that the Complaint fails to allege that they made misrepresentations or acted as loan brokers, so there is no cause of action under LBTP. Plaintiffs contend that Scott made false or misleading statements and engaged in a course of conduct creating a likelihood of confusion and misunderstanding, and Duffy and Main Line are liable under respondeat superior.

Under LBTP, Main Line qualifies as a "loan broker" because, through their agent Scott, they were "engaged in providing services for the purpose of procuring or attempting to procure a loan.” Taking all factual allegations in complaint as true, it is possible that Main Line, through Scott, may have engaged in practices prohibited under LBTP. The complaint sufficiently alleges misleading statements, actions that create the likelihood of confusion or misunderstanding, and failure to make reasonable efforts to procure a loan on behalf of a borrower. This count against Main Line cannot be dismissed on a motion under Rule 12(b)(6).

Scott was not the agent for Duffy. Duffy cannot be held liable under respondeat superior for any alleged breach of LBTP by Scott. This count against Duffy will be dismissed.

G. Negligence

Count VII claims that defendants were negligent by: (I) failing to advise plaintiffs properly of all of the steps that need to be taken prior to the issuance of a loan by the defendants and/or one of their affiliates; (ii) failing to return a copy of the loan package to plaintiffs when it was originally requested on March 19, 1996 so that the plaintiffs could arrange for alternate financing; (iii) failing to service plaintiffs request for funding properly; (iv) failing to service the request for funding throughout the entire loan process; and (v) failing to advise plaintiffs that they should have requested a return of the $60,000.00 deposit during the due diligence period before the funds became non-refundable. Defendants characterize this negligence claim as a refashioned claim for breach of contract which is barred by the statute of frauds.

The elements of a cause of action in negligence are: (1) a duty recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injuries; and (4) actual loss or damage to the interests of another. Morena v. South Hills Health System, 462 A.2d 680 (Pa. 1983).

"Duties can arise from common law, by statute, and by contract." Emerson v. Adult Community Total Services, Inc., 842 F. Supp. 152, 155 (E.D. Pa. 1994). Any duty defendants owed was based on ECOA, LBTP, contract, or conversion of the plaintiff's loan package after plaintiffs requested it back. A breach of duty under ECOA, LBTP, or contract would be recoverable under those counts. Plaintiffs' negligence is "an impermissible attempt to convert a contract claim into a tort claim." USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 440 (3d Cir. 1993). A "[b]reach of contract, without more, is not a tort." Windsor Sec., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 664 (3d Cir.

1993). There was no duty to return the loan application package, nor was the alleged conversion of the loan package the proximate cause of any harm to plaintiffs, since plaintiffs could have prepared the same or similar material required by another lender. Plaintiffs' mere allegation of negligence does not create a cause of action surviving a 12(b)(6) motion. This count will be dismissed.

H. Punitive Damages

Plaintiffs request punitive damages because "[t]he actions of the Defendants constitutes [sic] such willful, wanton, reckless and outrageous conduct that cannot be tolerated in a civilized society thereby warranting punitive damages." (Compl. ¶ 66).

Punitive damages are awarded to punish a defendant for outrageous conduct, defined as an act which, in addition to creating "actual damages, also imports insult or outrage, and is committed with a view to oppress or is done in contempt of plaintiffs' rights." Delahanty v. First Pa. Bank, N.A., 464 A.2d 1243, 1263 (Pa. Super. 1983). Defendants claim the Complaint fails to allege sufficiently outrageous conduct to warrant an award of punitive damages, and base their argument for dismissal of this count on dismissal of the other counts.

Pennsylvania law is clear that "punitive damages are not recoverable in an action for breach of contract." Thorsen v. Iron and Glass Bank, 476 A.2d 928 (Pa. Super. 1984). Punitive damages are available under ECOA, 12 C.F.R. § 202.14 (1997), and under LBTP,[4] and will be considered if plaintiff prevails on either of those causes of action. Federal practice does not contemplate a separate count for punitive damages. This count will be dismissed without prejudice to a claim of punitive damages if warranted under ECOA or LBTP.

I. Failure to Join Parties Under Rule 19

Defendants also maintain plaintiffs have failed to join several defendants with an interest in this action: First Financial; Dr. Novak; and Robert A. Ruggerio, the third principal of Kimberton.

Plaintiffs claim that they did not join First Financial and Dr. Novak because there was no privity of contract with either of them. Their claims do not involve First Financial or Novak, who refused to lend money to the plaintiffs, because they made no contracts or representations regarding the Project. Plaintiffs' claims involve the actions and omissions of Scott: promises to secure financing, failure to do so, and failure to notify them timely of the unwillingness or inability to finance

[4] The Attorney General promulgated LBTP pursuant to his authority under UTPCPL, 73 P.S. §§ 201-1, 201-3.1 (Purdon 1993). UTPCPL allows the judge to award treble damages. 73 P.S. § 201-9.1 (Purdon 1993). "It is undisputed that the imposition of exemplary or treble damages is essentially punitive in nature." Johnson v. Hyundai Motor of Am.,698 A.2d 631, 639 (Pa. Super. 1997). In determining whether to award treble damages under LBTP, this court "will be guided by the well-established, general principles of law governing punitive damages when exercising discretion under the UTPCPL." Id.

the Project. First Financial and Novak are not indispensable parties because Scott failed to approach them for financing.

Plaintiffs omitted Ruggerio because he was not a signatory to the loan transaction, although he was a principal of Kimberton Chase. The corporation, an independent legal entity, sufficiently represents its own interests, and any interest Ruggerio might have in this action. The other two principals would have been signatories to the loan, and may have interests in addition to their interests as principals of the corporation.

Defendants have not stated sufficient reasons why other parties are indispensable, especially in light of the fact that "courts are loath to grant motions of this type." 5A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1359 (2d ed. 1990).

IV. Conclusion

Counts II (UTPCPL), V (Fraud), VI (Promissory Estoppel), VII (Negligence), and VIII (Punitive Damages) will be dismissed in their entirety. Counts I (ECOA), III (LBTP), and IV (Breach of Contract) will be dismissed against Duffy. Taking all plaintiffs' factual allegations and all reasonable inferences therefrom as true, the complaint sufficiently alleges that defendant Main Line may be liable for an violation of ECOA, or LBTP, and that Main Line was bound by contract through its agent, Scott. The ECOA, LBTP, and contract claims against Main Line cannot be dismissed on a 12(b)(6) motion. There are no indispensable parties who must be joined. Defendants' Motion for

Failure to State a Claim upon Which Relief Can Be Granted and for Failure to Join a Party under Rule 19 is granted in part and denied in part.

An appropriate order follows.

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

KIMBERTON CHASE REALTY CORPORATION, GREGORY R. NOONAN, ESQUIRE, and BIYI OYEFULE, M.D.	: CIVIL ACTION
v.	:
MAIN LINE BANK, WALTER E. SCOTT, JR. and JOSEPH DUFFY	: No.97-2767

ORDER

AND NOW, this 3rd day of November, 1997, upon consideration of Defendants' Motion to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted and Failure to Join a Party under Rule 19, plaintiff's Response and Memorandum in Opposition thereto, and Defendants' Reply, and Defendants' Supplemental Memorandum of Law in Support of the Motion to Dismiss, it is **ORDERED** that:

1. Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**:

A. Counts I, III, and IV of Plaintiffs' Complaint are **DISMISSED** against defendant Joseph Duffy, but not dismissed against Main Line Bank.

B. Counts II, V, VI, VII, VIII are **DISMISSED**.

2. Defendant Main Line Bank shall have ten (10) days within which to file its Answer to Counts I, III, and IV of plaintiffs' Complaint.

____
J.