

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2010-CA-9409
DIVISION: CV-A

CITIBANK, N.A.,
Plaintiff(s),

vs.

MARY ERICKSON,
Defendant(s).

ORDER GRANTING MOTION TO DISMISS
WITHOUT PREJUDICE

Upon consideration of Defendant's *Motion to Dismiss*, and after hearing argument of counsel and conducting further research, the court grants Defendant's motion based upon the following grounds:

1. Defendant has raised two separate grounds for dismissing Plaintiff's Complaint. First, Defendant claims that Plaintiff lacks standing to bring this suit because the "Home Equity Credit Line Agreement" attached to the Complaint was an agreement between Defendant and the originator of the loan, MORTGATEIT, Inc., and there is nothing in the Complaint or the attached documents which alleges that Plaintiff is the owner of the purported promissory note. Second, Defendant claims that the attached "Home Equity Credit Line Agreement" is not a negotiable instrument under Chapter 673, which is Florida's version of the Uniform Commercial Code.

2. As to the first ground raised, lack of standing is an affirmative defense which normally must be raised in a responsive pleading, rather than in a motion attacking the sufficiency of the pleadings. Glynn v. First Union National Bank, 912 So.2d 357, 358 (Fla. 4th DCA 2005). Furthermore, the Plaintiff has alleged in its Complaint that it is the owner and holder of the note

which, for purposes of a motion to dismiss directed to the sufficiency of the complaint allegations, is enough to deny Defendant's motion.

3. However, Defendant's position that the attached "Home Equity Credit Line Agreement" is not a negotiable instrument is well taken. No Florida court appears to have addressed the issue of whether a line of credit such as the one described in Plaintiff's complaint qualifies as a "negotiable instrument" as that term is defined under §673. 1041, Fla. Stat.

4. Under this statute, the term "negotiable instrument" is defined, in part, to mean "an unconditional promise or order *to pay a fixed amount of money*, with or without interest or other charges described in the promise or order...." §673.101(1), Fla. Stat. (emphasis supplied).

5. Defendant contends, and the court agrees, that the "Home Equity Credit Line Agreement" is not an unconditional promise to pay a fixed amount of money. Instead, the agreement allows for the Defendant to make draws of varying amounts from the line of credit over a 5 year period up to a limit of \$150,000.00. However, there is no set amount that Defendant has to borrow under the agreement and, theoretically, Defendant does not have to draw anything from the line of credit.

6. Those courts that have addressed this issue under similar U.C.C. provisions adopted by other states appear to agree with Defendant's position. See, Yin v. Society National Bank Indiana, 665 N.E.2d 58, 62-63 (Ind. Ct. App. 1996)(Line of credit where borrower could make draws of varying amounts determined to be outside of the definition of negotiable instrument because the line of credit lacked an unconditional promise to pay a sum certain); Resolution Trust Corp. v. Oaks Apartments Joint Venture, 966 F.2d 995, 1001-1002 (5th Cir. 1992)(RTC failed to qualify as a "holder in due course" under Texas law when note failed to demand payment of a sum certain and therefore did not qualify as a negotiable instrument); What constitutes a "Fixed Amount of Money"

for purposes of §3-104 of the Uniform Commercial Code providing that negotiable instrument must contain an unconditional promise to pay a fixed amount of money, 61 A.L.R.5th 289 (2000).

7. Accordingly, the attached agreement, on its face, is not subject to the provisions of chapter 673, Fla. Stat., and Plaintiff's claims under Chapter 673 are without foundation.

8. Because it does not appear to the court that amendment would be impossible or futile at this point, the dismissal of Plaintiff's claim is without prejudice to allow Plaintiff the opportunity to amend its complaint in order to state a cause of action under another theory that does not rely on the negotiability of the agreement in question. Plaintiff shall have thirty (30) days from the date of this order in which to file an amended complaint.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida on this 4th day of January, 2011.

JAMES H. DANIEL, Circuit Judge

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ORDER ENTERED
JAN 04 2011
/s/ James H. Daniel