

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

CORINTHIAN T. CUFFEE and	:	
KIMBERLY L. SMITH,	:	C.A. No. 04C-06-034 WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
FAIRBANKS CAPITAL CORP.,	:	
and EQUICREDIT CORPORATION	:	
OF AMERICA,	:	
	:	
Defendants.	:	

Submitted: February 4, 2005
Decided: May 17, 2005

ORDER

Upon Defendant Fairbanks Capital Corporation's
Motion to Dismiss. Denied.

Richard H. Cross, Jr., Esquire of Cross & Simon, LLC, Wilmington, Delaware;
attorneys for the Plaintiffs.

Karen Lee Turner, Esquire of Eckert Seamans, Wilmington, Delaware; attorneys for
the Defendants.

WITHAM, R.J.

FACTS

Before the Court is a Motion to Dismiss Plaintiffs' Complaint filed by Defendant, Fairbanks Capital Corporation. On February 8, 2005 Counsel for Plaintiffs sent a letter to the Court requesting that this motion be considered as a Summary Judgment Motion under Rule 56. The Court granted Plaintiffs' request on February 9, 2005.

Plaintiffs filed this suit on June 24, 2004 alleging negligent servicing of their loans and other claims arising out of the servicing of two loans on one property located at 247 Plymouth Road, Felton, DE. The first of these loans was commenced in March of 1994 and the second soon thereafter. The first loan was paid in full on July 15, 2003 and the second was paid in full on July 8, 2003. Fairbanks was the loan servicing agent for Defendant Equicredit with respect to both these mortgages.

A class action settlement against Fairbanks Capital Corporation was approved by the United States District Court for the District of Massachusetts on May 17, 2004 (the "Curry Class Action"). The terms of the class action required that any consumers whose loans were serviced between January 1, 1999 and December 10, 2004 and who were affected by certain "covered practices" had to opt out of the class settlement.

Defendants allege that Plaintiffs' Complaint must be dismissed because Plaintiffs' claims make them members of a nationwide class action settlement with Fairbanks. Defendants maintain that Plaintiffs were given the proper notice that they were members of the class via mailing and by publication in the national edition of USA Today but that Plaintiffs failed to opt out and are therefore still members of the

class.

Plaintiffs contend that their claim should not be dismissed because 1) Plaintiffs obtained two loans on their property, the first of which was obtained in 1994, approximately 5 years before the period covered by the class action; 2) the notices that Plaintiffs received indicated that the class action was an “opt-in” as opposed to an “opt-out” class action in which the Plaintiffs would be required to sign certain documents in order to become part of the class action; 3) the Massachusetts court did not have jurisdiction over the Plaintiffs; and 4) in any event, Plaintiffs’ claims go beyond the scope of the class action.

DISCUSSION

Summary judgment is appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.¹ The facts must be viewed in the light most favorable to the non-moving party.² Summary judgment may not be granted if the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.³ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for

¹ Super. Ct. Civ. R. 56(c).

² *Guy v. Judicial Nominating Com’n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

³ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

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decision as a matter of law.⁴

Counsel for Defendant, in her letter objecting to Plaintiffs' request for the Court to consider the motion under Rule 56, asserts that the disagreement over which form of notice was sent in this case "goes to a disputed question of fact, which is an issue that is both genuine and material."⁵ Plaintiffs also contend that the question of which form of notice Plaintiffs received amounts to a question of material fact. The Court agrees with the parties that the issue of which form of notice the plaintiffs actually received is a genuine issue of material fact still in dispute in this case. As such, Summary Judgment cannot be granted. Defendants Motion is DENIED without prejudice.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution

⁴ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁵ Letter dated February 14, 2005.