

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT CHRISTIANSTED

PHILLIP EVANS,

Plaintiff,

vs.

BANK OF NOVA SCOTIA,
GERALDINE SIMPSON, individually
and as Employee of the BANK OF
NOVA SCOTIA, and BETTY
CHRISTENSEN, Individually and
as Employee of the BANK OF NOVA
SCOTIA,

Defendants.

CIVIL NO. 459/1982

ACTION FOR RECISSION AND
DAMAGES

JURY TRIAL DEMANDED

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PETERSEN, Judge

MEMORANDUM OPINION
October / , 1982

The present action came to this Court on a complaint by the Plaintiff charging all Defendants with negligence, fraud, intentional fraudulent misrepresentation and other conduct, in connection with several loan transactions, which

conduct allegedly violated the Federal Truth in Lending Act. The Bank of Nova Scotia has filed an answer, but both Defendants Simpson and Christensen have filed motions to dismiss. These motions to dismiss are hereby denied.

Defendant Christensen's motion to dismiss will be dealt with first, as there is a procedural question whether it should be treated as a request for dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or as a request for summary judgment under Rule 56, F.R.C.P. This Defendant's motion is entitled "Motion to Dismiss," and it states that the Defendant "moves the Court pursuant to Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure for an order dismissing this matter." In Plaintiff's opposition to this motion, he states that he "opposes the Motion for Summary Judgment...which was styled as a Motion to Dismiss."

Federal Rule of Civil Procedure 12 was amended in 1948. This amendment added the last sentence of Rule 12(b), and provides that a Rule 12(b)(6) motion to dismiss for failure to state a claim shall be converted into a Rule 56 motion for summary judgment whenever "matters outside the pleading are presented to and not excluded by the court...." (emphasis added). Fed. R. Civ. P.12. See also C. Wright & A. Miller, Federal Practice and Procedure: Civil, Sections 1366, 2713. Thus, a 12(b)(6) motion is to be considered a motion for summary judgment only when factual matters are presented in affidavits or other "outside" material, and the court specifically relies on this matter. "The court has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." Wright & Miller, supra, Section 1366. The Wright and Miller treatise further explains that this

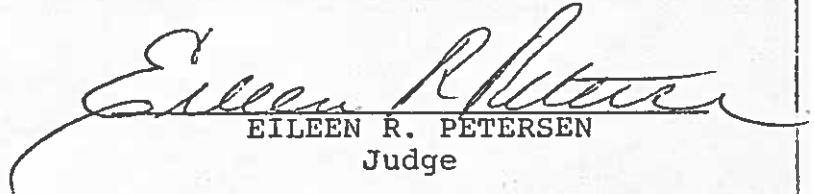
discretion will be exercised pursuant to the court's determination of whether or not the outside material, and the subsequent conversion from Rule 12(b)(6) to a Rule 56 motion, will facilitate disposition of the action. "When the extra-pleading material is comprehensive and will enable a rational determination of a summary judgment motion, the Court is likely to accept it; when it is scanty, incomplete, or inconclusive, the court probably will reject it." Wright & Miller, supra, Section 1366.

This Court will not treat Christensen's motion to dismiss as a motion for summary judgment. Although this Defendant has submitted an affidavit along with the motion to dismiss, the affidavit does not resolve any issues of material fact. Therefore it cannot support a motion for summary judgment. As a result, the outside matter proffered in the affidavit will be excluded, and this Court refuses to accept it or consider it in ruling on the 12(b)(6) motion to dismiss.

Having determined that Defendant Christensen's motion is a 12(b)(6) motion to dismiss, as is Defendant Simpson's, both motions for dismissal will be denied for the same reasons. The standard for determining the sufficiency of a complaint when faced with a Rule 12(b)(6) motion to dismiss was stated by the Supreme Court as follows: "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admission, its task is necessarily a limited one. The issue is not whether a Plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.... Moreover, it is well established that, in passing on a motion to dismiss ... the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Looking at the complaint in a light most favorable to the Plaintiff, there appears to be

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no good reason why he should not be permitted to offer evidence to prove his claims against Christensen and Simpson. The Plaintiff alleges that both Defendants defrauded him and were instrumental in various violations of the Federal Truth in Lending Act as it relates to personal loans obtained by the Plaintiff from the Defendant Bank of Nova Scotia. In Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the Supreme Court held that a Rule 12(b)(6) dismissal should only be allowed where "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Such is not the case here. For that reason, and also because this Court is concerned only with the sufficiency of the allegations in the complaint and is disinclined to dismiss a case on the pleadings, the motions of Defendants Christensen and Simpson to dismiss for failure to state a claim upon which relief can be granted are DENIED.


EILEEN R. PETERSEN
Judge