

FTC v. Capital City Mortg. Corp.

United States District Court for the District of Columbia
February 7, 2002, Decided ; February 7, 2002, Filed
Civil Action No. 98-237 (GK), Civil Action No. 98-1021 (GK)

Reporter: 2002 U.S. Dist. LEXIS 2199

FEDERAL TRADE COMMISSION, Plaintiff, v. CAPITAL CITY MORTGAGE CORP., Defendants. CLYDE HARGRAVES, et al., Plaintiffs, v. CAPITAL CITY MORTGAGE CORP., Defendants.

For ERIC SANNE, defendant (98-CV-237): J. Edward Wicht, ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER, L.L.P., Washington, DC.

Subsequent History: [*1] The Name of this Case has been Corrected by the Court March 29, 2004.

Motion denied by FTC v. Capital City Mortg. Corp., 2002 U.S. Dist. LEXIS 28692 (D.D.C., Mar. 28, 2002)

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, third-party plaintiffs (98-CV-237): Philip Michael Musolino, MUSOLINO & DESSEL, Washington, DC.

Prior History: Hargraves v. Capital City Mortg. Corp., 147 F. Supp. 2d 1, 2001 U.S. Dist. LEXIS 7738 (D.D.C., 2001)

For CHESTER KATZ, third-party defendant (98-CV-237): Jack A Gould, Matthew William Lee, ECCLESTON & WOLF, Washington, DC.

Disposition: Plaintiff's Motion for Injunction Temporarily Freezing Defendants' Assets denied.

For RON DEUTSCH, third-party defendant (98-CV-237): Kevin Michael Murphy, Dennis John Quinn, CARR MALONEY P.C., Washington, DC.

Counsel: For FEDERAL TRADE COMMISSION, plaintiff (98-CV-237): Ori Lev, Laura D. Berger, DEPARTMENT OF JUSTICE, Washington, DC.

For MICHAEL SHELTON, third-party defendant (98-CV-237): James Richard Bucher, SASSCER, CLAGETT & BUCHER, Upper Marlboro, MD.

For FEDERAL TRADE COMMISSION, plaintiff (98-CV-237): Bradley H. Blower, FEDERAL TRADE COMMISSION, Office of General Counsel, Washington, DC.

For AGUSTIN DE LA CRUZ-VAZQUEZ, MARIA GUADALUPE DE LA CRUZ-GARCIA, Petitioners (98-CV-237): Robert F. Jacobs, Santa Ana, CA.

For FEDERAL TRADE COMMISSION, plaintiff (98-CV-237): Herbert Alain Sheer, Sandra Mitchell Wilmore, FEDERAL TRADE COMMISSION, Washington, DC.

For JOHN ASHCROFT, Respondent (98-CV-237): Regional Counsel, Western Region Immigration & Naturalization Service, Laguna Niguel, CA.

For FEDERAL TRADE COMMISSION, plaintiff (98-CV-237): Lauren E. Willis, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For JOHN ASHCROFT, Respondent (98-CV-237): LOS ANGELES DISTRICT COUNSEL, IMMIGRATION & NATURALIZATION SERVICE, Office of the District Counsel, Los Angeles, CA.

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, defendants (98-CV-237): Rena Karen Schild, Philip Michael Musolino, MUSOLINO & DESSEL, Washington, DC.

For JOHN ASHCROFT, Respondent (98-CV-237): Joan [*3] E. Smiley, Esq., David V. Bernal, Attorney, OFFICE OF IMMIGRATION LITIGATION, Washington, DC.

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, defendants (98-CV-237): Lawrence Bradley Bernard, VENABLE, BAETJER, HOWARD & CIVILETTI, L.L.P., Washington, DC.

For JOHN ASHCROFT, Respondent (98-CV-237): Brian G. Slocum, Office of Immigration Litigation, Washington, DC.

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, defendants (98-CV-237): Leticia Maria Watson, CAPITAL CITY MORTGAGE CORPORATION, Washington, DC.

For JOHN ASHCROFT, Respondent (98-CV-237): Ronald E. LeFevre, Chief Legal Officer, District Counsel, Immigration and Naturalization Service, San Francisco, CA.

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, defendants (98-CV-237): Charles [*2] Holton Acker, III, Gaithersburg, MD.

For CLYDE HARGRAVES, ERLINDA COOPER, GREATER LITTLE ARK BAPTIST CHURCH, WALTER JAMISON, SR, NANCY HILLIARD, ANGELA BIRTH, FAIR HOUSING COUNCIL OF GREATER WASHINGTON, SYLVIA ROBINSON, plaintiffs (98-CV-1021): Richard Ritter, Lars T. Waldorf, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS, Washington, DC.

For CLYDE HARGRAVES, ERLINDA COOPER, GREATER LITTLE ARK BAPTIST CHURCH, WALTER JAMISON, SR, NANCY HILLIARD, ANGELA BIRTH, FAIR HOUSING COUNCIL OF GREATER WASHINGTON, plaintiffs (98-CV-1021): Jeffrey David Robinson, Duane Kenneth Thompson, Elizabeth Torrant Sheldon, BAACH, ROBINSON & LEWIS, Washington, DC.

For CLYDE HARGRAVES, ERLINDA COOPER, GREATER LITTLE ARK BAPTIST CHURCH, NANCY HILLIARD, ANGELA BIRTH, FAIR HOUSING COUNCIL OF GREATER WASHINGTON, SYLVIA ROBINSON, plaintiffs (98-CV-1021): John Peter [*4] Relman, RELMAN & ASSOCIATES, Washington, DC.

For CLYDE HARGRAVES, ERLINDA COOPER, GREATER LITTLE ARK BAPTIST CHURCH, WALTER JAMISON, SR, NANCY HILLIARD, ANGELA BIRTH, FAIR HOUSING COUNCIL OF GREATER WASHINGTON, plaintiffs (98-CV-1021): Kurt Hirsch, JELLYVISION, Chicago, IL.

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, defendants (98-CV-1021): Christopher Schwartz, HOLLAND & KNIGHT, L.L.P., Washington, DC.

For CAPITAL CITY MORTGAGE CORPORATION, THOMAS K. NASH, defendants (98-CV-1021): Rena Karen Schild, Philip Michael Musolino, MUSOLINO & DESSEL, Washington, DC.

For CAPITAL CITY MORTGAGE CORPORATION, defendant (98-CV-1021): Eric Jerome Sanne, Leticia Maria Watson, CAPITAL CITY MORTGAGE CORPORATION, Washington, DC.

For THOMAS K. NASH, defendant (98-CV-1021): Leticia Maria Watson, CAPITAL CITY MORTGAGE CORPORATION, Washington, DC.

For UNITED STATES OF AMERICA, amicus (98-CV-1021): Michelle Aronowitz, DEPARTMENT OF JUSTICE, Washington, DC.

For SYLVIA ROBINSON, plaintiff (98-CV-1021): Duane Kenneth Thompson, Elizabeth Torrant Sheldon, BAACH, ROBINSON & LEWIS, Washington, DC.

Judges: GLADYS KESSLER, UNITED STATES DISTRICT JUDGE.

Opinion by: GLADYS KESSLER

Opinion

[*5] **MEMORANDUM-OPINION**

The Plaintiff Federal Trade Commission ("FTC") has moved, in Civ. No. 98-237., for an injunction to temporarily freeze the assets of Defendants Capital City Mortgage Corp. and Thomas K. Nash in order to prevent performance of the finalized settlement reached between the *Hargraves* Plaintiffs, in Civ. No. 98-1021, and the parties who are Defendants in both cases. ¹ Upon consideration of the Motion, the Oppositions submitted by the *Hargraves* Plaintiffs and the Defendants, the Reply of the FTC, the applicable case law, and the record herein, the Court concludes that the Motion shall be **denied**.

On January 29, 1998, after a number of years of investigation, the FTC initiated the present litigation, Civ. No. 98-237 ("the *FTC* action or lawsuit"), alleging that Defendants, a mortgage lending company and its sole owner, violated the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a); [*6] the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq.; and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq.

Shortly thereafter, on April 28, 1998, the *Hargraves* Plaintiffs filed their lawsuit, Civ. No. 98-1021 ("the *Hargraves* action or lawsuit"), alleging that Defendants engaged in a pattern and practice of predatory and racially discriminatory lending in the Washington, D.C., area, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), (d), & 1965(c); the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(a) & (b), 3605(a)-(b)(1) & (b)(2); the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691; the Civil Rights Acts, 42 U.S.C. § 1981 & 1982m; the District of Columbia's prohibition against unfair and deceptive lender practices, D.C. Code § 28-3312; and common law fraud and breach of contract principles.

After extensive discovery and litigation of lengthy summary judgment motions, the parties entered into settlement discussions at the urging of Judge [*7] Joyce Hens Green, to whom this case had been assigned until she

¹ These two cases were consolidated for purposes of discovery in October 1998.

retired. Those discussions took place, with the assistance of Magistrate Judge Alan Kay, during the first half of 2001. Counsel for the *Hargraves* Plaintiffs sought a global settlement that would resolve both cases. The FTC rejected this suggestion, and therefore the two sets of Plaintiffs proceeded to conduct separate negotiations with the Defendants. On August 8, 2001, the *Hargraves* Plaintiffs and Defendants informed the Court at a status conference they believed a settlement of their case was likely; a final settlement has now been reached, thanks to the substantial assistance of Magistrate Judge Kay. At a Pre-Trial Conference on November 27, 2001, trial was set in the *FTC* case for March 25, 2002. On December 7, 2001, in accordance with the Pre-Trial Order of November 28, 2001, the FTC filed the pending Motion.

The Court is denying Plaintiff's Motion for the following reasons:

First, as the FTC candidly and straightforwardly admits, there is absolutely no precedent, whether under Section 13(b) of the FTC Act or the Court's general equitable powers, for freezing a defendant's assets when no preliminary injunction [*8] has been entered and no final judgment on the merits has been rendered, so as to preclude that defendant from using its assets to comply with a settlement agreement entered into in a different lawsuit with a different plaintiff. Indeed, in *FTC v. Evans Products Co.*, 775 F.2d 1084, 1089 (9th Cir. 1985), the Ninth Circuit affirmed the trial court's denial of the FTC's request for an asset freeze because defendant was in bankruptcy and there was no evidence that it would hide assets.

Second, to enter such a freeze would significantly undermine and frustrate the long-standing policy of the judiciary to encourage parties to settle their disputes whenever that is possible. In this case, both Judge Green and Magistrate Judge Kay, as well as this Court, have repeatedly urged all parties to weigh the benefits of settlement versus the tremendous risks and expenditure of time and money of going to trial.² Were the Motion to be granted, the *Hargraves* Plaintiffs would pay a heavy price for their arduous and good-faith negotiations with Defendants. Not only would they lose the certainty of the bargain they made in their settlement with the Defendant, but they would also face [*9] an extremely lengthy delay in collecting even a reduced percentage of their settlement amount, given the possibility of appeals, and the desire of the FTC to have a receiver appointed to examine the remainder of hundreds of case files which its experts have not analyzed.

Third, to enter such a freeze would burden the Court with an impossible task. It would require the Court, at a

minimum, to analyze and compare the different statutory and common law claims in each case, the different statutory and common law remedies available in each case, and the likelihood of the *Hargraves* Plaintiffs prevailing on their statutory and common law claims. Then the Court would have to apportion damage awards between the *Hargraves* Plaintiffs, the FTC, and the consumer borrowers it can identify on the basis of that comparison. In both cases there are different causes of action and different statutory penalties.

Fourth, Plaintiff FTC had an opportunity to [*10] work toward a global settlement and rejected it. The *Hargraves* Plaintiffs persevered with settlement discussions and were able to reach agreement. It would be extremely unfair to now allow the FTC to benefit from its strategic decision not to participate in efforts to reach a global settlement. In short, it would give the FTC the best of all possible worlds--it could take a hard line on negotiations but still be assured that with entry of a freeze there would be adequate assets left to satisfy any judgment, or compromise, it might reach.

Fifth, the parties in the *Hargraves* case have a right to settle their case on any terms they can live with. It is hornbook law that a settlement is a private contract. The *Hargraves* Plaintiffs and the Defendants have a right to enter into their private contract to resolve and dispose of their case, without the Court, or the FTC, diminishing that right by precluding compliance with that agreement, especially when the FTC has not obtained any judgment in its favor on the merits nor a negotiated settlement in this case.

Finally, the FTC argues with great vigor that the requested freeze must be entered in order to protect the far greater [*11] number of consumer-victims it speaks for as opposed to the eight Plaintiffs who will benefit from the *Hargraves* settlement. As the FTC puts it, "courts of conscience" have exercised their equitable powers to avoid preferring one group of victims over another and to prevent one group of victims from benefitting at the expense of other similarly-situated victims.

The problem with this argument, despite its appealing rhetoric, is that it rests on a faulty foundation. These victims are not, *at this point in time*, similarly situated. The *Hargraves* Plaintiffs have negotiated a settlement. The FTC borrowers, *as of this point in time*, have not established their legal right to any compensation whatsoever, and therefore have no legal claim to Defendants' assets. Their claims, *again as of this point in time*, are purely speculative. Moreover, the FTC has only analyzed the claims and loan records of a relatively small

² The *FTC* case alone is scheduled for a 6-8 week bench trial.

number of borrowers and merely "spot-checked" the records of another limited number of borrowers. What the FTC hopes to do--after it has prevailed at trial--is convince the Court to appoint a receiver who will then analyze the loan records of hundreds of borrowers [*12] who *may* have valid claims.

The cases upon which the FTC relies present very different factual situations: either consent decrees--which this case is not, see *Citizens for a Better Environment v. Gorsuch*, 231 U.S. App. D.C. 79, 718 F.2d 1117, 1126 (D.C. Cir. 1983); cases in which judgments have already been entered--which this case is not, see *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 467 (11th Cir. 1996); or cases in which freezes have been entered to avoid concealment, transfers, disposal or wasting, of the assets--which is not a concern presented in this case, see *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

In sum, neither legal precedent nor equitable considerations support granting the extraordinary remedy sought of freezing assets of Defendants to prevent enforcement of a settlement agreement in a different case when no liability has been established and no danger of dissipation or siphoning off of assets exists. Moreover, as already discussed, to do so would be to inject the Court into (as the *Hargraves* Plaintiffs have put it), "a thicket of equitable distribution". It is inappropriate for the [*13]

Court to venture into that thicket and it would be impossible to emerge unscathed by its brambles.

Wherefore, it is this 7th day of February 2002, hereby

ORDERED, that Plaintiff FTC's Motion for an Injunction Temporarily Freezing Defendants' Assets is **denied**.

Feb. 7, 2002

DATE

GLADYS KESSLER

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the FTC's Motion for an Injunction Temporarily Freezing Defendants' Assets is **denied**.

Feb. 7, 2002

DATE

GLADYS KESSLER

UNITED STATES DISTRICT JUDGE