

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
GAINESVILLE DIVISION

IN RE: MICHAEL S. CLAUSS and  
CORA SUE CLAUSS,

CASE NO.: 06-10271

Debtors.

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MICHAEL S. CLAUSS and  
CORA SUE CLAUSS

ADV. PRO. NO.:07-1003

Plaintiffs,

vs.

EQUITY HOLDING CORPORATION a/k/a  
EQUITY HOLDING CORPORATION TRUSTEE;  
CEB PROCESSORS, INC., a/k/a CEB PROCESSORS;  
GRAMPIAN PROPERTIES, LLC; LAND PARTNERS  
OF AMERICA, INC.,

Defendants.

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**FINAL JUDGMENT**

This case was heard upon the motion of Michael S. Clauss and Cora Sue Clauss (Clauss) seeking entry of a Final Judgment After Default against: EQUITY HOLDING CORPORATION a/k/a EQUITY HOLDING CORPORATION TRUSTEE; CEB PROCESSORS, INC., a/k/a CEB PROCESSORS; GRAMPIAN PROPERTIES, LLC; LAND PARTNERS OF AMERICA, INC. (Defendants).

From the Complaint, and the Affidavit of Clauss in Support of Final Judgment, the Court finds:

## FINDINGS OF FACT

1. This Court has jurisdiction and this case is a core proceeding within the meaning of 28 U.S.C. §157(b). This Court has personal jurisdiction over the parties.
2. Clauss filed their Bankruptcy Petition on December 29, 2006.
3. Prior to December 1, 2005, Clauss owned, fee simple title to their residence real property described as 16515 NE 124<sup>th</sup> Avenue, Waldo, Florida 32694, as more particularly described in Exhibit 1 (attached) (residence real property).
4. At all times pertinent, Clausses were consumers. The transaction described herein was a consumer credit transaction in which credit was extended to Clauss by the defendants for personal and/or household purposes for use in avoiding foreclosure on the Clauss homestead residence.
5. In September 2005, the Clauss residential real property was the subject of a pending GMAC foreclosure action.
6. As a consequence of the foreclosure action, Clauss received a number of letters from prospective individuals who promised Clauss the ability to refinance their residence property and avoid foreclosure. One of those prospective refinancers was represented by an individual known as Mr. Murphy Rivenbark.
7. In sequential interviews, Clauss met with Mr. Rivenbark in September and October of 2005. Clauss was informed by Mr. Rivenbark that his company could assist Clauss in saving their residence real property. Clauss was informed by Mr. Rivenbark that they did not need to file a Chapter Thirteen Bankruptcy. As it was explained by Mr. Rivenbark, the Clauss residence real property would be held in a land trust with Clauss as a beneficiary. As further explained

to Clauss, in one year the residence real property would be refinanced. In the meantime, the GMAC mortgage would be paid by Equity Funding. Court costs and the amount advanced to cure the GMAC mortgage arrearage would be repaid by Clauss through the refinancing process.

8. It was also disclosed that any equity remaining in the residence real property after the refinance loan (and payment of the preceding mortgage and advances) would be split between Clauss and the Trust.
9. In order to stop the pending GMAC Mortgage foreclosure, Clauss did the following:
  - a. On December 1, 2005, Clauss executed a Trust Agreement in favor of Equity Holding. Equity Holding as the trustee was to hold the residence real property in trust for the ultimate use and benefit of Clauss as beneficiaries. The interest of Clauss as a beneficiary was designated as personal property. The Trust Agreement provided that in the event the Trustee made an advance of money, Clauss was to repay all disbursements or advances made by the Trustee.
  - b. On December 1, 2005, Clauss executed a Warranty Deed conveying fee simple title in their residence real property to Equity Holding. The Warranty Deed was recorded in the Official Records of Alachua County, Florida.
  - c. On December 1, 2005, Clauss executed an Occupancy Agreement in favor of Equity Holding. Under the terms of the Occupancy Agreement, Equity Holding as landlord agreed to lease the residence real property to Clauss as tenant.

- d. On December 1, 2005, Clauss executed a Beneficiary Agreement in favor of NARS NEH Trust. Under the terms of this Trust, the Clauss residence real property was designated to be sold as of the Trust termination. Clauss had a first option to purchase the residence real property at a price that would be proposed for sale of the property to any third party. CEB Processors, Grampian Properties, LLC, and Landpartners of America, Inc. had a right to purchase the residence real property when Clauss failed to exercise their first right to purchase the residence real property.
10. In particular, Exhibit A to the Beneficiary Agreement, provided that upon the termination of the Trust or the disposition of the Trust property, the proceeds were to be distributed as follows:
    - a. Payment of encumbrances on the residence real property;
    - b. Relevant costs of disposition of the residence real property;
    - c. CEB Processors, 20% ownership of the beneficiary interest;
    - d. Grampian Properties, LLC, 25% ownership of the beneficiary interest;
    - e. Landpartners of America, Inc., 5% of the beneficiary interest;
    - f. Clauss was to receive a settler/residential beneficiary distribution equal to 50% of the Trust, less costs advanced and less any contribution to the land trust buy-in (“down payment”).
  11. In summary, the transactions described in the preceding paragraphs were actually a sale-lease back under the terms of which:

- a the Trustee and the investors advanced monies to stop the GMAC foreclosure;
  - b Clauss transferred the legal and equitable title of the residence real property to the Trust;
  - c Clauss, in turn, leased the residence real property from the Trust;
  - d Clauss retained the right to repurchase the residence real property from the Trust.
  - e The Trust had the right to force a sale of the residence real property at an appraised price if Clauss did not exercise the right to repurchase the residence real property.
12. As a consequence of the advance of monies to stop the GMAC foreclosure, Clauss was obligated to repay the advances and costs plus Clauss lost 50% of their equity interest in the residence real property in order to repay the investors their equity/lien holder interest in addition to the GMAC mortgage reimbursement.
13. The transactions described in the preceding paragraphs were actually a consumer credit transaction in which a security interest was acquired and retained in the residence real property.
14. In connection with the Clauss/Equity Holding, et al, transaction, Clauss did not receive the following documents mandated to be provided to Clauss by virtue of the Federal Truth In Lending Act.
- a the Notice of Right to Rescind;
  - b disclosure of the annual percentage rate;

- c disclosure of the finance charge;
  - d disclosure of the amount financed;
  - e disclosure of the total of payments;
  - f the payment schedule.
15. Clauss discovered that they did not receive the Federal Truth In Lending interest rate and other disclosures when they reviewed their documentation in preparation for filing of their Chapter Thirteen Bankruptcy Petition.
  16. Clauss has elected to rescind. Clauss has sent a Notice of Rescission to all of the named Defendants. The named Defendants in this Adversary Proceeding have failed to terminate the security interest created under the transaction referenced by the documents specified in para 9.
  17. The Clauss transaction with Equity Holding and the other entities was not a business-risk transaction. The Clauss residence is valued at \$219,000.00 and is located in an established area that has been steadily increasing in property values in the past seven (7) years. The proof of claim filed by GMAC Mortgage Corporation is for \$113,459.00. There are no other mortgages on the residential real property.
  18. Clauss has incurred attorney's fees in the bringing of this action.
  19. Clauss has suffered statutory damages allowable under 15 U.S.C. §1640, together with the costs of bringing this Adversary Proceeding.

### **CONCLUSIONS OF LAW**

Florida has statutory law which deem certain conveyances to be mortgages when the purpose of the conveyance was security for a loan of money.

Fla. Stat. 697.1(1)(2007) states:

All conveyances, obligations, conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, whether real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

Advances of money to a debtor secured by deeds and trust agreements have been actually deemed to be mortgages. *Smith v Potter*, 406 So.2d 1231(Fla.5th DCA 1981); *Williams v Rountree*, 478 So.2d 1171(Fla.1st DCA 1985); *Kirkland v Miller*, 702 So. 2d 620(Fla.4th DCA 1997); *Oregrund, Ltd. P'ship v Sheive*, 873 So.2d 451(Fla.5th DCA 2004)

The Federal Truth In Lending Act gives the consumer the right to rescind consumer credit transactions in which a security interest is taken as a consequence of a consumer credit transaction. 11 U.S.C.§1635. In addition to being entitled to a disclosure statement prior to consummating a credit transaction, a homeowner has the right under the Truth In Lending Act to rescind most transactions for which the home is taken as collateral, other than transactions for the purchase of the home. Home equity loans and home improvement credit sales are common examples of rescindable transactions.

The Truth In Lending right arises only when the credit transaction meets several criteria. The first and most basic one is that the loan must be a consumer credit transaction. Consumer credit

transactions involve the extension of credit to a natural person for personal, household or family purposes. The Statute provides for an initial three-day period during which consumers have an unconditional right to change their minds and cancel the transaction for any reason, or for no reason. However, if the creditor does not meet certain requirements under Truth In Lending, the three-day clock never starts ticking and so the right to rescind can extend for three years.

The consumer may exercise the right to rescind until midday of the third business day following the latest of the following events: delivery of a proper notice of the right to rescind; or delivery of all of the material disclosures correctly made. The date of “delivery” is the date upon which the required material disclosures and notice of the right to rescind are given to the consumers in a form they may keep.

11 U.S.C.§1635(b) provides that when an obligor exercises his right to rescind the, the obligor is not liable for any finance or any other charge. Provided, that after a rescission, the obligor shall tender to the creditor money or property as defined in 15 U.S.C.§1635(b)

The term “material disclosures” means the disclosure as required by the Truth In Lending Act stating the annual percentage rate, the method of determining the finance charge, the balance upon which the finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of payments, the due dates or the periods of payments required to repay the indebtedness. *15 U.S.C.§1602(u)*

The Truth In Lending Act at 15 U.S.C.§1640(a) provides for statutory damages in the case of an individual action equal to twice the amount of the finance charge in connection with the transaction except that the liability shall not be greater than \$1,000.00. The same statute at 15

U.S.C. §1640(a)(3) also provides for an award of reasonable attorney's fees as determined by the Court together with costs.

### **JUDGMENT**

It is therefore adjudged that: The Warranty Deed executed by Clauss on the 1<sup>st</sup> day of December 2005 in favor of Equity Holding Corp. and its successors in interest and recorded in Official Records Instrument 2204441 (4 pages) of the Official Public Records of Alachua County, Florida is deemed rescinded and void.

Michael S. Clauss and Cora Sue Clauss are restored to full fee title ownership of the residence real property described as 16515 NE 124<sup>th</sup> Avenue, Waldo, Florida 32694, as more particularly described in Exhibit 1 (attached), subject to all the existing mortgage in favor of GMAC Mortgage Corporation effective as of the date of this Judgment.

Clauss is entitled to have and recover from the named defendants statutory damages in a total amount of \$2,000.00.

Clauss is entitled to have and recover from the named defendants the total sum of \$4,606.25 as attorney's fees.

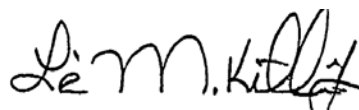
Interest on the foregoing statutory damages amount and attorney's fees shall commence as of the date of the entry of this Judgment pursuant to 28 U.S.C. §1961.

Within twenty (20) days after the entry of this Final Judgment, Defendants shall file in accordance with Bankruptcy Rule 7013, an Adversary Counterclaim, seeking to recover in this Adversary case any claim for money or property following the Clauss's rescission as defined in 15 U.S.C. §1635(b). Any counterclaim filed by a corporate entity in this Adversary Proceeding shall be consistent with Local Rule 2090-1(D)(5). Within twenty (20) days after filing any request

for return of money or property pursuant to 15 U.S.C. §1635(b) the Plaintiffs shall file any right to set off and/or damages. If the Adversary Defendants do not file any counterclaim for return of money or property pursuant to 15 U.S.C. §1635(b) within the aforementioned twenty (20) day time period, this case shall be deemed adjudicated and closed.

For all of which let execution issue.

Dated this 20th day of August 2007.



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LEWIS M. KILLIAN, JR.  
United States Bankruptcy Judge

copies to:

Albert H. Mickler  
5452 Arlington Expressway  
Jacksonville, FL 32211

Michael Clauss  
Cora Sue Clauss  
16515 NE 124<sup>th</sup> Avenue  
Waldo, FL 32694

Equity Holding Corporation a/k/a  
Equity Holding Corporation as Trustee Michael J. Clauss Trust No. 2502797  
c/o Thomas Stanton K. Stanton  
State Registered Agent for Receipt of Process  
4932 Ponderosa Way  
Midpines, CA 95345

CEB Processors  
c/o Walter M. Rivenbark, Managing Agent  
5930 NW 54<sup>th</sup> Way  
Gainesville, FL 32653

Grampian Properties, LLC  
c/o Peter English  
State Registered Agent for Receipt of Process  
127 42<sup>nd</sup> Street  
New Port Beach, CA 92663

Land Partners of America, Inc.  
c/o Carmen L. Cunha, President  
4790 W Commercial Blvd  
Tamarac, FL 33319

**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

COMMENCE AT THE NORTHEAST CORNER OF THE SOUTHWEST 1/4 OF SECTION 25, TOWNSHIP 8 SOUTH, RANGE 21 EAST, THENCE RUN SOUTH 60 FEET TO THE SOUTH RIGHT OF WAY OF COUNTY ROAD, THENCE RUN WEST ALONG SOUTH RIGHT OF WAY OF SAID COUNTY ROAD A DISTANCE OF 185 FEET TO THE POINT OF BEGINNING. (1) THENCE RUN SOUTH 300 FEET, (2) THENCE RUN WEST 300 FEET, (3) THENCE RUN NORTH 300 FEET TO THE SOUTH RIGHT OF WAY OF SAID COUNTY ROAD, (4) THENCE RUN EAST ALONG THE SOUTH SIDE OF SAID COUNTY ROAD RIGHT OF WAY A DISTANCE OF 300 FEET TO THE POINT OF BEGINNING; ALL LYING AND BEING IN SECTION 25, TOWNSHIP 8 SOUTH, RANGE 21 EAST, ALACHUA COUNTY, FLORIDA.

APN: 17516-002-000

ALSO KNOWN AS: 16515 NE 124TH AVENUE, WALDO, FLORIDA 32694

Exhibit   1    
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