

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<i>Docket No. 98-89-P-DMC</i>
	)	
<b>PAULA V. STEWART,</b>	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM DECISION ON PLAINTIFF’S MOTION IN LIMINE  
TO PRECLUDE CERTAIN EVIDENCE AT TRIAL<sup>1</sup>**

The plaintiff, the United States of America acting through the Rural Housing Service (formerly known as the Farmers Home Administration) of the Department of Agriculture, has moved *in limine* for an order precluding the defendant in this mortgage foreclosure action from presenting evidence at trial in support of two affirmative defenses asserted in her answer to the complaint: (i) that the plaintiff breached a duty to inspect the premises for the benefit of the defendant prior to closing on the mortgage and (ii) that the defendant had the right to forego payments due on the mortgage while fulfilling her contractual obligation under the mortgage to “maintain improvements in good repair.” United States’ Motion in Limine . . . to Preclude Defendant’s Evidence at Trial (“Motion”) (Docket No. 13) at 2-3. At oral argument on the motion held before me today, counsel

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<sup>1</sup> Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

for the defendant identified the second, fourth and fifth affirmative defenses listed in the defendant's answer as the affirmative defenses implicated by this motion. Docket No. 3.

The defendant contends that she has been forced to spend \$30,000 on necessary repairs to the residence subject to the mortgage since she took ownership in January 1988. Defendant's Pretrial Memorandum (Docket No. 11) at 1. "Because of the cost of repairing and maintaining the property, she was unable to keep up full payments on the mortgage," *id.*, the original principal amount of which was \$94,000, Plaintiff's Final Pretrial Memorandum (Docket No. 10) at 2. The defendant has made no payments on the mortgage since April 20, 1996. Stipulations (Docket No. 15), Stipulations of Facts ¶ 14.

### **I. Duty to Inspect**

The government argues that it had no contractual duty to inspect the premises subject to the mortgage for the benefit of the plaintiff before closing on the mortgage, and the defendant does not seriously dispute this interpretation of the loan documents. She relies instead on the "Rural Development Law," Opposition . . . to Motion in Limine to Preclude Defendant's Evidence at Trial ("Defendant's Opposition") (Docket No. 14) at 2, without further specification of any statute, and 7 C.F.R. § 1951.301, *id.*, a federal regulation that the parties agree is applicable to the transaction at issue here, although it has since been rescinded by the Department of Agriculture.

The defendant must provide a specific statutory citation if she intends to rely upon a duty imposed upon the plaintiff by statute as an affirmative defense. It is the defendant's burden to

provide the court with authority supporting her position.<sup>2</sup> Counsel for the defendant stated at oral argument that he did not wish to direct the court's attention to any specific statute or any specific authority other than 7 C.F.R. § 1951, Subpart G. The court therefore will not consider any statutory authority for the defendant's position..

The defendant relies on *Block v. Neal*, 460 U.S. 289 (1983), in arguing that the government has "Good Samaritan duties of care once services are undertaken." Plaintiff's Opposition at 1. The *Block* decision was a very narrow one, addressing only the question whether a claim that Farmers Home Administration employees failed properly to inspect and supervise construction of a home for which the agency provided a construction loan was a claim of misrepresentation within the meaning of 28 U.S.C. § 2680(h), a section of the Tort Claims Act. 460 U.S. at 294. The Supreme Court held that it was not, allowing the plaintiff to pursue a claim for negligence arising out of the agency's "undertak[ing] . . . to supervise construction of [the plaintiff's] house." *Id.* at 299. That result merely begs the question at issue here: did the defendant agency have a duty to inspect the house for the plaintiff's benefit?

The government contends that *Manstream v. United States Dep't of Agric.*, 649 F. Supp. 874 (M.D.Ala. 1986), is essentially identical to the instant case with respect to this issue and should be followed by this court. The defendant responds by characterizing *Manstream* as relating "to a Federal Tort Claims Act action and . . . not applicable to the instant case." Defendant's Opposition at 1. I disagree. In *Manstream*, the Farmers Home Administration had made a rural housing loan to the plaintiffs, who failed to make the monthly payments as agreed. *Id.* at 876-77. The government

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<sup>2</sup> Local Rule 7(b), regarding objections to motions, provides, *inter alia*, that "[a]ny objections shall include citations and supporting authorities and affidavits and other documents setting forth or evidencing facts on which the objection is based."

foreclosed on the mortgage administratively and sold the property at auction. *Id.* at 877. The plaintiffs refused to surrender possession of the premises and filed suit. *Id.* In their complaint, the plaintiffs asserted that they had discovered numerous defects in the dwelling upon moving in, defects which the government agency should have discovered “by any kind of reasonable inspection.” *Id.* They sought relief including a setting aside of the foreclosure, an order requiring the government to correct the defects, an order permanently enjoining the government from evicting them from the premises, and damages and attorney fees. *Id.* at 878.

The government later filed an action seeking judgment on the note executed by the Manstreams when they obtained the Farmers Home Administration mortgage and judicial foreclosure. *Id.* at 879. In their answer, the Manstreams “track[ed] word for word the complaint” in their earlier action. *Id.* The two actions were consolidated and the government moved for summary judgment. The court treated the answer in the second action “as an attempt to allege affirmative defenses to the foreclosure action and as a claim or counterclaim seeking injunctive relief and damages.” *Id.* The court held that the Manstreams’ failure to comply with the jurisdictional requirement of the Tort Claims Act that an administrative claim be filed before a court action may be instituted barred their claims in the first action. *Id.* at 879-80. It went on to conclude that there was no duty to inspect imposed on the government agency as lender under applicable state law. *Id.* at 880. The Manstreams had provided no evidence that the Farmers Home Administration undertook to perform the function of inspecting the property for their benefit. *Id.* at 881. The court held that “where the government conducts inspections, it is not undertaking a legal duty to render services as required by the Good Samaritan Doctrine.” *Id.* The court entered summary judgment in favor of the government in both cases. *Id.* at 885.

Contrary to the defendant's interpretation of *Manstream*, the court in that case did consider the affirmative defense raised by the defendant here as an affirmative defense and not only as an affirmative claim governed by the Tort Claims Act. The trial court rejected that affirmative defense.

The fact that a defendant may have a cause of action under the Tort Claims Act for the costs incurred in making necessary repairs, provided that the claim is properly presented in accordance with the procedural requirements of that Act,<sup>3</sup> does not mean that the defendant necessarily may employ that claim as an affirmative defense to a foreclosure action. The defendant here does not rely on state law as the source of the alleged duty to inspect but relies specifically only on the former 7 C.F.R. § 1951.301, which provided, in its entirety:

This subpart sets forth policies and procedures of the Rural Housing and Community Development Service (RHCDS) or its successor agency, (RHCDS) to ensure that in borrower supervision, servicing and collection of Single Family Housing Loan Accounts, all authorities are considered and used to assist borrowers to become successful homeowners, thereby reducing the number and amount of borrower delinquencies and borrower failures resulting in liquidation of the account. This subpart pertains to all section 502 and 504 Rural Housing (RH) loans (except RH loans for farm service buildings) hereby referred to as Single Family Housing (SFH) borrowers, including those who are also indebted for a Farmer Program loan, i.e., farm ownership (FO), operating (OL), soil and water (SW), recreation (RL), emergency (EM), economic emergency (EE), economic opportunity (EO), special livestock (SL), and software timber (ST). Farmer Program loans and RH loans for farm service buildings will be serviced in accordance with applicable farmer program regulations. The requirements of this subpart do not apply if the decision has been made to liquidate the farmer program loan(s) of a borrower who also has an RH loan(s), if the dwelling was used as security for the farm loan(s). In these cases, the RH loan account will be handled in accordance with applicable portions of

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<sup>3</sup> See, e.g., *Kipf v. United States*, 501 F. Supp. 110, 114 (D. Mont. 1980) (finding support for claim for damages arising out of cost of necessary repairs against Farmers Home Administration in regulation, no longer in existence, stating that "basic objective" of FmHA in making section 502 loans "is to assist farm owners and other persons who live in rural areas to obtain decent, safe, and sanitary dwellings").

subpart S of part 1951 and § 1955.15(d)(2)(iv) of subpart A of part 1955 of this chapter pertaining to acceleration of the RH account. This subpart does not apply to borrowers who assumed RH loans, or have purchased inventory housing by credit sale on nonprogram terms unless refinanced in accordance with § 1951.315 of this subpart. These are NP loans which will be serviced according to subpart J of part 1951 of this chapter. SFH cases where unauthorized loan or other financial assistance has been received will be serviced according to subpart M of part 1951 of this chapter. In executing the authorities provided in the subpart, FmHA or its successor agency under Public Law 103-354 will observe requirements of the Equal Credit Opportunity Act (ECOA) which prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or disability.

At oral argument, counsel for the defendant argued that the following language from this regulation, as well as 7 C.F.R. § 1951 Subpart G read as a whole, created a “partnership” between the government and the borrower that imposed duties, including the duty to inspect the property and discover defects before closing for the benefit of the borrower, upon the government: “to ensure that in borrower supervision, servicing and collection . . . all authorities are considered and used to assist borrowers to become successful homeowners.” Neither this language nor any fair reading of Subpart G in its entirety can lead to the conclusion that the agency is required to inspect the properties for the purchase of which it issues mortgages for the benefit of the potential borrowers. The defendant has not directed the court’s attention to any “authority” that provides for such inspection. The defendant is not entitled to pursue an affirmative defense based on this claim.

## **II. Expenditures for Repairs and Improvements**

The defendant supports her invocation of this affirmative defense as follows:

[S]he did not have the option — under the mortgage, under State and local health and occupancy requirements, or under standards of common sense — of ignoring costs related to systems, structure, and habitability; that evidence of these costs are [sic] relevant to showing Plaintiff’s contribution to her mortgage payment difficulties; that Plaintiff’s role in causing the

difficulties and then failing to provide appropriate assistance violated its statutory obligations; and that such disregard of statutory policy precludes this foreclosure action. See *Ricker v. U.S.*, 417 F.Supp. 133, 139 (D.Me. 1976).

Defendant's Opposition at 2. There is no citation to any specific statute, section of the mortgage document, or state or local law. In her pretrial memorandum, the defendant refers to the plaintiff's denial of her application in September 1995 for a moratorium on mortgage payments and to a meeting in May 1996 "regarding servicing options in lieu of accelerating her loan account," Defendant's Pretrial Memorandum at 1-2. I assume that this is the alleged failure to provide appropriate assistance to which the defendant refers in her objection. Based upon the representations of counsel for the defendant at oral argument, the references to "statutory obligations" and "statutory policy" can only be construed as references to 7 C.F.R. § 1951.301, which is set forth above.

The government has pointed out that the defendant's reference to the mortgage in this context can only be a reference to the following language in the mortgage document:

BORROWER for Borrower's self, Borrower's heirs, executors, administrators, successors and assigns WARRANTS THE TITLE to the property to the Government against all lawful claims and demands whatsoever except any liens, encumbrances, easements, reservations, or conveyances specified hereinabove, and COVENANTS AND AGREES as follows:

\* \* \*

9. To maintain improvements in good repair and make repairs required by the Government; operate the property in a good and husbandmanlike manner; comply with such farm conservation practices and farm and home management plans as the Government from time to time may prescribe; and not to abandon the property, or cause or permit waste, lessening or impairment of the security covered hereby, or, without the written consent of the Government, cut, remove, or lease any timber, gravel, oil, gas, coal, or other minerals except as may be necessary for ordinary domestic purposes.

Real Estate Mortgage for Maine, Exh. B to Complaint (Docket No. 1), at [2] & [3]. The defendant

does not disagree with this characterization of the basis for her claim. As the government also points out, nothing in the mortgage or the promissory note that accompanied it, Exh. A to the complaint, excuses the defendant from her obligation to make regular payments while or because she is complying with this additional requirement of the mortgage. The mortgage is a contract. The defendant's interpretation implies an additional term in that contract that is not necessary to either party's discharge of its contractual obligations. The law will not impose such implied terms upon mortgage contracts. *See FDIC v. LeBlanc*, 85 F.3d 815, 821 (1st Cir. 1996) (defendant sought to raise affirmative defense based on lender's failure to assist him in obtaining easement; alleged duty not included in promissory note but alleged to be present in unrecorded side agreement). *See also Forsythe v. BancBoston Mortgage Corp.*, 135 F.3d 1069, 1075 (6th Cir. 1997) (rejecting defendant's argument that mortgage imposed implied duty on lender to accept partial payments and to provide yearly warning of any underpayment).

In *Ricker*, the only specific authority cited by the defendant in support of her position, this court found that the failure of the Farmers Home Administration to provide the plaintiff borrowers with notice of the impending foreclosure of their mortgage and an opportunity to be heard violated the borrowers' rights to due process of law under the Fourteenth Amendment to the United States Constitution. 417 F. Supp. at 136. The defendant in this case makes no constitutional claim. This court also declined in *Ricker* to reach the question whether the underlying loan was made and enforced "in violation of the agency's alleged obligations to make only sound loans to plaintiffs and to supervise plaintiffs' farming operations." *Id.* at 135, 136. Nothing in the *Ricker* decision supports the defendant's asserted affirmative defense based on an alleged requirement that the borrower effect repairs to the property before or in lieu of making payments on the mortgage loan. That argument,

carried to its logical end, would allow a borrower unfettered discretion in making payments on his or her mortgage, so long as he or she were also making repairs or improvements to the property.

The defendant is not claiming a setoff by means of this defense; she is seeking to avoid foreclosure altogether. Answer (Docket No. 3) at 2. She has offered no authority to support such a defense, and my research has not unearthed any. Accordingly, she is not entitled to assert such an affirmative defense at trial.

### **III. Appropriate Relief**

Based upon defense counsel's characterization of the affirmative defenses set forth in the answer, my ruling on this motion means that the defendant may not pursue her second or fourth affirmative defenses at trial, as well as certain aspects of her fifth affirmative defense. The government has requested that the court preclude "the defendant from offering or introducing evidence relating to any inspection of the premises at the time of the loan," Motion at 3, and "from offering or introducing evidence relating to any repairs/improvements that she made to the premises," *id.* at 4. The first request appears fully justified by my conclusion that the defendant may not assert an affirmative defense based on an alleged duty of the government to inspect the premises for her benefit before closing on the mortgage. The second request, however, is too broad. The answer raises in its fifth affirmative defense claims that the government failed to comply with all of the necessary procedural requirements of its own regulations before instituting foreclosure and specifically that it failed to provide a payment moratorium or payment plan as required under those regulations. Answer at 2. As counsel for the government conceded at oral argument, evidence

concerning the defendant's expenditures on the property might be considered relevant to her asserted entitlement to such administrative relief after the mortgage was in effect and before the decision to accelerate the debt was made. It appears that such evidence could also be relevant to the question whether provision of such relief is a condition precedent to foreclosure under applicable regulations. To that extent, evidence relating to repairs and improvements may be offered, but it will not be considered as support for an affirmative defense that such expenditures entitle a borrower to stop making payments on the loan.

Accordingly, the government's motion *in limine* is **GRANTED**, with the limitation that, subject to objection on some other basis, evidence relating to the defendant's expenditures for repairs or improvements to the property may be admitted but only with respect to her asserted affirmative defense that the government failed to provide administrative remedies required under applicable and identified regulations as a condition precedent to acceleration of the loan and foreclosure.

Dated this 15th day of December, 1998.

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David M. Cohen  
United States Magistrate Judge