UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
SUSAN ZOHBE,	)	CASE NO. **07-62709** - MHM
	)	
Debtor.	)	
	)	
SUSAN ZOHBE, AYMAN ZOHBE,	)	
	)	**ADVERSARY PROCEEDING**
Plaintiffs,	)	**NO. 07-6194**
	)	
v.	)	
	)	
AMERIQUEST MORTGAGE COMPANY,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiffs filed this adversary proceeding seeking relief under the Truth-in-Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA"). Trial commenced July 27, 2011, and Plaintiffs concluded their case-in-chief that day, at which time, Defendant orally moved for judgment as a matter of law. Plaintiffs filed a *Post Trial Brief* August 1, 2011 (Doc. No. 109), to which Defendant objected as unauthorized and to which Defendant filed a response September 7, 2011 (Doc. No. 110).

With respect to Defendant's objection to the unauthorized[1] filing by Plaintiffs' counsel of a post-trial brief, review of the brief shows that it is disjointed, disorganized, and except for the case citations, most of which had been cited previously in other pleadings filed in this proceeding, not helpful. Therefore, whether to consider the brief does not present a significant issue. All the case citations of both parties have been considered, as well as the evidence and argument presented at trial thus far. In the trial thus far, Plaintiffs presented the testimony of both Mr. and Mrs. Zohbe, as well as the deposition testimony of the closing attorney, Mr. Tracey Dewrell.

Plaintiffs jointly own real property located at 2665 Logan Way, Lawrenceville, Georgia (the "Property"). On or about July 15, 2004, Debtor Susan Zohbe and Defendant[2] entered into a transaction to refinance the mortgage on the Property. Ms. Zohbe was the borrower in the transaction, so that although both Plaintiffs signed the security deed conveying a security interest in the Property to Defendant, only Ms. Zohbe signed the promissory note to Defendant. Both parties also signed the Notice of Right to Cancel (the "Notice"), which provided them with notice of their right to rescind and contained an acknowledgment that they had each received two copies of the Notice.

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[1] The brief is "unauthorized" because Plaintiffs did not seek or obtain leave of court to file the brief and it is not otherwise provided for in the Federal Rules of Civil Procedure or the local rules. Additionally, it is not "post-trial" because the trial was not yet concluded.

[2] The reference to "Defendant" includes the named defendant and, as applicable, any predecessors in interest.

Under TILA, Plaintiffs were entitled to the right to clear and conspicuous disclosure of their rights to rescind the transaction. 12 C.F.R. § 226.23(b). Such notice must clearly and conspicuously disclose:

- The retention or acquisition of a security interest in the consumer's principal dwelling.
- The consumer's right to rescind the transaction.
- How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.
- The effects of rescission, as described in paragraph (d) of this section [§226.23].
- The date the rescission period expires.

Id. If a creditor fails to deliver notice of the right to rescind or any of the required material disclosures, the debtor may rescind at any time up to three years following the consummation of the transaction. 12 C.F.R. § 226.23(a)(3). Lenders must provide two copies of the notice of right to rescind to each consumer entitled to rescind. 12 C.F.R. § 226.23(b)(1). Therefore, Plaintiffs were each entitled to two copies of the Notice, for a total of four copies. Plaintiffs' signatures on the Notice created a rebuttable presumption that Plaintiffs received the requisite number of copies. 15 U.S.C. §1635(c).[3]

Ms. Zohbe testified that she has no specific memory about the number of copies of the Notice Plaintiffs received, but she also testified that she put all the papers received at

[3] "Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof."

closing together and when she returned to them in connection with this bankruptcy case, she found only two copies of the Notice. Mr. Zohbe testified at trial that he does remember that Plaintiffs received less than four copies of the Notice, although that trial testimony is inconsistent with his prior deposition testimony in which he stated he had no specific memory of the number of copies of the Notice Plaintiffs received. The closing attorney's testimony was based not on any specific memory but on his standard practice and procedures in closing such transactions.

Following the refinancing, in April 2005, the parties entered into their first forbearance agreement, which modified the payment terms and included a release of Defendant from all liability arising from the loan documents. As a result of continued payment delinquencies, the parties executed several additional forbearance agreements until finally, Defendant declared a default and noticed a foreclosure sale, which prompted Ms. Zohbe to file her Chapter 13 bankruptcy case. Ms. Zohbe's bankruptcy case was dismissed November 1, 2007, and closed December 13, 2007. Ms. Zohbe currently has no bankruptcy case pending.

Defendant argues it is entitled to judgment as a matter of law (formerly known as directed verdict) on the following grounds:

- Plaintiffs failed to rebut the presumption that they received the required number of copies of the Notice;
- Even if Plaintiffs received only one copy each of the Notice, one copy is sufficient to constitute substantial compliance with the statute;

- Plaintiffs' claims in this proceeding are barred by the release executed in 2005;
- Plaintiffs are unable to comply with the tender requirements of 15 U.S.C. §1635.

Did Plaintiffs rebut the presumption?

TILA is to be construed liberally in favor of the consumer. *Bank One, NA v. Bumpers*, 2003 WL 22119929 (N.D. Ill. 2003). Federal Rule of Evidence ("FRE") 301 addresses presumptions:

> [A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party upon whom it was originally cast.

FRE 301 has been characterized as the "bursting bubble" theory, *i.e.,* a party need only introduce rebutting evidence sufficient to support a finding contrary to the presumed fact; once the presumption is rebutted, the court makes its decision as any ordinary issue of fact. *Sousa v. Wells Fargo Bank,* 2011 WL 917853 (Bankr. D. N.H. 2011).

In the instant case, Mr. Zohbe's testimony that he actually remembered receiving only two copies of the Notice was impeached by his deposition testimony. No other party testified from actual memory, but the fact that Ms. Zohbe's file of documents contained only two copies of the Notice is sufficient to rebut the presumption and constitutes sufficient evidence in the face of the closing attorney's testimony about his standard practice to support a finding that Plaintiffs received fewer than the required four copies of

the Notice. Plaintiffs succeeded in rebutting the presumption. *See Regan v. HSBC Bank*, 439 B.R. 522 (Bankr. D. Kan. 2010); *Sibby v. Ownit Mortgage Solutions, Inc.*, 240 Fed. Appx. 713 (6th Cir. 2007); *Webster v. Centex Home Equity Corp.*, 300 B.R. 787 (Bankr. W.D. Okla. 2003); *Williams v. Empire Funding Corp.*, 109 F. Supp. 2d 352 (E.D. Penn. 2000).

Are two copies sufficient?

Defendant asserts that, even assuming Plaintiffs received only two copies of the notice, those two copies were sufficient to comply with TILA and Regulation Z. Defendant characterizes the requirement of providing each party with two copies of the Notice is a technical requirement, and enforcing such "hypertechnical" requirements is inappropriate.

The requirement of providing each party with two copies of the Notice, however, is not an example of simple redundancy. The Notice itself includes a box to be completed and signed by a party seeking to exercise the right to rescind. Thus, two copies of the Notice are required to provide, upon the actual exercise of rescission, one copy to be transmitted to the lender and one copy to be retained by the party rescinding. *See Stone v. Mehlberg*, 728 F. Supp. 1341 (W.D. Mich. 1990). In the instant case, Mr. Zohbe and Ms. Zohbe each had an independent right of rescission. Finding TILA is violated by the failure to provide four copies of the Notice instead of two is not a hypertechnicality. Providing less than the required four copies of the Notice does constitute a violation of TILA, extending the right of rescission to three years.

Is Plaintiffs' claim barred by the release?

The general rule is that for a waiver to be enforceable, the waiver must represent an intentional relinquishment of a known right, *i.e.,* it must be knowing and voluntary, which is determined by examination of the totality of the circumstances, including the parties' respective roles in deciding terms of the contract, the contract's clarity, the availability of independent advice, and the nature of the consideration. *DiVittorio v. HSBC Bank,* 430 B.R. 26 (Bankr. D. Mass. 2010). In *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697 (1947), the Court looked at the circumstances in which rights under a federal statute can be waived or released: "[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." *Id.* at 704.

Although the Court in *O'Neil* was examining a party's rights under the Fair Labor Standards Act, not TILA, the Eleventh Circuit Court of Appeals has examined the waiver/release issue in the context of TILA in *Parker v. DeKalb Chrysler Plymouth,* 673 F. 2d 1178 (11th Cir. 1982). In *Parker,* the court refused to enforce a release executed in connection with the dealer's correction of mechanical problems with an automobile purchased by the plaintiff. The plaintiff later attempted to rescind the credit transaction. Relying on *O'Neil,* the court based its refusal to enforce the release in connection with the truth-in-lending claim on the failure of the release itself to mention TILA, the failure of the creditor to mention TILA when negotiating the release, and the fact that the release was negotiated in connection with a dispute between the parties that

had nothing to do with TILA and nothing to do with the credit transaction between the parties. Releases of claims under TILA have rarely been enforced except in very limited situations, such as the release negotiated in a class action proceeding in which the settlement was negotiated by the state attorney general. *See e.g. Tucker v. Beneficial Mortgage Co.*, 437 F. Supp. 2d 584 (E.D. Va. 2006). *But see DiVittorio v. HSBC Bank,* 430 B.R. 26 (Bankr. D. Mass. 2010) (Because the borrower was in possession of all the loan documents, she was on inquiry notice of any TILA violation; also the borrower had counsel when she signed the release).

In the instant case, Ms. Zohbe signed a release of any and all claims, known or unknown, arising under the loan documents. She signed the release, which had been prepared by Defendant, in connection with a forbearance agreement and without advice of counsel. Apparently, she signed the release without reviewing her file of the original loan documents and therefore, without realizing that she had not received the requisite number of copies of the Notice. Therefore, in accordance with the principles described in *O'Neil* and *Parker,* the release is unenforceable.

May the court condition rescission upon tender by Plaintiffs?

TILA, 15 U.S.C. §1635(b), describes the procedure for rescission under the TILA:

> When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination

> of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

Therefore, TILA reorders the usual procedure applicable to equitable rescission outside TILA. When a debtor rescinds within the three-day rescission period, the debtor's right to performance by the lender of its rescission obligations before the debtor's tender is required is not questioned; when rescission occurs months or years after the closing, however, whether the debtor is entitled to the lender's rescission before tender is more problematic. *Webster v. Centex Home Equity Corp.,* 300 B.R. 787 (Bankr. W.D. Okla. 2003). Even though TILA was violated , voiding the lender's security interest and rendering the debt unsecured "would exact a penalty entirely disproportionate to [the] offense." *Id.* at 803.

The last sentence of §1635(b) was added by the Truth in Lending Simplification and Reform Act, Pub.L. No. 96-221, tit. VI, § 612(a)(4), 94 Stat. 168, 175 (1980) (codified as amended at 15 U.S.C. § 1635(b) (1988)). As noted in *Williams v. Homestake Mortgage Co.,* 968 F. 2d 1137 (11th Cir. 1992), even before this amendment, the majority of courts recognized their equitable power to modify the rescission procedures in TILA.

Only the Fifth Circuit Court of Appeals, in precedent binding in the Eleventh Circuit, refused to permit modification of TILA's rescission procedure. *Gerasta v. Hibernia Nat'l Bank,* 575 F.2d 580 (5th Cir.1978). In *Williams*, however, finding that the holding in *Gerasta* was no longer valid, the Eleventh Circuit concluded:

> In this instance, Congress, through its legislative history, has made it quite clear that "the courts, *at any time during the rescission process,* may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act." S.Rep. No. 368, 96th Cong., 2d Sess. 29 (1980) (emphasis added), *reprinted in* 1980 U.S.C.C.A.N. 236, 265. Furthermore, the plain language of § 1635(b) leaves little room for narrowing the court's ability to modify the process of effecting rescission, as Congress' grant of authority covers all "procedures prescribed by [the] subsection." Thus, we hold that a court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances.

Thus, without question, this court may condition rescission upon Plaintiffs' tender.

The parties have presented insufficient evidence thus far to permit precise calculation of the amount that Plaintiffs must tender, but case law does provide the appropriate formula: Plaintiffs must tender the loan amount, less all payments made by Plaintiffs, including any down payment, less loan expenses, and less any applicable civil penalties and any attorneys fees awarded. *Semar v. Platte Valley Federal Savings & Loan Association*, 792 F. 2d 699 (9th Cir. 1986); *Mayfield v. Vanguard Savings & Loan Association*, 710 F. Supp. 143 (E.D. Penn. 1989); *Echols v. Ameriquest*, Case No. 01-CV-1315-ECS (N.D.Ga., September 13, 2002).

The timing and mechanism of tender ordered by courts in connection with rescission under TILA, however, has varied. Some courts contemplate a debtor's tender through payments under a Chapter 13 plan. *Bell v. Parkway Mortgage, Inc.*, 314 B.R. 54 (Bankr. E.D. Penn. 2004); *Cromwell v. Countrywide Home Loans,* 461 B.R. (Bankr. D. Mass. 2011). Such an option does not appear available in this proceeding, as Ms. Zohbe's Chapter 13 bankruptcy case has been dismissed. Other courts contemplate reasonable monthly installments, including interest going forward. *Echols, supra*; *Mayfield, supra*. One court took a more stringent view of the tender requirement: In *Regan v. HSBC Bank*, 439 B.R. 522 (Bankr. D. Kan. 2010), the court required the debtors to tender the net proceeds of the loan to the lender within 14 days; provided, however, that if the debtors tendered a quitclaim deed, the debtors would be allowed 120 days to try to sell or refinance. During that 120-day period, the mortgage would remain in place and the debtors would be required to pay interest on the net principal and to insure the premises. If tender was not timely made, the debtors would be required to vacate. In *Rendon v. Countrywide Home Loans, Inc.*, 2009 WL 3126400 (E.D. Cal. 2009), the court dismissed a *pro se* complaint because the plaintiff failed to allege that he had tendered or was able to tender the rescission balance.

The Eleventh Circuit in *Williams* recognized that courts should consider traditional equitable notions, such as the severity of TILA violation and whether the debtor has the ability to repay. The aim of conditioning rescission upon tender is to return the parties to

the *status quo* while allowing rescission to remain vital as an enforcement tool. *Williams,* 968 F. 2d 1137, 1142. Therefore, it is appropriate to allow the parties an opportunity to negotiate reasonable terms for Plaintiffs' tender of the net loan proceeds. Accordingly, it is hereby

ORDERED that Defendant's motion for judgment as a matter of law is ***denied.*** It is further

ORDERED that, in light of the holdings in this order, within 14 days of the date of entry of this order, lead counsel for the parties are required to confer in a good faith effort to settle the case. Defendant's counsel shall initiate arrangements for scheduling the date of the conference and Plaintiffs' counsel shall reply and cooperate promptly. If, within the time allowed, the parties fail to announce settlement of this adversary proceeding (or request additional time to negotiate settlement), continuation of the trial will be scheduled.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon counsel for Plaintiffs, counsel for Defendant, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the 26th day of March, 2012.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE