

MAR 23 2008

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

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

ORDER DENYING PLAINTIFFS' MOTION
 FOR PARTIAL SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiffs' motion for partial summary judgment (the "Motion"). The sole issue presented by Plaintiffs' Motion is whether the Notice of Right to Cancel (the "Notice") executed in connection with the relevant loan transaction provided Plaintiffs with clear and conspicuous notice of their rights under the Truth-in-Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA").

The facts are undisputed. 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 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.

Even though Mr. Zohbe was not a borrower in the transaction, he possessed certain rights under TILA, including the right to clear and conspicuous disclosure of his right to rescission of the transaction. 12 C.F.R. § 226.23(b). The 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).

A copy of the Notice is attached to this Order as Exhibit A. Plaintiffs assert that the Notice is unclear because it is directed only toward Ms. Zohbe. Specifically,

Plaintiffs complain that in the heading of the Notice, only Ms. Zohbe is listed as the borrower. At the bottom of the Notice, where the signatures of both Ms. Zohbe and Mr. Zohbe were affixed, below each of the signatures is the designation borrower/owner. The body of the Notice is written in the informal style prescribed by Regulation Z, using the pronoun "you." For example, the opening paragraph of the Notice states:

You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS....

Plaintiffs also contend that the clarity of the Notice is negatively affected by another document entitled "Understanding Your Loan," which was provided to and signed by only Ms. Zohbe.

Plaintiffs rely upon the holding in the case of *In re Apgar*, 291 B.R. 665 (Bankr. E.D. Penn. 2003), which presents facts very similar to those in the instant case. The only factual difference between *Apgar* and the instant case is that in *Apgar*, in the box on the form for use in activating the right to cancel, the borrowing-spouse's name, but not the non-borrowing spouse's name, had been typed below the blank signature line. The court concluded that if notice is subject to two or more sensible readings, and if different results ensue depending upon which of the two readings is adopted, then the parties have not received clear notice about their right to rescind.

The difference in facts between *Apgar* and the instant case appears to be significant. The Notice signed by Plaintiffs did not contain any typewritten name in the box for activating the right to rescind. Therefore, Plaintiffs are left with asserting that the insertion of Susan M. Zohbe's name in the heading of the Notice, designating her as borrower, is alone sufficient to render the Notice unclear. In the context of the specific transaction between Plaintiffs and Defendant, the Notice was not unclear. Ms. Zohbe was, in fact, the borrower – the only borrower. Her husband did not sign the promissory note and was not a borrower in the transaction. The insertion of her name in the heading, especially with the designation "borrower," does not give rise to a presumption that the body of the Notice is addressed only to her. Quite clearly, the information contained in the heading is for purposes of identification of the parties to the transaction. Nothing else in the Notice would mislead either Debtor into believing that only Ms. Zohbe or only Mr. Zohbe, or both of them jointly were entitled to rescind.

Attempting to engraft the "Understanding Your Loan" document onto the Notice to create an ambiguity is inappropriate. The disclosures and explanations in that document were directed to Ms. Zohbe alone because she alone was the borrower. The document reiterated her right to cancel the transaction, but

confirmation of her right to cancel does not render ambiguous the disclosure in the Notice of Mr. Zohbe's right to cancel.

TILA "does not require perfect notice; rather it requires a clear and conspicuous notice of rescission rights." *Veale v. Citibank F.S.B.*, 85 F. 3d 577 (11th Cir. 1996).

See also Smith v. Highland Bank, 108 F.3d 1325 (11th Cir. 1997). The Notice provided both Debtors with clear and conspicuous notice of their rescission rights.

Accordingly, it is hereby

ORDERED that Debtors' motion for partial summary judgment is denied.

The Clerk is directed to serve a copy of this order upon Plaintiffs' attorney and Defendant's attorney.

IT IS SO ORDERED, this the 25th day of March, 2008.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

NOTICE OF RIGHT TO CANCEL

LENDER: Ameriquest Mortgage Company

DATE: July 14, 2004
LOAN NO.: 0084883828 - 7311
TYPE: ADJUSTABLE RATE

BORROWER(S): Susan M Zohbe

ADDRESS: 2665 Logan Way
CITY/STATE/ZIP: Lawrenceville, GA 30043

PROPERTY: 2665 Logan Way
Lawrenceville, GA 30043

You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have a legal right under federal law to cancel this transaction, without cost, within THREE BUSINESS DAYS from whichever of the following events occurs last:

ENTER DOCUMENT SIGNING DATE
7/15/2004

- 1. The date of the transaction, which is
or
2. The date you received your Truth In Lending disclosures;
or
3. The date you received this notice of your right to cancel.

If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on your home has been cancelled, and we must return to you any money or property you have given to us or anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation.

HOW TO CANCEL

If you decide to cancel this transaction, you may do so by notifying us in writing, at:

Ameriquest Mortgage Company
1600 S Douglass Rd
Anaheim, CA 92806

ATTN: FUNDING
PHONE: (714)634-3494
FAX: (800)664-2256

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of

ENTER FINAL DATE TO CANCEL
7/19/2004

(or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time. I WISH TO CANCEL.

SIGNATURE

DATE

The undersigned each acknowledge receipt of two copies of this NOTICE OF RIGHT TO CANCEL and one copy of the Federal Truth In Lending Disclosure Statement, all given by lender in compliance with Truth In Lending Simplification and Reform Act of 1980 (Public Law 96-221).

Each borrower in this transaction has the right to cancel. The exercise of this right by one borrower shall be effective to all borrowers.

Susan M. Zohbe 7/15/04
BORROWER/OWNER Susan M Zohbe Date

Ayman Zohbe 7/15/04
BORROWER/OWNER Ayman Zohbe Date

BORROWER/OWNER Date

BORROWER/OWNER Date



LENDER COPY

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