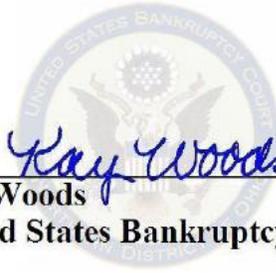


IT IS SO ORDERED.

Dated: April 13, 2012
09:38:39 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

GARY JOSEPH ZUPP and
MARLENE ANN ZUPP,

Debtors.

* * * * *

GARY JOSEPH ZUPP and
MARLENE ZUPP,

Plaintiffs,

v.

BAC HOME LOAN SERVICING,
L.P.,

Defendant.

CASE NUMBER 10-41948

ADVERSARY NUMBER 11-4124

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING PARTIAL JUDGMENT ON THE PLEADINGS

This cause is before the Court on Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative for Equitable Rescission (Doc. # 12) and its supporting Memorandum in

Support of Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative for Equitable Rescission (Doc. # 13) (collectively, "Motion for Partial Judgment") filed on January 9, 2012, by Defendant BAC Home Loans Servicing, L.P.¹ ("BAC" or "Defendant"). On February 10, 2012, Plaintiffs Gary Joseph Zupp and Marlene Zupp ("Plaintiffs" or "Debtors") filed Plaintiffs' Opposition to Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative, [sic] for Equitable Rescission [sic] ("Response") (Doc. # 22). On February 27, 2012, the Defendant filed Reply in Support of Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative for Equitable Rescission ("Reply") (Doc. # 27).

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTS

The Debtors filed a petition pursuant to chapter 13 of the Bankruptcy Code on May 24, 2010 (Main Case, Doc. # 1). On that same date, they filed a Chapter 13 Plan (Main Case, Doc. # 2), which

¹ The Court notes that Bank of America, N.A., is the successor by merger to BAC Home Loans Servicing, L.P.

included the following provision: "[t]he Debtor's [sic] intend to file an adversary to enforce a rescission [sic] under the Truth & Lending Act with regards to the creditor Taylor Bean and the property located at 7006 Blossom Drive, Canfield, OH." (Plan at 6.) BAC, as successor in interest to the Loan², objected to the Debtors' Plan (Main Case, Doc. # 24). On August 19, 2010, the Court entered Agreed Order Resolving Objection to Debtors' Plan by BAC Home Loans Servicing, L.P. FKA Countrywide Home Loans Servicing, L.P. (Main Case, Doc. # 49), which provided that BAC's "ability to receive payment on the [L]oan" will be determined through this adversary proceeding. (*Id.* ¶ 3.)

On April 18, 2011, the Plaintiffs filed Adversary Complaint ("Complaint") (Doc. # 1), which contains the following allegations³:

Count One - Truth in Lending Rescission. The Defendant, as assignee of Taylor, Bean & Whitaker, failed to comply with the requirements in the Truth in Lending Act ("TILA") and, as a result of such failure to comply, the Plaintiffs had "up to three years after consummation of the transaction" to rescind the Loan, which they did on April 23, 2010, "by sending the notice of rescission to Defendant BAC." (Compl. ¶¶ 25-26.)

Count Two - Fair Debt Collection Practices Act. After the Plaintiffs rescinded the Loan, BAC continued to attempt to collect the full amount of the Loan "both through statements to the plaintiffs and reporting to the credit bureau." (*Id.* ¶ 33.)

Count Three - Consumer Sales Practices Act ("CSPA"). The Defendant's refusal to accept the Plaintiffs' rescission, and continued "attempt[s] to collect a debt that should have been rescinded per the TILA is unfair, deceptive, and unconscionable." (*Id.* ¶¶ 41, 39.)

² "Loan" is defined *infra* at 6.

³ Each of the Plaintiffs' claims rests, at least in part, on the alleged violation of the TILA and the alleged rescission of the Loan.

Count Four - Breach of Contract. The Defendant failed "to abide by all conditions precedent before accelerating the note, specifically following the FHA loss mitigation guidelines before foreclosing, and by attempting to collect the mortgage though the Plaintiffs no longer owed it according to the TILA." (*Id.* ¶ 47.) Further, the Defendant inflated costs on the Loan "under the guise of foreclosure expenses," which also violated the implied covenant of good faith and fair dealing. (*Id.*)

Count Five - Objection to Proof of Claim. Because the Loan was properly rescinded, the Plaintiffs do not owe the amount listed on the proof of claim. In addition, because the Defendant failed to comply with the loss mitigation guidelines for FHA mortgages, "none of the charges or payments are owed." (*Id.* ¶¶ 50-51.)

The Defendant's Answer (Doc. # 8), filed on June 15, 2011, generally denies liability on all counts and sets forth several affirmative defenses.

In the Motion for Partial Judgment, the Defendant asserts, "Plaintiffs' claim for rescission must be dismissed because they admittedly cannot meet their statutory tender obligations[,] or, in the alternative, "[the] Plaintiffs' right to rescind should be conditioned upon their making full tender. . . ." (Mot. for Partial J. at 2.) BAC further argues that the alleged violations of the FDCPA and the CSPA, as well as the breach of contract claim, and the objection to proof of claim must be dismissed to the extent they rely on the Plaintiffs' prior effective rescission. The Plaintiffs respond that "nothing in the Truth in Lending Act, the Regulations, or the Commentary . . . requires consumers to plead ability to tender." (Resp. at 2.) They also argue that any required tender obligation can be met through their Chapter 13 Plan. (*Id.* at 8.) In the Reply, the Defendant contends that it cannot be required to accept partial tender as an unsecured creditor. (Reply at 2-3.)

II. STANDARD OF REVIEW

Judgment on the pleadings is governed by FED. R. CIV. P. 12(c), which is made applicable to this proceeding pursuant to FED. R. BANKR. P. 7012(b). Rule 12(c) provides:

After the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings.

FED. R. CIV. P. 12(c) (West 2012).

A motion for judgment on the pleadings is reviewed under the same standard used to review a Rule 12(b)(6) motion to dismiss. *Ferron v. Zoomego, Inc.*, 276 Fed. Appx. 473, 475 (6th Cir. 2008). Judgment on the pleadings is proper when no material issue of fact exists and the moving party is entitled to judgment as a matter of law. *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007). In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party. *Estill County Bd. of Educ. v. Zurich Ins. Co.*, 84 Fed. Appx. 516, 518 (6th Cir. 2003). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JPMorgan Chase Bank*, 510 F.3d at 581 (citation and quotation marks omitted).

However, the Court is not required to accept as true "legal conclusions or unwarranted factual inferences." *Bohanan v. Bridgestone/Firestone North Am. Tire, LLC*, 260 Fed. Appx. 905, 906

(6th Cir. 2008) (citation and quotation marks omitted). Furthermore, even "[i]n construing the complaint in favor of the plaintiff, . . . [the Court is] 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Ferron*, 276 Fed. Appx. at 475 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

III. ANALYSIS

For purposes of this Motion for Partial Judgment, the Court will treat the following allegations from the Plaintiffs' Complaint as true.

1. The Plaintiffs list 7006 Berry Blossom Drive, Canfield, Ohio 44406 as their address in the caption of the Complaint (as well as on the Bankruptcy Petition).

2. The Plaintiffs entered into an FHA-insured loan with Taylor, Bean, & Whitaker ("Taylor Bean") on April 25, 2007 ("Loan"). BAC, as the assignee of Taylor Bean, is liable for "the TILA violations of which [they] were victims." (Compl. ¶¶ 1, 13.)

3. The notice provided by Taylor Bean regarding the right to rescind the Loan contained a material misstatement regarding the proper procedure for exercising the right to rescind. (*Id.* ¶ 14.)

4. Because of the material misstatement in the notice regarding rescission, the Plaintiffs had three years to send a notice of cancellation of the Loan. (*Id.* ¶ 15.)

5. The Plaintiffs timely sent BAC a notice of cancellation on April 23, 2010, which was within the three-year period following consummation of the Loan on April 25, 2007. (*Id.*)

6. BAC had an obligation to effectuate the rescission by cancelling the security agreement and returning the money to the Plaintiffs within 20 days after rescission. (*Id.*)

7. The Plaintiffs acknowledge that BAC responded to the notice of cancellation and indicated that the Loan was not subject to rescission. (*Id.*)

Taking these facts as true, the Court concludes (i) 7006 Berry Blossom Drive, Canfield, Ohio is the Plaintiffs' principal "dwelling;" and (ii) the Plaintiffs obtained the Loan to purchase their principal dwelling, which transaction constitutes a "residential mortgage transaction," as these terms are defined in the TILA. See 15 U.S.C. § 1602(w) and (x) (West 2012). Even though the Plaintiffs sent the "notice of cancellation" to BAC within three years after entering into the Loan, the Plaintiffs' "factual" assertion that they had a right to rescind the Loan can be true only if the TILA actually provides them with such right.

The Plaintiffs' Complaint is based on their alleged valid, proper and timely rescission of the Loan, which is secured by a mortgage on their principal dwelling. (*Id.* ¶¶ 1, 11, 24, 26.) As a consequence, the Court must first determine if the right of rescission set forth in the TILA applied to this transaction.

The Truth in Lending Act "is designed to 'assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer

against inaccurate and unfair credit billing and credit card practices.'" *Nix v. Option One Mortgage Corp.*, 2006 U.S. Dist. LEXIS 2289 (D.N.J. Jan. 19, 2006). Based on this objective, the TILA "requires creditors to provide borrowers with certain disclosures regarding things like finance charges, percentage rates of interest, and borrower's rights." *Id.* (citing 15 U.S.C. §§ 1631, 1632, 1635, 1635, 12 C.F.R. § 226.23(b)(1)).

Among the rights to be disclosed is a consumer's right to rescind certain transactions.

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

15 U.S.C. § 1635(a) (West 2012) (emphasis added). As set forth below, this right of rescission is not applicable to the transaction involving the Loan because such transaction constitutes a "residential mortgage transaction."

Despite application of the TILA's right of rescission generally to loans secured with a borrower's principal dwelling, residential mortgage transactions are specifically exempted from disclosure of the obligor's right to rescind. Section 1635(e) states, in pertinent part:

(e) Exempted transactions; reapplication of provisions

This section does not apply to-

(1) a residential mortgage transaction as defined in section 1602(w)¹ of this title;

15 U.S.C. § 1635(e) (West 2012) (emphasis added). "[T]he term 'residential mortgage transaction' means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w) (West 2012) (emphasis added). It is apparent that the TILA's right of rescission does not apply to initial financing for acquisition of a borrower's residence.

As set forth above, the Plaintiffs' Complaint is based on the purported rescission of the Loan used for the purpose of acquiring the Debtors' dwelling, *i.e.*, a residential mortgage transaction. As a consequence, this transaction is excepted from the TILA's right to rescind. Accordingly, the Plaintiffs did not have the right to

¹ Reference to § 1602(w) appears to be a typographical error in the statute. 15 U.S.C. § 1602(w) defines the term "dwelling." The applicable subsection is 15 U.S.C. § 1602(x), which provides the definition for "residential mortgage transaction." The Court will utilize § 1602(x) in its analysis.

rescind the Loan. Thus, whether the Debtors properly rescinded the Loan not relevant because they were not entitled to rescind the Loan under the TILA.

Each of the Counts of the Complaint is based on the Debtors' attempted rescission. This Court has concluded that rescission was not available as a remedy to the Debtors because the transaction at issue was a residential mortgage transaction. BAC was not required to disclose the right to rescind because residential mortgage transactions are exempted from the disclosure requirement in 15 U.S.C. § 1635(a). As a consequence, BAC is entitled to judgment on the pleadings to the extent each of Counts One through Five rely on the Plaintiffs' rescission of the Loan transaction as its factual basis.

IV. CONCLUSION

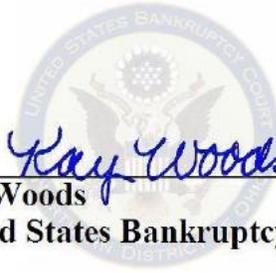
As stated, *supra*, the TILA's right of rescission did not apply to the transaction at issue in this adversary proceeding because the Loan was issued for the acquisition of the Debtors' dwelling, which makes the Loan a residential mortgage transaction. Residential mortgage transactions are exempted from the requirement of disclosure of a borrower's right to rescind in 15 U.S.C. § 1635. Each Count of the Complaint is based, at least in part, on an alleged violation of disclosure regarding the right to rescind and the Plaintiffs' purported attempt to rescind. To the extent Counts One through Five rest on the Plaintiffs' rescission under TILA, BAC is entitled to judgment on the pleadings because such facts fail to

support a cause of action. As a consequence, the Court will grant the Motion for Partial Judgment. An appropriate order will follow.

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IT IS SO ORDERED.

Dated: April 13, 2012
09:38:40 AM



Kay Woods
 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

GARY JOSEPH ZUPP and
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L.P.,

Defendant.

CASE NUMBER 10-41948

ADVERSARY NUMBER 11-4124

HONORABLE KAY WOODS

ORDER GRANTING MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

This cause is before the Court on Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative for

Equitable Rescission (Doc. # 12) and its supporting Memorandum in Support of Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative for Equitable Rescission (Doc. # 13) (collectively, "Motion for Partial Judgment") filed on January 9, 2012, by Defendant BAC Home Loans Servicing, L.P. On February 10, 2012, Plaintiffs Gary Joseph Zupp and Marlene Zupp filed Plaintiffs' Opposition to Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative, [sic] for Equitable Rescission [sic] (Doc. # 22). On February 27, 2012, the Defendant filed Reply in Support of Defendant's Motion for Partial Judgment on the Pleadings or in the Alternative for Equitable Rescission (Doc. # 27).

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby grants the Motion for Partial Judgment.

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