

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MECHANICS LIEN/MORTGAGE FORECLOSURE SECTION

HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE NOMURA HOME
EQUITY LOAN, INC. ASSET-BASED
CERTIFICATE SERIES 2007-3,

Plaintiff,

v.

JEANNE JACKSON, ET AL.,

Defendant.

08 CH 33861

Pamela Hughes Gillespie
Judge Presiding

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff, HSBC Bank USA, National Association's (hereinafter "HSBC") Motion to Dismiss defendant, Jeanne Jackson's (hereinafter "Jackson") Counterclaims, pursuant to Section 2-615 of the Illinois Code of Civil Procedure. For the reasons that follow, the Motion to Dismiss is denied.

BACKGROUND

In 1999, Jackson, along with her husband purchased the subject property located at 624 South Scoville in Oak Park, Illinois. By virtue of a Quit Claim Deed, Jackson became the sole owner of the property on April 1, 2005. In September 2006, Jackson refinanced through Resmae Mortgage Corporation (hereinafter "Resmae") and executed a mortgage, providing the property in Oak Park as security.

On or about September 12, 2008, HSBC¹ filed this foreclosure action against Jackson alleging that Jackson was in default under the note and mortgage for failing to pay the monthly mortgage payments. On March 20, 2009, Jackson filed her Answer, Affirmative Defenses, and Counterclaims to the complaint. Jackson asserts four affirmative defenses and two counterclaims against HSBC. Jackson's counterclaims allege violations of the Truth In Lending Act (hereinafter "TILA"). Specifically, that Jackson was not provided with a

¹ HSBC alleges in its complaint that it is the Mortgagee under 735 ILCS 5/15-1208. Complaint ¶ 3N. In its Motion to Dismiss, HSBC asserts that MERs as nominee for Resmae assigned and transferred all of its interests under the Mortgage to HSBC. Moreover, an assignment was produced by Defendant memorializing that transfer.

complete payment schedule and that she did not receive a proper Notice of Right to Cancel. Jackson asserts that these violations give rise to an extended right of rescission under TILA. Within her counterclaims, Jackson asserts a claim for rescission because of the alleged TILA violations, "Ms. Jackson elects to rescind, between herself and Plaintiff, by these pleadings. Ms. Jackson also exercised her right to rescind by tendering a written notice of rescission to the Plaintiff's counsel on March 19, 2009." Defendant's Affirmative Defenses and Counterclaims ¶¶ 2-29.

HSBC subsequently filed this section 2-615 motion to dismiss Jackson's counterclaims, arguing that rescission is not available because Jackson failed to assert that she intends and is capable of tendering the monies required to rescind. The failure to allege tender, according to HSBC, renders her rescission claim substantially insufficient at law.

Jackson responds that there is no such pleading requirement for a rescission claim in Illinois nor does TILA require a showing on ability to tender. Moreover, Jackson argues that rescission is a three-step process. First, the consumer gives creditor notice of rescission. Second, the creditor returns the consumer's money or property and terminates its security interest. And finally, the consumer tenders reasonable value of the property extended. However, to require a borrower to plead the ability to tender, Jackson argues, takes the process out of order. Jackson acknowledges that a court, in its discretion, may modify the order of the second and third steps or may impose equitable conditions to protect both the borrower and the creditor, but, argues the first step in the process cannot be modified.

HSBC replies that Illinois courts have not definitively determined whether tender is a pleading requirement. However, HSBC argues that other jurisdictions have recognized the dangerous position creditors are put in when a borrower elects to rescind the transaction and asks that any claim for rescission be conditioned upon the tender of monies previously advanced to the borrower.

STANDARD FOR SECTION 2-615 MOTION

A motion to dismiss counterclaims under 735 ILCS §5/2-615 attacks only the legal sufficiency of the pleading, and all well-pleaded facts are taken as true. Connick v. Suzuki Motor Co., 174 Ill.2d 482, 790 (1996); Doe v. Calumet City, 161 Ill.2d 374, 381 (1994). The only issue presented on a 2-615 motion to dismiss is whether the well-pled facts, taken in the light most favorable to the non-moving party, establish a cause of action for which relief may be granted. Connick, 174 Ill.2d at 490; Dix Mutual Ins. Co. v. LaFramboise, 149 Ill.2d 314, 318-19 (1992). Thus, a motion to dismiss under section 2-615 should only be granted if it is clear that the well-pled facts do not entitle the complainant to relief. McGann v. Illinois Hosp. Ass'n, 172 Ill.App.3d 560, 564 (4th Dist. 1988).

DISCUSSION

Jackson asserts the right to rescind the subject loan because HSBC failed to provide her with a complete payment schedule for the loan and it failed to provide a valid Notice of Right to Cancel pursuant to 15 U.S.C. § 1635(a) and Regulation Z, 12 C.F.R. § 226.23. No where in Jackson's affirmative defenses or counterclaims does she allege an ability to tender funds in order to effectuate a rescission with her lender. The sole issue on this motion to dismiss is whether Jackson is required to do so.

The purpose of TILA is "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 uniformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998) citing 15 U.S.C. § 1601(a). Under TILA, when a loan made in a consumer credit transaction is secured by the borrower's "principal dwelling," the borrower may rescind the loan agreement if the lender fails to deliver certain forms or make certain material disclosures. 15 U.S.C. § 1635(a). Moreover, the consumer has an "absolute right to rescind a credit transaction simply by notifying the creditor, within a specific time [three years] that she intends to do so." Velazquez v. HomeAmerican Credit, Inc., 254 F.Supp.2d 1043, 1044-45 (N.D. I.L. 2003). The creditor is not permitted to retain the security interest or withhold money or property pending the return of the monies used by the borrower under the transaction. Id. at 1045. Under TILA, the consumer "need not return money or property to the creditor until *after* the creditor has fulfilled its obligations under the statute." Id.

Section 1635 (b) provides the procedures for TILA rescission. Under the section, rescission is a step-by-step process:

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 in this subsection shall apply except when otherwise ordered by a court.

15 U.S.C. § 1635 (b). The rescission scheme under TILA differs from the common law rule of rescission, where the rescinding party must tender first. Velazquez, 254 F.Supp.2d at 1045 (citing Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1139 & n.5 (11th Cir. 1992)). The court in Velazquez surmised that the absolute right of rescission under TILA puts the consumer in a much stronger position than under the common law rescission in order to insure creditors comply with the TILA requirements. Id. However, the court noted that notions of equity may require the consumer's tender be made simultaneously with the release of the creditor's security interest. Id. at 1047.

In this case, HSBC cites a series of decisions from the various federal district and bankruptcy courts for the proposition that rescission must not be judicially enforced unless it is conditioned on the consumer's tender of monies. See, Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 701 (9th Cir. 1986); In re Groat, 369 B.R. 413, 419 (Bankr. 8th Cir. 2007); In re Cox, 162 B.R. 191 (Bankr. C.D. Ill. 1993); Am. Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007); Yamamoto v. Bank of N.Y., 329 F.3d 1167, 1172 (9th Cir. 2003). However, because this is a 2-615 motion, the question at hand is whether the consumer is required to plead their ability to tender the money. There is no law to support the conclusion that such an averment is required and to require such a statement flies in the face of Congress's clear intent in TILA. Regulation Z requires only that a consumer "notify the creditor of the rescission by mail, telegram, or other means of written communication." 12 C.F.R. § 226.23 (a)(2). If the consumer were required to file suit and plea the ability to tender, Regulation Z would expressly require it. See, In re: John H. Hunter v. Countrywide Home Loans, 400 B.R. 651, 658-59 (Bankr. N.D. Ill. 2009). The consumer's ability to tender the borrowed funds is an issue as the lawsuit advances; however, the consumer is not required to plead the ability to tender in order to state their claim for rescission.

CONCLUSION

Therefore, for the foregoing reasons, HSBC's Motion to Dismiss Jeanne Jackson's Counterclaim, pursuant to section 2-615 of the Code of Civil Procedure, is denied.

ENTERED:

Pamela Hughes Gillespie
Judge Presiding

DATED:

Associate Judge Pamela Hughes Gillespie
OCT 08 2009
Circuit Court - 1953