

IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

52486

TILA

(6)

DANA FRANKLIN PIERSON and  
ROSALEA COLLINS PIERSON,

Plaintiffs,

v.

75-0334  
CIVIL ACTION NO. ~~75-0334~~-CH

FAIRMONT MOBILE HOMES, INC.,  
a corporation; GENERAL  
ELECTRIC CREDIT CORPORATION,  
a corporation; and FRANK H.  
JACKSON,

Defendants.

MEMORANDUM ORDER

This is a civil action filed individually by the named plaintiffs against Fairmont Mobile Homes, Inc., a retailer of mobile homes (Fairmont), against General Electric Credit Corporation, a financier of mobile homes (GECC), and against Frank H. Jackson, a salesman for Fairmont (Jackson).

On November 26, 1974, plaintiffs agreed with salesman Jackson to purchase from Fairmont, on credit, a new 1975 mobile home. Defendant Fairmont retained a security interest in the mobile home to secure payment of the purchase price. Also, as a part of the transaction, plaintiffs executed a deed of trust conveying two vacant lots to a trustee to further secure Fairmont in the payment of the purchase price. The purchase agreement containing the security interest was assigned to GECC, but the deed of trust was not. GECC admits that it holds the contract of sale subject to all claims and defenses which the plaintiffs would have against the defendant Fairmont if the latter attempted to enforce such contract.

The mobile home was placed on the two lots of real estate referred to above, and was used as plaintiffs' principle residence. The home was not attached to the realty, save for water and electric connections. It is sufficient for the purposes of this suit to say that the plaintiffs' contend that the mobile home was defective and not fit for the purposes for which it was purchased. Plaintiffs formally rescinded their contract to purchase the trailer by letter dated August 22, 1975, and received by defendants on August 25, 1975.<sup>1</sup> The defendants have not returned any of the consideration paid by the plaintiffs, and plaintiffs still possess the mobile home.

The plaintiffs filed suit basing their cause of action in part upon the federal Consumer Credit Protection Act, 15 U.S.C. §§ 1601 et seq., commonly known as Truth-in-Lending Act. They seek, inter alia, rescission of the contract and money damages as a civil penalty due to the alleged failure to disclose the right of rescission. At this juncture, the record includes various stipulated facts, affidavits, exhibits and pleadings. All parties have moved for summary judgment

<sup>1</sup>The text of the rescission letter reads as follows:

RESCISSION

The undersigned hereby rescind the transaction involving the purchase of a 1975 Castle Mobile Home, purchased on the 26th day of November, 1974, from Fairmont Mobile Homes, Inc., dealer, and financed through General Electric Credit Corporation. The undersigned further states that, with the return of all monies paid and release of security interest, the above corporation may take immediate possession of the property at its present location.

/s/ Dana Franklin Pierson  
Dana Franklin Pierson

/s/ Rosalea Collins Pierson  
Rosalea Collins Pierson

upon the record and the parties agree that the primary issue for resolution is whether or not the plaintiffs should have been afforded the right to rescind the purchase agreement. For the reasons hereinafter set out, and based upon the authorities cited, the court grants the plaintiffs' motion for summary judgment.

I.  
RIGHT OF RESCISSION

15 U.S.C. § 1635(a) provides in pertinent part:

Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence 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 disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. \* \* \*

Plaintiffs purchased the mobile home on November 26, 1974, but the defendants never gave the plaintiffs a written notice of the right of rescission. Therefore, pursuant to § 1635, the right to rescind the transaction has remained in the plaintiffs, unless some exception applied to deny them this right.<sup>2</sup>

II.  
POSSIBLE EXCEPTIONS TO THE RIGHT OF RESCISSIONS

15 U.S.C. § 1635(e) provides, in pertinent part:

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<sup>2</sup>The right of rescission is not indefinite. Under 15 U.S.C. § 1635(f), "An obligor's right of rescission shall expire three years after the date of consummation of the transaction . . . ." Since plaintiffs' letter of rescission was sent to the defendants less than one year from the date of consummation of the transaction, § 1635(f) is not applicable.

This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling or to a consumer credit transaction in which an agency of a State is the creditor.

Defendants argue that this exception applies to deny plaintiffs their benefit of the right to rescind under § 1635(a). We disagree.

For the exception in § 1635(e) to apply, a first lien must be created against a dwelling. The regulations implementing § 1635 define a dwelling as follows:

"Dwelling" means a residential-type structure which is real property and contains one or more family housing units, or a residential condominium unit wherever situated.

12 C.F.R. 226.2(v) (emphasis added). Pursuant to this definition, for a structure to be a dwelling, it must also be real property. Real property is defined as "property which is real property under the law of the State in which it is located." 12 C.F.R. § 226.2(dd).

Both parties admit, and the court agrees, that the mobile home was personal property when the sale was consummated, and we hold further that it remained personal property even after being placed upon the lot. The mobile home was never affixed to the lots, save for the water and electric connections, and it did not lose its character as movable personal property under West Virginia law. See Snuffer v. Spangler, 79 W. Va. 628, 638, 92 S.E. 106, 110 (1917). Therefore, the exception contained in § 1635(e) does not apply to deny the plaintiffs the benefit of the right to rescind.

One of the regulations implementing § 1635(e) provides, in pertinent part:

This section does not apply to:

. . .

A security interest which is a first lien retained or acquired by a creditor in connection with the financing of the initial construction of the residence of the consumer . . . .

12 C.F.R. § 226.9(g)(2). However, we do not view this transaction as involving construction, and the term "residence", like dwelling, is defined in terms of real property, 12 C.F.R. § 226.2(ff), and therefore not applicable here for the reasons outlined above.

The court holds that, under § 1635(a), the plaintiffs had the right to rescind the purchase agreement, and no exception raised by the defendant is applicable to limit or deny that right.

### III. REMEDIES

15 U.S.C. § 1635(b) provides:

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 ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, 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 practicable 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 ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

Under the terms of this statute, after rescission, plaintiff was entitled to maintain possession of the mobile home until the defendants performed their obligation of returning consideration given by the plaintiffs. Furthermore, since plaintiffs tendered possession of the mobile

home to the defendants," and the defendants did not take possession within ten days, the ownership of the mobile home vested in the plaintiffs, without obligation to pay for it. See Sosa v. Fita, 498 F.2d 114, 120 (5th Cir. 1974). Under § 1635(b), the defendants are also obligated to return to plaintiffs any money "given as . . . downpayment or otherwise", which includes earnest money, any downpayment, taxes, insurance, and payments made on the mobile home. Cf. Sosa, supra. Additionally, the security interest given in the contract and the deed of trust are both void and the defendants are directed to take appropriate action necessary to reflect the termination thereof.

Pursuant to § 1635(a), defendant had a duty to disclose to plaintiffs their right of rescission,<sup>4</sup> and plaintiffs' contend that the failure to perform this duty also renders the defendants monetarily liable under 15 U.S.C. § 1640(a), which provides in pertinent part:<sup>5</sup>

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 of this title with respect to any person is liable to such person in an amount equal to the sum of--

. . .

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<sup>3</sup>See the rescission letter in note 1 supra.

<sup>4</sup>15 U.S.C. § 1635(a) provides in pertinent part:

The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. . . .

<sup>5</sup>The parties relied on a version of § 1640(a) which had been amended before this cause of action arose. This court will apply § 1640(a) as amended by P.L. 93-495, effective October 28, 1974. The amendment does not affect the outcome of this case.

(2) (A) In the case of an individual action twice the amount of any finance charge in connection with the transaction, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000;

. . . . .  
This court holds that under this section, defendants are liable to plaintiffs for \$1,000 plus the cost of this action and reasonable attorneys fees.<sup>6</sup> However, before the court can award attorneys fees, the court must have an affidavit from plaintiffs' counsel reflecting the time spent on this action and describing the work performed. Counsel for the plaintiffs shall file an affidavit and such other materials as he deems appropriate within 20 days of the entry of this order. The defendants shall reply, if they choose to, on the attorney's fees issue within 10 days following the plaintiffs' filing.

IV.  
CONCLUSION

The plaintiffs' motion for summary judgment is granted and plaintiff is entitled to the following relief:<sup>7</sup>

1. Rescission of the purchase agreement and a determination that the security interest in the purchase agreement and deed of trust are both void; and
2. Possession of the mobile home free of any obligation to pay therefor; and
3. Statutory damages assessed in the amount of \$1,000; and
4. Costs and such reasonable attorney fees as this court may hereafter allow.

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<sup>6</sup>The finance charge in this case is \$6,697.95, and therefore, liability twice that amount would exceed the \$1,000 maximum provided in 15 U.S.C. § 1640(a).

<sup>7</sup>None of the relief granted applies against defendant Jackson since he is not a creditor within the meaning of either 15 U.S.C. § 1635 or § 1640. See 15 U.S.C. § 1602(F). The remainder of the defendants' motion for summary judgment is denied.

The court is not unaware of the harsh result produced by this decision, but it is the duty of this court to enforce the statutes enacted by Congress unless found to be in violation of the Constitution. It is not for this court to substitute its judgment for the clear intent of Congress, no matter how harsh the result.

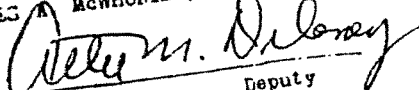
The clerk is directed to send certified copies of this order to all counsel of record.

ENTER: March 2/, 1978

  
K. K. HALL  
UNITED STATES CIRCUIT JUDGE  
Sitting by designation

A TRUE COPY. Certified this  
21 day of March, 1978

JAMES A. McWHORTER, Clerk

By   
Deputy