IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LOUIS H. SWAYZE and MARGARET SWAYZE, **Plaintiffs,**	
v.	**1:03-cv-733-WSD**
AMERIQUEST MORTGAGE COMPANY, **Defendant.**	

ORDER

This matter is before the Court on Plaintiffs Louis and Margaret Swayze's Objections [46] and Defendant Ameriquest Mortgage Company's Objections [45] to the Final Report and Recommendation and Order ("Report and Recommendation") regarding Defendant's Motion for Summary Judgment [28] and Plaintiffs' Motion for Partial Summary Judgment [29].

I. BACKGROUND

This is an action seeking statutory and actual damages, as well as rescission, for alleged violations of the Truth-in-Lending Act ("TILA"), 15 U.S.C. §§ 1601 et. seq. and Regulation Z, 12 C.F.R. § 226. The facts relevant to the summary

judgment motions filed by the parties are set out in the Report and Recommendation. The parties have not filed objections to the Magistrate Judge's factual summary and it is adopted by the Court.

Plaintiffs assert two objections to the Report and Recommendation. First, they claim the Magistrate Judge erred in concluding Defendant's loan disclosure complied with TILA. Second, they claim the Magistrate Judge erred in concluding Defendant's "One-Week Cancellation Period" notice did not render confusing Defendant's notice to Plaintiffs of their statutory rescission rights and the manner in which those rights are exercised. Defendant objects to the Report and Recommendation only on the grounds the Magistrate Judge failed to address its argument that Plaintiffs' right to rescission expired when they sold their home in August 2003.

In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a careful, *de novo* review of the portions of the Report and Recommendation to which the parties have objected. The Court has reviewed the remainder of the Report and Recommendation for plain error. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983).

II. DISCUSSION

A. Notice of Right to Rescind

The Magistrate Judge recommended the Court deny Plaintiffs' and Defendant's motions for summary judgment concerning the adequacy of the right-to-rescind notice and the number of copies of it provided to Plaintiffs in connection with their mortgage loan. Specifically, the Magistrate Judge found there are genuine issues of material fact regarding the date information which was provided in the notice form and whether Plaintiffs received the number of copies of the form required by statute. Neither party objects to these determinations and, finding no plain error, the Court adopts the Magistrate Judge's recommendation and the parties' motions for summary judgment on these issues are denied.

Plaintiffs object to the Magistrate Judge's finding that the One-Week Cancellation Period notice provided to Plaintiffs at their loan closing did not render Defendant's notice of Plaintiffs' statutory rescission rights confusing and thus not in compliance with TILA. Specifically, Plaintiffs contend the One-Week Cancellation Period notice, by providing borrowers with a contractual right to cancel beyond the three-day statutory right of rescission, effectively might lead a

borrower to believe he or she had one week to exercise their statutory rescission right and that the rescission had to be in writing.

Plaintiffs rely on two cases to support their argument that the contractual extension of the rescission period by Defendant made unclear the Plaintiffs' statutory rescission rights. In Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. 1994), *abrogated on other grounds by* Veale v. Citibank, F.S.B., 85 F.3d 577, 579-80 (11th Cir. 1996), the borrower was presented and executed at the time of closing an "Acknowledgment of Receipt of Notice of Right to Cancel and Election Not to Cancel" form. In that form, the borrower was advised of his statutory rescission rights but was asked to elect not to exercise them by signing the election form before the three-day statutory period to rescind expired. The court held the form was confusing for four reasons. First, the tendering of the Election Not to Cancel form at the closing implied that the three-day statutory period could be waived. Second, signing the form on the day of closing could lead the borrower to believe she could not subsequently cancel within the three-day cooling off period provided by the statute. Third, the incorporation of the Election Not to Cancel provision into the same form advising of the three-day rescission period was inherently confusing. Fourth, handing the borrower the Election Not to Cancel

form at the closing could suggest the borrower's signing of the form was a condition of completing the loan transaction. Plaintiffs also rely on Henlon v. Goldome Credit Corp., No. 87-2347, 1988 U.S. Dist. LEXIS 17464, at *3 (S.D. Fla. July 14, 1988). In Henlon, the lender provided the wrong rescission-right expiration date in the rescission notice, leading the borrower to believe he had more than three days to rescind.

Neither Rodash nor Henlon applies here. There is no claim Defendant provided a rescission date which conflicted with the proper statutory rescission date. There is no claim Plaintiffs were required to or asked to elect not to rescind at the closing or at any other time. Here, Defendant's notice of the right to rescind did not contain an election not to rescind, Plaintiffs were not required to sign any election form before their statutory period for rescission expired and there was nothing in the notice of right to rescind paperwork suggesting a period other than three days to exercise Plaintiffs' statutory rescission rights.

Plaintiffs' argument is based solely on the One-Week Cancellation Period notice given to Plaintiffs at the closing. This notice advised them Defendant was giving them, contractually, additional time to cancel their loan if they so desired. Plaintiffs' argument that this additional contract right wrongfully confused Plaintiffs

regarding their statutory rights is not persuasive or logical. The grant of additional time to cancel was set forth in a separate document from the notice advising Plaintiffs of their statutory rescission rights. Plaintiffs were not required to give up any portion of their statutory rescission period. Instead, Plaintiffs were provided with a separate document granting them additional cancellation rights by contract. This separate document did not refer to or purport to alter the statutory rights required by TILA. Plaintiffs' claim that the granting of these additional rights made unclear the rights provided by TILA, if accepted, would work to limit the rights of borrowers rather than to enhance them. Under Plaintiffs' theory, lenders would be discouraged from providing a borrower with additional time to cancel a loan, since doing so -- whether in a separate document provided at closing, mailed after the closing was completed or even hand-delivered on the third day of the statutory rescission period -- arguably would mislead a borrower into believing his rescission rights are different than those stated in the notice of rescission rights he received at his loan closing. This result would run counter to the purposes of TILA.

The Magistrate Judge in this case found the One-Week Cancellation Period notice confirmed Plaintiffs' statutory rescission rights under TILA, clearly and expressly granted to Plaintiffs additional time to cancel and explained clearly the

means by which these additional rights could be exercised. The Court, having conducted its *de novo* review, agrees with the Magistrate Judge's recommendation that Plaintiffs' motion for summary judgment based on the One-Week Cancellation Period notice be denied and that summary judgment in favor of Defendant be granted on this issue.

B. Disclosure Statement

The Magistrate Judge recommended the Court deny Plaintiffs' and Defendant's motions for summary judgment concerning the number of copies of the Disclosure Statement provided to Plaintiffs in connection with their mortgage loan. Specifically, the Magistrate Judge found there are genuine issues of material fact regarding whether Plaintiffs received the number of copies of the form required by statute. Neither party objects to this determination and, finding no plain error, the Court adopts the Magistrate Judge's recommendation and the parties' motions for summary judgment on this issue are denied.

Plaintiffs object to the Magistrate Judge's conclusion that the Disclosure Statement provides sufficient information to inform Plaintiffs that they were required to make monthly payments. The facts concerning this issue are undisputed. The Disclosure Statement provided that Plaintiffs were required to

make "359" payments of "$1,615.85" with payments becoming due beginning on "10/01/02." The Statement further provided for "1" payment of "$1,607.47" which is due beginning on "09/01/2032." The Disclosure Statement did not state specifically the payments were to be made "monthly" or according to any other periodic interval. Plaintiffs claim TILA and Regulation Z required Defendant to state specifically the payments are due "monthly." Defendant argues the information provided was sufficient because the total amount to be paid, coupled with the total payments to be made, necessarily meant payments were to be made monthly. The Magistrate Judge agreed with Defendant.

TILA requires in Section 1638 for certain disclosures by creditors:

> For each consumer credit transaction other than under an open credit plan, the creditor shall disclose each of the following items, to the extent applicable:
>
> . . .
>
> (6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

15 U.S.C. § 1638(a)(6). The statute is specific. Three elements are required: (1) the number of payments; (2) the amount of payments; and (3) either the due dates of payments or the period for which payments are to be made.

The Federal Reserve Board, in enacting Regulation Z, provided guidance to lenders on the schedule of payments requirement. Section 226.18(g) of the regulation provides as follows:

> (g) *Payment schedule.* The number, amounts, and timing of payments scheduled to repay the obligation.

12 C.F.R. § 226.18(g). The staff of the Division of Consumer and Community Affairs of the Federal Reserve Board's commentary on this requirement provides:

> *General rule.* Section 226.18(g) requires creditors to disclose the timing of payments. To meet this requirement, creditors may list all of the payment due dates. They also have the option of specifying the "period of payments" scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose as "monthly" or "bi-weekly," and the calendar date that the beginning payment is due. For example, a creditor may disclose that payments are due "monthly beginning on July 1, 1998." This information, when combined with the number of payments, is necessary to define the repayment period and enable a consumer to determine all of the payment due dates.

12 C.F.R. § 226, Supp. I, Official Staff Interpretation of § 226.18(g), Comment 4(i). The statute and the Federal Reserve Board regulations and guidance all provide that a creditor must either set out all of the payment due-dates or state the period for payments.

Here, the parties agree Defendant has not provided the due dates for payments. Defendant argues, however, the quantum of information provided in the Disclosure Statement adequately notified Plaintiffs of the period for payments. Specifically, Defendant claims the number of payments, the date on which payments begin and the total amount paid over the life of the loan necessarily means the payments are required to be made monthly. Notwithstanding the logical appeal of this argument, it is clear the Disclosure Statement does not include a period for payments and thus does not meet the strict requirements of the statute.

Our circuit has stated that TILA "ensures a meaningful disclosure of credit terms to enable consumers to compare readily the various credit terms in the marketplace." Rodash, 16 F.3d at 1144. It further has stated "creditors must strictly comply with TILA's requirements." Id. (citing Schroder v. Suburban Coastal Corp., 729 F.2d 1371, 1380 (11th Cir. 1984) (holding creditor's disclosures must be in "the proper technical form and in the proper locations on the contract, as mandated by the requirements of TILA and Regulation Z. Liability will flow from even minute deviations from the requirements.")). Thus, while reason may dictate that Plaintiffs here must have known the payments were monthly, that is not what the law requires. A "consumer may sue for enforcement

even if she is not actually deceived or harmed." Rodash, 16 F.3d at 1145. Because there is no genuine issue of material fact that the Disclosure Statement provided to Plaintiffs failed to meet the requirements of the statute, Defendant's motion for summary judgment on this claim cannot be granted and summary judgment in favor of Plaintiffs on this claim is appropriate.

C. Sale of the Home

Finally, Defendant objects to the Report and Recommendation on the grounds the Magistrate Judge failed to address its argument that Plaintiffs' sale of their home prohibits them from seeking rescission in this case. Defendant relies on Meyer v. Ameriquest Mortgage Co., 342 F.3d 899 (9th Cir. 2003).[1] This argument

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[1] The Court in Meyer, relying on Regulation Z, held the sale of the borrowers' home caused the borrowers' right to rescind to expire. The Court stated:

> The regulation is clear: the right to rescind ends with the sale. "If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the Property, or upon sale of the property, whichever occurs first.

Id. at 903 (citing 12 C.F.R. § 226.23(a)(3)). Plaintiffs here exercised their right to rescind before the sale and thus complied with 15 U.S.C. § 1635(f) which allows

was addressed by the Magistrate Judge in her March 9, 2004 Order. After a thoughtful consideration of Defendant's argument based on Meyer, the Magistrate Judge found that the sale of Plaintiffs' home did not affect Plaintiffs' claim for rescission. The Court agrees with the analysis in the Magistrate Judge's March 9, 2004 Order and adopts it here.

The Magistrate Judge, in accordance with her March 9, 2004 Order, found that if Plaintiffs acquired an extended right to rescind on account of a failure by Defendant to make one or more material disclosures, "they properly exercised it when, on January 18, 2003 (less than three years after the transaction date), they mailed a rescission notice to [Defendant]." (R&R at 22.) Although the Magistrate Judge concluded issues of fact remained as to whether Defendant failed to make the required disclosures, the Court ruled in Section II(B)(2) that summary judgment in favor of Plaintiffs was appropriate with respect to Defendant's failure to properly disclose the period of payment in violation of TILA. "If a finding is made that [Defendant] failed to make one or more material disclosures, the court should also

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rescission so long as the borrower exercises her right to rescind within three years of consummation of the loan transaction and prior to sale of the property.

find that Defendant violated TILA by failing to effect rescission of the transaction." (R&R at 23.) Defendant concedes it did not take any of the actions required by TILA in response to a proper notice of rescission. And aside from its argument concerning the sale of the property, Defendant did not object to the Magistrate Judge's recommendation that summary judgment in favor of Plaintiffs on their claim for rescission is warranted if the Court found Defendant failed to make a material disclosure in violation of TILA. Accordingly, summary judgment in favor of Plaintiffs on their claim for rescission is warranted.

III. CONCLUSION

For the foregoing reasons, and except as discussed in Section II(B) and (C), *supra*, the Court ADOPTS the Magistrate Judge's Report and Recommendation. Plaintiffs' Motion for Partial Summary Judgment is GRANTED in part and DENIED in part. Plaintiffs' motion is GRANTED with respect to their claim that the Disclosure Statement failed to provide sufficient information to inform Plaintiffs they were required to make monthly payments and their claim for rescission. Their motion is denied as to all other claims. Defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part. Defendant's motion is GRANTED with respect to Plaintiffs' claim that Defendant's notice of right to

rescind was made confusing by its providing the One-Week Cancellation Period notice. The motion is denied as to all other claims. The parties shall file their proposed consolidated pre-trial order on or before March 18, 2005.

SO ORDERED, this 16th day of February, 2005.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE