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signed 7-1-02
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**EDWARD JUNIOR GREEN,

DEBTOR.**

**CASE NO. 0-40678-13
CHAPTER 13**

**EDWARD JUNIOR GREEN,

PLAINTIFF,**

ADV. NO. 00-7111

v.

**CONSECO FINANCE SERVICING CORP.,

DEFENDANT.**

ORDER ON SUMMARY JUDGMENT MOTION

This proceeding is before the Court on the plaintiff-debtor's motion for summary judgment.

The plaintiff-debtor ("the Debtor") appears by counsel Fred W. Schwinn of the Consumer Law Center, P.A., Topeka, Kansas. Defendant Conseco Finance Servicing Corporation ("Conseco") appears by counsel Michael A. Priddle of Joseph & Hollander, P.A., Wichita, Kansas. The Court has reviewed the relevant pleadings and is now ready to rule.

In March 1999, the Debtor and Judy A. Sherman obtained a loan from Conseco, then known as Green Tree Financial Servicing Corporation, for about \$115,000. They gave Conseco a mortgage on real property that served as the Debtor's home (the record contains no indication whether it was also Ms. Sherman's home) to secure the loan. Conseco gave them notice of their right to rescind the transaction, as required by §1635 of the Truth in Lending Act ("TILA"), 15 U.S.C.A. §1635, but used

an incorrect notice form for the type of transaction it was. As a result, instead of three days, the Debtor and Ms. Sherman had three years to rescind the transaction.

The Debtor filed a chapter 13 bankruptcy petition in April 2000. On May 12, 2000, Conseco filed a proof of claim in which it asked to have notices sent to it at an address in Tempe, Arizona; although the mortgage that the Debtor and Ms. Sherman gave Conseco was on real property, Conseco says the Arizona address is for its mobile home department. Two months after Conseco filed its proof of claim, the Debtor's attorney sent a certified letter to Conseco at the Arizona address, informing the company of the Debtor's decision to rescind the home mortgage transaction. A few months after that, the Debtor commenced this adversary proceeding, seeking to enforce the rescission remedy established by the TILA. Conseco concedes that the Debtor has the right to rescind the transaction and contests only whether he effectively did so by sending the notice of rescission to the Arizona address. Conseco also concedes that "someone" at the Arizona address received the letter from the Debtor's attorney, but claims it cannot determine whether it received the letter at that address, apparently meaning it cannot determine whether the person who signed the certified mail receipt was acting on its behalf. It has not suggested that any people who were not its employees would have been at that location and might have signed for the letter. Conseco contends that the Debtor was required to send his notice of rescission to Conseco at the address identified in the original loan documents as the one to use for that purpose.

Ms. Sherman has not been made a party to the adversary proceeding, but has entered an appearance as an interested party and asked that notices in the case be sent to her attorney.

DISCUSSION AND CONCLUSIONS

As indicated, Conseco concedes that the Debtor sent his notice of rescission to a valid address for a department of the company and that someone at that address received the notice. Apparently, it is now unable to locate the notice, and so questions whether it actually received the notice. However, it has not indicated how the notice might have been received by anyone other than one of its employees at the address where it was delivered. The Court concludes that Conseco has not raised a genuine issue of material fact concerning its receipt of the notice. Furthermore, the Court cannot agree that the Debtor should have sent the notice to the address contained in the original loan documents, which were fifteen months old by the time the notice was sent. Instead, the Debtor reasonably sent the notice to the address that Conseco gave on its proof of claim as the place where it wanted to receive all notices concerning the Debtor's bankruptcy case. What notice could be more important to a secured creditor than one indicating the bankrupt debtor was trying to rescind his or her transaction with the creditor? Furthermore, if the Debtor had sent the notice to the address contained in the loan documents and Conseco could not locate the notice, the Court is convinced that Conseco would have taken the opposite position and claimed the Debtor should have used the proof of claim address. The Court concludes that the Debtor validly rescinded the transaction, and that Conseco received the notice of rescission at the Arizona address.

With that preliminary question out of the way, the Court notes that the parties have made the same arguments concerning rescission under §1635 of the TILA that the Court considered and resolved in two decisions in a previous case. *See Quenzer v. Advanta Mortgage Corp. (In re Quenzer)*, 266 B.R. 760 (Bankr. D. Kan. 2001) ("*Quenzer I*"); *Quenzer v. Advanta Mortgage Corp. (In re Quenzer)*, 274 B.R. 899 (Bankr. D. Kan. 2001) ("*Quenzer II*"). In this case, only one of

the two obligors under the mortgage transaction has tried to rescind the transaction, but Conseco has not alleged that this fact has any impact on rescission under the TILA. Otherwise, this case is not distinguishable in any relevant way from the Quenzer case, and the Court concludes that its resolution of that case applies here as well. This means that Conseco's mortgage immediately became void when the Debtor sent it his notice of rescission. When Conseco received that notice, it became obliged to return certain money or property to the Debtor, after which the Debtor would become obliged to return money to Conseco. As in *Quenzer II*, because the Debtor intends to satisfy his obligation to Conseco by treating it as a general unsecured obligation under his chapter 13 plan, the Court will exercise its authority under §1635 to modify the statutory rescission procedure established under that provision, and will set the parties' obligations off against one another, instead of requiring Conseco to fulfill its obligation first.

The Court will also impose civil penalties under TILA §1640 for Conseco's violations of that act. The uncontroverted facts have established that, like the creditor in *Quenzer*, Conseco violated the TILA in two respects: (1) it gave improper notice of the right to rescind; and (2) it failed to honor a valid exercise of the right to rescind. So long as the Court's conclusion that Conseco's mortgage became void when the Debtor rescinded the transaction remains in effect, the Court will impose a \$250 civil penalty for each violation, for a total penalty of \$500. If Conseco succeeds in saving its mortgage lien, however, the Court will increase the penalties to \$2,000 for each violation, for a total of \$4,000. The Debtor has asserted another TILA violation in connection with a \$100 charge in the mortgage transaction, but Conseco has properly raised a genuine issue of material fact about whether the charge violated the TILA, so the Court cannot resolve that dispute in this summary judgment ruling.

The Debtor has offered a partial calculation of the proper net amount of the unsecured claim that Conseco should be allowed against his bankruptcy estate, but the amounts stated are not complete and are not properly supported by the record, so the Court cannot now determine the amount of Conseco's claim. The Court informs the parties that it will follow the method it used in *Quenzer II*, see 274 B.R. at 904-06, to calculate Conseco's net unsecured claim against the chapter 13 bankruptcy estate. The parties should confer to see if they can determine the proper amounts to use in making that calculation. If they cannot, they should file pleadings bringing their remaining dispute to the Court for resolution.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of July, 2002.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE