



The relief described hereinbelow is SO ORDERED.

Signed October 13, 2004.

A handwritten signature in cursive script that reads "Robert D. Berger".

ROBERT D. BERGER  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In Re:**

**GLEN H. FRASER and  
LESLIE WILKES FRASER,  
Debtors.**

**Case No. 02-21243  
Chapter 13**

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**GLEN H. FRASER and  
LESLIE WILKES FRASER,  
Plaintiffs,**

**v.**

**Adv. No. 02-6065**

**HOUSEHOLD FINANCE  
CORPORATION III,  
Defendant.**

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**ORDER DENYING PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

This proceeding is before the Court on the plaintiffs' Motion for Summary Judgment (Doc. # 26). The plaintiffs, Mr. Glen H. Fraser and Mrs. Leslie Wilkes Fraser, appear by counsel Kenneth M. Gay. Defendant Household Finance Corporation III appears by counsel Todd W.

Ruskamp and Kristen F. Trainor. The Court has reviewed the relevant pleadings and is now ready to rule. The Court hereby denies the plaintiffs' Motion for Summary Judgment because a genuine issue of material fact remains regarding whether the plaintiffs received the requisite number of disclosures prescribed by the Truth-in-Lending Act, 15 U.S.C.A. § 1601, *et seq.* ("TILA"), and the accompanying regulations in 12 C.F.R. part 226, otherwise known as Regulation Z.

### **Background**

On or about March 26, 1999, the parties entered into an agreement wherein the defendant loaned the plaintiffs money ("the Transaction"). To secure the obligation, the plaintiffs granted the defendant a mortgage on their home. The parties do not dispute the nature of the Transaction or that the Transaction is governed by the TILA. Under the TILA, a debtor ordinarily has three days to rescind such transactions and must be informed of this right by the creditor. However, when a creditor fails to provide the debtor proper notice of the right to rescind or provides notice that does not comply with the TILA requirements, the debtor's right to rescind is extended for up to three years from the date of consummation of the transaction.<sup>1</sup> Believing they had not been given the proper disclosures and that their right to rescind had been extended, the plaintiffs notified the defendant by letter of their intention to rescind the Transaction on or about March 19, 2002. The defendant, who acknowledges receiving the plaintiffs' request for rescission one day later, denies that it provided inadequate disclosure and, consequently, contends the plaintiffs failed to timely exercise their right to rescind. The plaintiffs, who filed for Chapter 13 protection on April 15, 2002, commenced this adversary proceeding to determine the validity of exercising

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<sup>1</sup> See 15 U.S.C. § 1635(f).

their option to rescind the Transaction.

The plaintiffs contend that they had an extended period to rescind the Transaction because the defendant failed to provide the requisite number of copies of the notice of a right to rescind the Transaction (the “Notice”) in violation of the provisions of Regulation Z § 226.23, which require a creditor to provide each individual entitled to rescind a transaction with two copies of the notice. To support their first contention, that the defendant failed to provide them each with two copies of the Notice, the plaintiffs have each provided an affidavit that, respectively, states all of the documents they received regarding the Transaction from the defendant were placed in an envelope by one of the defendant’s employees, that the envelope was given to the debtor, Mrs. Fraser, who stored the documents undisturbed in an office at home, and that they learned the defendant failed to provide the appropriate TILA disclosures only after consulting with their attorney, who also reviewed the Transaction documents and informed them of their rights.<sup>2</sup> However, neither plaintiff specifically mentioned in his or her respective affidavit the number of copies of the Notice he or she received. In addition, the plaintiffs concede that they each signed an acknowledgment stating they each received two copies of the Notice.

The defendant, in response, points to the plaintiffs’ concession that they signed the acknowledgment and argues that the acknowledgment, which creates a rebuttable presumption

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<sup>2</sup> The Court notes the plaintiffs’ contention that they did not receive the required disclosures is not set forth in the statement of uncontested material fact in their support brief as required by D. Kan. LBR 7056.1. However, both the contention and the affidavit relied upon are clearly set forth in the argument section of the plaintiffs’ support brief. The Court, believing the plaintiffs have substantially complied with the local rules and that no party will be prejudiced as a result, will accept the plaintiff’s contentions as though they were proffered in compliance with the local rules.

that a mortgagor did in fact receive the required number of disclosures,<sup>3</sup> creates a question of fact that precludes summary judgment. The defendant has also provided the affidavit of an employee familiar with the Transaction, which describes some of the employee training provided by the defendant. However, the employee's affidavit does not attest to facts particular to the Transaction, but rather makes general averments regarding employee training provided by the defendant and the employee's familiarity with the type of documents executed by the plaintiffs in connection with the Transaction.

### **Discussion**

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. In articulating the standard of review for summary judgment motions, Rule 56 provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law.<sup>4</sup> In determining whether any genuine issues of material fact exist, the court must construe the record liberally in favor of the party opposing the summary judgment.<sup>5</sup> An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim."<sup>6</sup> The

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<sup>3</sup> 15 U.S.C. § 1365(c).

<sup>4</sup> FED. R. CIV. P. 56(c); FED R. BANKR. P. 7056.

<sup>5</sup> *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

<sup>6</sup> *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

moving party has the burden of establishing that he or she is entitled to summary judgment.<sup>7</sup>

### **A. TILA Background**

Congress enacted the TILA to regulate the disclosure of the terms of consumer credit transactions in order “to aid unsophisticated consumers and to prevent creditors from misleading consumers as to the actual cost of financing.”<sup>8</sup> Disclosure allows consumers to compare different financing options and their costs.<sup>9</sup> To encourage compliance, TILA violations are measured by a strict liability standard, so even minor or technical violations impose liability on the creditor.<sup>10</sup> The consumer-borrower can prevail in a TILA suit without showing that he or she suffered any actual damage as a result of the creditor’s violation of the TILA.<sup>11</sup>

### **B. Right to Rescind**

In transactions covered by the TILA, as the parties have stipulated is the case here, the borrower has a right to rescind the transaction that is established by TILA § 1635. The right to rescind lasts for only three days so long as the lender gives the borrower the disclosures required by the TILA and notice of the right to rescind; the right lasts up to three years if the lender fails to give the disclosures and notice.<sup>12</sup> Section 1635 provides in relevant part that a “creditor shall [] provide, in accordance with regulations of the Board, appropriate forms for the obligor to

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<sup>7</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>8</sup> *Morris v. Lomas & Nettleton Co.*, 708 F.Supp. 1198, 1203 (D. Kan. 1998) (citing *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 363-69 (1973)).

<sup>9</sup> 15 U.S.C. § 1601(a).

<sup>10</sup> *See, e.g., Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (“To insure that the consumer is protected, as Congress envisioned, requires that the provisions of [the TILA and Reg. Z] be absolutely complied with and strictly enforced.”).

<sup>11</sup> *Herrera v. First Northern Savings and Loan Ass’n*, 805 F.2d 896, 900 (10th Cir. 1986).

<sup>12</sup> 15 U.S.C. § 1635.

exercise his right to rescind any transaction subject to this section.”<sup>13</sup>

The Board of Governors of the Federal Reserve System, the “Board” referred to above,<sup>14</sup> has promulgated extensive regulations implementing the TILA,<sup>15</sup> all of which it calls Regulation Z.<sup>16</sup> The defendant acknowledges and acquiesces that Regulation Z § 226.23(b), which specifically addresses a borrower’s right to the notice of right to rescind, requires a creditor to deliver two copies of the notice of the right to rescind to each consumer entitled to rescind a transaction.<sup>17</sup> Regulation Z’s requirements are significant because the permissible construction and interpretation of a statute promulgated by an agency charged with the statute’s enforcement must be granted deference by the courts.<sup>18</sup> This rule is especially strong in the context of the TILA and Regulation Z, where even official staff interpretations of the statute and regulation should control unless shown to be irrational.<sup>19</sup> As the Court finds nothing irrational about Regulation Z § 226.23(b)’s requirement that each consumer entitled to rescind a transaction receive two copies of the notice of right to rescind, its terms will control the subsequent legal analysis.

To succeed in their motion for summary judgment on the ground that the defendant failed to provide two copies of the Notice, the plaintiffs must demonstrate that no genuine issue of

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<sup>13</sup> 15 U.S.C. § 1635(b).

<sup>14</sup> 15 U.S.C. § 1602(b).

<sup>15</sup> 12 C.F.R. Part 226 (2003).

<sup>16</sup> *See* 12 C.F.R. § 226.1(a).

<sup>17</sup> 12 C.F.R. § 226.23(b).

<sup>18</sup> *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

<sup>19</sup> *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-70 (1980).

material fact exists regarding the defendant's failure to provide the requisite number of disclosure copies. Here, the plaintiffs concede that they each signed an acknowledgment of receipt in duplicate of the required disclosures. However, a written acknowledgment of receipt "does no more than create a rebuttable presumption of delivery" of the documents.<sup>20</sup> Addressing the presumption, the plaintiffs suggests that their testimony by affidavit is sufficient to rebut the presumption and justify summary judgment in their favor. This Court disagrees and joins the majority of courts ruling that a borrower's testimony that he or she did not receive two copies of the right to rescind disclosures required by TILA creates a question of fact to be decided at trial.<sup>21</sup>

Even if this Court were to consider an affidavit or declaration as sufficient grounds for overcoming the presumption, the affidavits provided by the plaintiffs in support of their motion for summary judgment fail to assert the actual number of disclosures they received. Instead, the plaintiffs state in vague terms that they provided their attorney with the documents they received from the defendant at the time of the Transaction and that their attorney discovered that the defendant failed to provide them with the appropriate disclosures required under the TILA. While this Court is confident that the plaintiffs believe the defendant failed to provide the appropriate disclosures, it cannot grant summary judgment based on mere conjecture and the legal conclusions drawn by plaintiffs' counsel. Representations of fact, absent stipulation or concession, must be specifically supported by affidavit or declarations under penalty of perjury.<sup>22</sup>

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<sup>20</sup> 15 U.S.C. § 1635(c).

<sup>21</sup> *See In re Jones*, 298 B.R. 451, 459 (Bankr. D. Kan. 2003) (compiling cases).

<sup>22</sup> *See* D. Kan. LBR 7056.1(c).

Such is not the case here, and summary judgment in favor of the plaintiffs on the ground that the defendant failed to provide them each with two copies of the notice of right to rescind would be inappropriate because genuine issues of material fact remain.

**Conclusion**

The Court concludes that genuine issues of material fact remain regarding whether the defendant provided each of the plaintiffs with two copies of the required TILA right to rescind disclosures. Therefore, the plaintiffs' Motion for Summary Judgment is denied.

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ROBERT D. BERGER  
U.S. BANKRUPTCY JUDGE  
DISTRICT OF KANSAS