



SO ORDERED.

SIGNED this 31 day of March, 2005.

Janice Miller Karlin

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

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

In re:)
SCOTT DAVID CUSHING and)
LISA DIANE CUSHING,)
)
Debtors.)

Case No. 03-42373
Chapter 7

SCOTT DAVID CUSHING and)
LISA DIANE CUSHING,)
)
Plaintiffs,)

v.)
)
HOUSEHOLD FINANCE)
CORPORATION III,)
)
Defendant.)

Adversary No. 03-7120

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' Complaint to Enforce Truth in Lending Rescission.¹

This matter constitutes a core proceeding,² and the Court has jurisdiction to decide it.³

Plaintiffs initiated this action against Household Finance Corporation III ("Household"), seeking to enforce the rescission of a consumer credit transaction concerning the refinancing of their house. Plaintiffs contend that Household violated the Truth in Lending Act ("TILA") by providing improper and incomplete disclosures to them at the time of the refinancing. As a result, Plaintiffs claim they have three years under TILA to rescind the transaction with Household, rather than the normal three day period that is allowed when the proper disclosures are given.

Plaintiffs moved for summary judgment on the issue of the extended right to rescind, which was denied by the Court on the basis that there were two questions of fact that precluded summary judgment.⁴ The Court then held an evidentiary hearing to determine (1) whether Plaintiffs received the number of copies of their right to rescind required by TILA, and (2) whether the residence that was refinanced was the principal dwelling of Scott Cushing at the time of the refinancing.⁵

¹Doc. 1.

²28 U.S.C. § 157(b)(2)(B).

³28 U.S.C. § 1334.

⁴*See* Doc. 44.

⁵In the Court's Memorandum and Order dated January 21, 2005, the Court determined that the form and substance of the TILA disclosures and notices supplied by Household to the Plaintiffs complied with TILA regulations, thus the Court will not further discuss that issue herein.

I. FINDINGS OF FACT

On April 14, 2003, Plaintiffs entered into a consumer credit transaction with Household to refinance their home located at 5300 SW 12th Street in Topeka, Kansas. Betty Neal, who was the closing agent for Household, came to the Cushing residence to complete the refinancing transaction with the Cushings. According to the testimony of both Plaintiffs, Ms. Neal brought two separate stacks of documents to the closing. Ms. Neal and Plaintiffs went through one stack of documents (the stack containing the originals), and Ms. Neal indicated where Plaintiffs needed to sign and initial the original documents. Included in that set of original documents was the “NOTICE OF RIGHT TO CANCEL” (hereinafter “Notice”).⁶ The Notice, admittedly signed by both Scott and Lisa Cushing, contains the following provision: “The undersigned each acknowledge receipt of two copies of NOTICE of RIGHT TO CANCEL.”

The second stack of documents brought by Ms. Neal to the Cushing’s house, which stack measured approximately two inches thick, remained clipped together during the closing. Plaintiffs were informed that this was their set of documents to keep. Plaintiffs did not review the documents contained in their set, but instead placed them in a locked drawer in their desk.⁷ Plaintiffs kept the documents in that drawer, and in the same condition originally received, until they delivered them to their lawyer’s office in connection with their bankruptcy filing. Although Scott testified that his lawyer informed him that there was not the right number of copies of the Notice contained in their set of documents, neither Plaintiff was able

⁶Trial Exhibit 14.

⁷The evidence at trial was that the drawer was on occasion only unlocked for a brief period of time while the Cushings worked at the desk, but there is no reliable evidence to suggest that anyone disturbed this set of documents.

to testify at trial that they had any personal knowledge as to the actual number of copies of the Notice that was contained within their retained set of documents. Lisa was directly asked that question by both her attorney and Household's attorney, and Scott was directly asked that question by both his attorney and this Judge, but neither of the Plaintiffs could testify what number of copies of the Notice they had each actually received.

The second issued tried dealt with whether the refinanced home was actually Scott's principal dwelling on the date the transaction closed. The evidence showed that in late February 2003, Plaintiffs were experiencing marital problems, which resulted in Lisa asking Scott to find somewhere else to stay while they tried to work out their problems. A few days later, Scott moved in with a friend in Burlingame, Kansas, where he stayed approximately three to five nights per week. Scott would typically stay at the 12th Street property a few nights a week so he could maintain his relationship with his minor children, but Lisa would go stay with a friend when he stayed overnight. Scott left the majority of his personal property at the 12th Street property, taking only a suitcase with clothes for work and some basic toiletry items. He left his baseball collection, his off-season clothes, and all other personal property that belonged to him at the 12th Street property. Scott never forwarded his mail from the marital home, or submitted a change of address to the Postal Service or his employer, prior to April 14, 2003.

Both Plaintiffs testified that at the time they refinanced the house with Household on April 14, 2003, they were attempting to reconcile their marriage. Lisa filed for divorce on April 25, 2003, and met with her divorce attorney at least one day before the filing, as evidenced by Lisa's Domestic Relations Affidavit,

which was prepared on April 24, 2003.⁸ Scott testified that he was still planning on eventually moving back into the 12th Street property, and only gave up such hope after April 25, 2003, when Lisa filed the divorce petition. Scott eventually moved into his current residence at 1107 SW Osborne, Topeka, Kansas at the end of May 2003. Scott never moved back into the 12th Street property after Lisa asked him leave in February 2003.

II. CONCLUSIONS OF LAW

The central issue in this case is whether Plaintiffs are entitled to rescind their mortgage transaction with Household, well after the “normal” three day rescission period granted by TILA when the regulations have been followed by the lender. This proceeding involves a non-purchase-money loan secured by a consumer-borrower’s home.⁹ In such non-purchase-money transactions, the consumer-borrower has a right to rescind established by TILA § 1635. It provides:

(a) Disclosure of obligor’s right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling 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 information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. 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. The creditor shall also provide, in accordance with regulations of the

⁸See Trial Exhibit J.

⁹See 15 U.S.C. §§1635(e)(1) and 1602(2) (excluding from rescission rights given by § 1635 liens against consumer-borrowers’ homes that secure financing of acquisition or initial construction).

Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.¹⁰

So long as the creditor has not given the obligor the items specified in this provision, the obligor's right to rescind will expire three years after the consummation of the transaction, with certain exceptions that do not apply here.¹¹

Plaintiffs seek to exercise their right to rescind the transaction with Household several months after the normal three-day rescission period expired. They contend that they are entitled to an extended rescission period because the errors committed by Household in providing the required TILA disclosures entitle them to the longer rescission period provided by TILA § 1635(f).

Based upon the Court's Memorandum and Order dated January 21, 2005, the only basis upon which Plaintiffs would be entitled to an extended rescission period is if Household failed to give them each at least two copies of the Notice. The Court found that two fact issues remained regarding the issue of whether Household provided the correct number of copies of the Notice, to wit: (1) how many copies of the Notice each Plaintiff received at the closing of the transaction with Household; and (2) if Plaintiffs only received a total of two copies, whether the 12th Street property was the principal dwelling of Scott at the time of the transaction, thus entitling Plaintiffs to receive a total of four copies of the Notice (two each).

¹⁰15 U.S.C. § 1635(a). (Emphasis added).

¹¹See TILA § 1635(f) and 15 U.S.C. § 1635(f).

A. Number of Copies of the Notice Supplied by Household

Plaintiffs contend in the Final Pretrial Order,¹² which supercedes any prior pleadings, that they only received a total of two copies of the Notice from Ms. Neal at the closing held April 14, 2003. At the closing of the transaction, however, Plaintiffs each signed a copy of the Notice, which unequivocally states “The undersigned each acknowledge receipt of two copies of the NOTICE OF RIGHT TO CANCEL.” Plaintiffs’ signatures on this Notice create a legal presumption that each received two copies of the Notice.¹³ That presumption, however, is rebuttable, and the Court allowed Plaintiffs the opportunity to present evidence at trial that they did not each receive at least two copies of that Notice.

Neither Plaintiff was able to testify how many copies of the Notice they received. Scott did testify, without any hearsay objection, that when he met with his attorney to review the documents, his attorney told him that there was not the correct number of copies. However, Scott went on to testify, referring to the number of Notices contained in the packet at the time they reviewed them with their lawyer, that he could not “honestly say exactly how many were in there at that time.”

At the conclusion of the evidence, the only evidence that had been offered to rebut the presumption that each Plaintiff received two copies was Scott’s statement that his attorney informed him there were not the correct number¹⁴ of copies provided. However, no witness testified that he or she had personal

¹²Doc. 33 at ¶ 7.1(A)(4)(b).

¹³See 15 U.S.C. § 1635(c).

¹⁴The “correct number” of copies under the TILA regulations is two for each person whose principal dwelling is being refinanced. Thus, hypothetically, if Household gave each Plaintiff three copies, that would also not be the “correct number.” Since the purpose of the two copy requirement is to assist borrowers in allowing one copy of the rescission to be mailed to the Lender, with Borrowers retaining a copy for their files, a decision by a lender to give more than two copies would not be a

knowledge of the number of copies of the Notice each Plaintiff actually received.¹⁵ Apparently the only person with personal knowledge of the number of copies, and thus the only person qualified to testify on the matter, was Plaintiffs' lawyer, who was not called as a witness in this case.

Because no evidence was presented that each Plaintiff did not receive at least two copies of the Notice, this Court finds Plaintiffs have failed to rebut the legal presumption created by their signatures on the Notice. Therefore, the Court finds, based upon the presumption created by their signatures, that Plaintiffs each received two copies of the Notice, and that Household did not violate the TILA by providing fewer than the required number of copies.

B. Issues Surrounding Scott Cushing's Principal Dwelling

The issue concerning whether the 12th Street property was Scott's principal dwelling¹⁶ at the time of the transaction is only relevant to the outcome of this case if each Plaintiff did not receive at least two copies of the Notice. Based upon the Court's ruling that Plaintiffs each received two copies of the Notice, the issue of whether the real property was Scott's principal dwelling is moot and need not be decided by the Court. Any ruling on this issue would not affect the overall outcome of this case in any manner, and the Court thus declines to offer what would essentially be an advisory opinion on this issue.

violation, since the purpose of the multi-copy requirement would not be compromised.

¹⁵The Court would note that Fed. R. Evid. 602 prohibits any witness from testifying to a matter unless evidence is presented to establish the witness has personal knowledge of the matter. Household did not interpose an objection, or move to strike, the testimony, however.

¹⁶The right to rescind only applies to those individuals whose "principal dwelling" is the subject of the transaction. *See* 15 U.S.C. § 1635(a).

III. CONCLUSION

The Court finds that Household must prevail in this action. The Court ruled on January 21, 2004 that the form and content of the TILA disclosures provided by Household to Plaintiffs satisfied TILA requirements. The only remaining issue was whether Household provided Plaintiffs at least the required number of copies of the Notice of Right to Cancel. The Court has found, based upon a legal presumption created by Plaintiffs' signatures on the Notice of Right to Cancel, coupled with a lack of sufficient evidence to overcome that presumption, that Household provided each Plaintiff two copies of the Notice of Right to Cancel, as required by TILA. Therefore, the Court finds that Household did not violate the Truth in Lending Act in its transaction with Plaintiffs, and that Plaintiffs are not entitled to an extended period of rescission on their April 14, 2003 transaction with Household.

IT IS, THEREFORE, BY THIS COURT ORDERED that Plaintiffs are not entitled to an extended period of rescission under the Truth in Lending Act for the transaction between Household and Plaintiffs on April 14, 2003, and that judgment is entered in favor of Household Finance Corporation III.

IT IS FURTHER ORDERED that the foregoing discussion shall constitute findings of fact and conclusions of law under Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52(a). A judgment in favor of Household Finance Corporation III, reflecting this ruling, will be entered on a separate document in compliance with Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

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