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

FRED BERRY JR. and HENRY IDA BERRY, Plaintiffs, v. BENEFICIAL MORTGAGE CO. OF GEORGIA, and BENEFICIAL FINANCIAL, INC., Defendants.	CIVIL ACTION FILE NO. 1:10-CV-3259-GET-WEJ

NON-FINAL REPORT AND RECOMMENDATION

Plaintiffs filed their Amended Complaint [11] on February 10, 2011, alleging violations of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., including 12 C.F.R. § 226.1 et seq. ("Regulation Z"), and the Georgia Fair Lending Act ("GFLA"), O.C.G.A. § 7-6A-1 et seq. Now pending before the Court is defendants' Motion to Dismiss [15]. For the reasons discussed below, the undersigned **RECOMMENDS** that defendants' Motion be **DENIED**.

I. THE COMPLAINT[1]

On October 10, 2007, plaintiffs obtained a mortgage loan in the amount of $157,496.12 from defendant Beneficial Mortgage Company of Georgia. (Am. Compl. ¶¶ 8, 10.) In exchange for the loan, Beneficial Mortgage acquired a security interest in the house in Atlanta in which Mr. and Mrs. Berry had lived in since 1975. (Id. ¶¶ 7, 11.) Mr. Berry was the sole borrower on the promissory note; both he and Mrs. Berry (as a vested owner in the property) signed the security deed. (Id. ¶ 9.) The loan had a fixed interest rate of 9.64% and had "inordinately high closing costs" in excess of 5% of the total loan amount. (Id. ¶¶ 10, 12.) The loan documents did not include notice that the mortgage was subject to GFLA, and plaintiffs did not certify to Beneficial Mortgage that they had been counseled on the advisability of a high-cost home loan. (Id. ¶¶ 13-14.)

[1] Because the matter is before the Court on a motion to dismiss, all of the factual allegations in the complaint must be accepted and construed in the light most favorable to the plaintiff. Young Apts., Inc. v. Town of Jupiter, Fla., 529 F.3d 1027, 1037 (11th Cir. 2008); Beck v. Deloitte & Touche, 144 F.3d 732, 735 (11th Cir. 1998). The Court may also consider documents that are referenced in the Amended Complaint and are central to plaintiffs' claims without converting the motion into a motion for summary judgment. Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1368-69 (11th Cir. 1997) (per curiam).

Defendant Beneficial Financial acquired Beneficial Mortgage in October 2009, thereby acquiring the latter's interest in the mortgage loan transaction. (Am. Compl. ¶¶ 15-16.) On October 8, 2010, Mr. and Mrs. Berry sent both Beneficial Mortgage and Beneficial Financial a demand for rescission of the loan under TILA and GFLA. (Id. ¶¶ 33-34, 42-43.) Neither company responded to the rescission demand. (Id. ¶ 35.)

In Count One, plaintiffs seek rescission and damages under TILA. As the basis for their rescission claim, plaintiffs allege that "the Notice of Right to Cancel failed to clearly and conspicuously disclose to Mr. Berry and Mrs. Berry the right of each to cancel the Transaction individually and unilaterally. Instead, an ordinary consumer could erroneously understand the Notice of Right to Cancel to require the signatures of both Mr. and Mrs. Berry in order to cancel the Transaction." (Am. Compl. ¶ 26.) The Notice of Right to Cancel is attached to the Motion to Dismiss as Defendant's Exhibit A [15-2].

In Count Two, plaintiffs seek rescission and damages under GFLA, contending that their loan was a "high cost home loan" as defined by Georgia law, and that defendants' GFLA violations entitle plaintiffs to rescind the loan within five years and to obtain statutory damages. (Am. Compl. ¶¶ 39-41, 46.)

Plaintiffs do not assert a separate cause of action in Count Three. Rather, they seek equitable relief, including immediate rescission of the mortgage loan and a judgment that any security interest created in that transaction is void. (See Am. Compl. Prayer for Relief.) Plaintiffs further request that defendants be enjoined, "temporarily during the pendency of this action and permanently thereafter, from instituting, prosecuting, or maintaining foreclosure proceedings on Plaintiffs' property . . . ." (Id.)

II. STANDARD OF REVIEW

A motion to dismiss does not test the merits of a case, but only requires that "the plaintiff's factual allegations, when assumed to be true, 'must be enough to raise a right to relief above the speculative level.'" Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Although Federal Rule of Civil Procedure 8(a)(2) only requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. The claim must include well-pled factual allegations, which if true, "plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 1950 (2009). "[T]he rule 'does not impose a probability

requirement at the pleading stage,' but instead 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295-96 (11th Cir. 2007) (quoting Twombly, 550 U.S. at 556). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 556 U.S. ___, 129 S. Ct. at 1949; see also Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206, 1214 (11th Cir. 2010) (applying Twombly and Iqbal).

III. DISCUSSION

A. TILA Claims

Plaintiffs seek both rescission and monetary damages for alleged TILA violations in conjunction with their October 10, 2007 mortgage refinancing.[2] (See Am. Compl. ¶¶ 27, 31, 35.) Under TILA, rescission is subject to statutory time limits. See 15 U.S.C. § 1635. If a creditor neglects to comply with its obligations under TILA, the

[2] TILA specifically excludes residential mortgage transactions. 15 U.S.C. § 1635(e)(1). However, the term "residential mortgage transaction" is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w). Thus, because the loan at issue here was not "to finance the acquisition or initial construction" of a dwelling, it is not exempt from TILA.

debtor's right to rescind is extended from three days to three years. Id. § 1635(f); Smith v. Highland Bank, 108 F.3d 1325, 1326 (11th Cir. 1997) (per curiam). The right to rescind is not subject to equitable tolling. Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998) ("We . . . hold that § 1635(f) completely extinguishes the right of rescission at the end of the 3-year period."). Thus, plaintiffs' right to rescind either expired three business days after the October 10, 2007 mortgage loan, if defendants complied with TILA, or three years after that date if they did not.

As noted above, plaintiffs contend that their rescission rights extended to three years because "the Notice of Right to Cancel failed to clearly and conspicuously disclose to Mr. Berry and Mrs. Berry the right of each to cancel the Transaction individually and unilaterally. Instead, an ordinary consumer could erroneously understand the Notice of Right to Cancel to require the signatures of both Mr. and Mrs. Berry in order to cancel the Transaction." (Am. Compl. ¶ 26.) Defendants respond that the disclosure satisfied TILA requirements and that a "nearly identical notice was recently approved by the U.S. Bankruptcy Court" in this District. (See Defs.' Mem. [15-1] 9-10.)

Regulation Z requires a creditor to provide notice of the right to rescind "on a separate document that identifies the transaction and shall clearly and conspicuously

disclose . . . the consumer's right to rescind the transaction." 12 C.F.R. § 226.23(b)(1).[3] "Whether a particular disclosure is clear for purposes of TILA is a question of law that depends on the contents of the form, not on how it affects any particular reader." Handy v. Anchor Mortg. Corp., 464 F.3d 760, 764 (7th Cir. 2006) (citation and internal quotation omitted). The "clear and conspicuous standard is less demanding than a requirement of perfect notice." Santos-Rodriguez v. Doral Mortg. Corp., 485 F.3d 12, 16-17 (1st Cir. 2007) (citing Veale v. Citibank, 85 F.3d 577, 581 (11th Cir. 1996)). "In assessing the adequacy of TILA disclosures, the . . . courts must adopt the vantage point of a hypothetical average consumer–a consumer who is neither particularly sophisticated nor particularly dense." McMillian v. AMC Mortg. Servs., Inc., 560 F. Supp. 2d 1210, 1218 n.13 (S.D. Ala. 2008) (citations and internal quotation omitted).

[3] Although 15 U.S.C. § 1635(a) creates a rescission right for an "obligor," a term that is undefined in the statute, Regulation Z applies that right to a "consumer," and defines that term to include "a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest." 12 C.F.R. § 226.2(a)(11). Moreover, "[w]hen more than one consumer in a transaction has the right to rescind, the exercise of the right by one consumer shall be effective as to all consumers." Id. § 226.23(a)(4). Thus, as a vested owner of the house used to secure the loan, Mrs. Berry obtained a rescission right despite not being an obligor.

Here, the Notice of Right to Cancel form used by Beneficial Mortgage is nearly identical to the model form provided in the appendix to Regulation Z. Compare Defs.' Ex. A with Model Form H-9, 12 C.F.R. Pt. 226, App. H. However, the model form contemplates a single consumer in its heading and signature block. The form used in this case identifies both Mr. Berry, the borrower, and Mrs. Berry, the vested owner, in the heading and in the signature blocks. (See Def.'s Ex. A.) Thus, the form appears to speak to the plural "you," although it includes no text that explains the Berrys' individual rights, clearly or otherwise. Given that each Berry had a unilateral right to rescind, the inconsistency with the model form is significant.

Contrary to defendants' assertion, the Notice used in this case was not "nearly identical" to the notice approved in Zohbe v. Ameriquest Mortg. Co., No. 07–62709-MHM, 2008 WL 7842103 (Bkrtcy. N.D. Ga. Mar. 26, 2008). In Zohbe, the notice identified only the borrower, but not the borrower's spouse, in its heading. Id. at *2. However, that form "did not contain any type-written name in the box for activating the right to rescind." Id. The court in Zohbe concluded, "Quite clearly, the information contained in the heading is for purposes of identification of the parties to the transaction. Nothing else in the Notice would mislead either Debtor into believing

that only Ms. Zohbe or only Mr. Zohbe, or both of them jointly were entitled to rescind." Id.

In this case, the Court cannot reach the same conclusion because placing signature blocks for Mr. and Mrs. Berry together on the Notice, without any explanatory language, would tend to be read by an average consumer as requiring both signatures to execute the form. At a minimum, the form is ambiguous, which supports a finding that it is not "clear" as required by TILA. See Handy, 464 F.3d at 764 ("Where more than one reading of a rescission form is plausible, the form does not provide the borrower with a clear notice of what her right to rescind entails.") (citation and internal quotations omitted); see also Vermurlen v. Ameriquest Mortg. Co., No. 1:06-cv-828, 2007 WL 2963637, at * 3 (W.D. Mich. Oct. 9, 2007) (vacated on other grounds) (finding required notice of consumer's right to rescind satisfied by form stating "each borrower in this transaction has the right to cancel. The exercise of this right by one borrower shall be effective to all borrowers."). Thus, because the Berrys' rights were not clearly and conspicuously disclosed, they have stated a claim that their rescission rights extended to three years.

Defendants further argue that, even if plaintiffs properly pleaded an entitlement to the remedy of rescission, they "have failed to plead facts sufficient to demonstrate

their ability to tender the loan proceeds they received at closing back to Defendants, which is required by TILA." (Defs.' Mem. 21-22.) Defendants assert that the Amended Complaint should be dismissed for this reason. (Id. at 25.) The Court disagrees.

In the Amended Complaint, plaintiffs allege that they "believe they will be able, after the Transaction is rescinded, to tender the remaining balance as determined by the Court, either by refinancing or by making reasonably [sic] monthly installment payments as allowed by relevant case authorities." (Am. Compl. ¶ 30.) As indicated by the parties' briefs, some courts "have required borrowers claiming rescission under TILA demonstrate their ability to return the borrowed funds to the lender," while others "have generally waited until the summary judgment stage to determine whether a borrower has the ability to fulfill the tender requirement." McGinnis v. GMAC Mortg. Corp., No. 2:10-cv-00301-TC, 2010 WL 3418204, at *5 (citing cases). The parties have identified cases within this Circuit demonstrating that split of authority. See Webb v. Suntrust Mortg., Inc., No. 1:10-CV-0307-TWT-CCH, 2010 WL 2950353, at *4 (N.D. Ga. July 1, 2010) (granting motion to dismiss, noting, inter alia, that "Plaintiffs have not alleged an intent or an ability to tender the money loaned to them"); Prince v. U.S. Bank Nat'l Ass'n, No. 08-00574-KD-N, 2009 WL 2998141, at

*5 (S.D. Ala. Sept. 14, 2009) (denying motion to dismiss as "premature" where "Defendants have proffered nothing more than mere speculation that the Plaintiffs are incapable of performing if rescission is ordered").

The Eleventh Circuit has explained that the "sequence of rescission and tender set forth in § 1635(b) is a reordering of common law rules governing rescission." Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1140 (11th Cir. 1992). However, "[t]hough one goal of the statutory rescission process is to place the consumer in a much stronger bargaining position, another goal of § 1635(b) is to return the parties most nearly to the position they held prior to entering into the transaction." Id. Consequently, courts have the power at any time during the rescission process to "impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by [TILA]." Id. at 1142. This "at any time" standard permits, but does not mandate, the Court to require plaintiffs to plead their ability to tender loan proceeds in a rescission under TILA.

Contrary to defendants' contention, plaintiffs have not "admitted the impossibility" of tendering back the loan proceeds in rescission. (Defs.' Reply [17] 10.) Rather, plaintiffs have alleged their intention to tender the loan proceeds as determined by the Court. See Moore v. Wells Fargo Bank, N.A., 597 F. Supp. 2d 612,

616 (E.D. Va. 2009) (denying motion to dismiss where plaintiff alleged intention to tender loan proceeds by refinancing or selling the home, and declining "invitation to 'take judicial notice' of the declining housing market in order to make a factual finding that Plaintiff is unable to tender, as 'Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.'") (citing Twombly, 555 U.S. at 556); see also Prince, 2009 WL 2998141, at *5 ("It is also important to note that a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits.") (citation omitted). If the Court concludes on summary judgment or at trial that the Berrys are entitled to rescind the loan, it will then "address the proper procedures for implementing the rescission." Prince, 2009 WL 2998141, at *5. Until then, imposing additional pleading requirements on plaintiffs would undermine TILA's reordering of common law rules to "plac[e] all burdens on the creditor" and "to place the consumer in a much stronger bargaining position than he enjoys under the traditional rules of rescission." Homestake, 968 F.2d at 1140; see also Moore, 597 F. Supp. 2d at 617 ("Although Plaintiff's proven inability to tender would unquestionably give this Court authority to exercise its discretion to deny rescission even if rescission was otherwise appropriate, such facts are not yet in evidence.").

In sum, accepting the allegations in the Amended Complaint as true and construing them in the light most favorable to the plaintiffs, Mr. and Mrs. Berry have stated a valid claim for rescission under TILA. The Berrys' right to rescind the loan was extended to three years, or through October 10, 2010. They exercised that right on October 8, 2010, when they sent Beneficial Mortgage and Beneficial Financial a demand for rescission and filed this action. The undersigned therefore **RECOMMENDS** that the Motion to Dismiss be **DENIED** as to plaintiffs' TILA rescission claim.[4]

In addition to seeking rescission, plaintiffs allege their entitlement to statutory damages under TILA. (See Am. Compl. ¶¶ 31, 36.) Neglect to comply with TILA also may result in civil liability for the creditor, and the imposition upon it of the debtor's costs and attorney's fees. See 15 U.S.C. § 1640(a). In their Motion to Dismiss, defendants focus entirely on the rescission claim and raise no defenses against plaintiffs' claim for statutory damages. (See Defs.' Mot. 1, 5-12.) Nevertheless,

[4] However, plaintiffs' failure to show that they are ready, willing, and able to tender the loan proceeds counsels the Court to refrain from granting the immediate equitable and injunctive relief sought by plaintiffs in Count Three and their Prayer for Relief. See Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005) (per curiam) (stating factors to consider in determining whether to grant injunctive relief).

defendants conclude that the Amended Complaint should be dismissed "in its entirety." (Id. at 25.) The Court construes that argument as an assertion that plaintiffs' claim for statutory damages under TILA should be dismissed. However, because defendants have failed to make any showing in support of that assertion, the undersigned **RECOMMENDS** that the Motion to Dismiss be **DENIED** as to plaintiffs' claims for statutory damages under TILA.[5]

B. GFLA Claims

Plaintiffs allege that the "points and fees charged in connection with the loan exceed 5% of the total loan amount, as defined under the GFLA," thereby making their mortgage a "high-cost mortgage loan." (Am. Compl. ¶¶ 12, 40.)[6] Under the GFLA,

[5] The Court observes, however, that the damages claims appear to be time-barred. An action for damages is timely "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). "The violation 'occurs' when the transaction is consummated." In re Smith, 737 F.2d 1549, 1552 (11th Cir. 1984). The Court will revisit this issue if and when it is properly before the Court.

[6] A loan is classified as "high cost" and therefore subject to the GFLA if the interest rate exceeds a certain threshold or if the total points and fees exceed 5% of the total loan amount if the total loan amount is $20,000 or more. See O.C.G.A. § 7-6A-7(7), (17). Plaintiffs allege that the mortgage loan was in the amount of $157,496.12 (Am. Compl. ¶ 10), which exceeds the $20,000 threshold. Plaintiffs do not allege the amounts of the points and fees, only that they exceeded 5% of the total loan amount. Although they allege a "high interest rate," plaintiffs do not appear to allege that the interest rate exceeds the threshold set by the GFLA.

high-cost mortgage loans impose additional requirements on the lender. Plaintiffs allege that Beneficial Mortgage failed to obtain the required certification that plaintiffs received counseling on the advisability of the loan transaction, in violation of O.C.G.A. § 7-6A-5(1). (See Am. Compl. ¶ 13.) Plaintiffs further allege that the loan documents did not include the required notice that the mortgage is subject to special rules under the GFLA, in violation of O.C.G.A. § 7-6A-5(15). (See Am. Compl. ¶ 14.) Accepting these allegations as true, they state a plausible claim for relief.[7]

The rescission right provided by the GFLA is identical to that of TILA, except that it is available for a period of five years. See O.C.G.A. § 7-6A-7(e). Neglect to comply with the GFLA also may result in civil liability for the creditor. See id. § 7-6A-7(a). Accepting the allegations in the Amended Complaint as true and construing

[7] Defendants argue that "this type of pleading has been specifically rejected by this Court." (Defs.' Mem. 13-4; see also Defs.' Reply 6 (citing Browder v. US Bank Nat'l Ass'n, No. 1:10-CV-540-CAP-LTW (N.D. Ga. filed Feb. 25, 2010)).) The Court in that case dismissed, without prejudice, a GFLA claim where the plaintiffs did not "allege any facts about the type or amount of points and fees associated with their mortgage loan." (Browder, No. 1:10-CV-540-CAP-LTW, Report and Recommendation [36] at 15-16.) However, as noted in that Report and Recommendation, the plaintiffs in Browder made "no allegations about the annual percentage rate of their mortgage loan," they did not allege that their loan exceeded $20,000 such that the 5% threshold for points and fees applied, and they did not "make any allegations whatsoever about their mortgage loan total." (Id. at 15.) The Amended Complaint in this case may not be an ideal pleading, but it alleges more than did the plaintiffs in Browder.

them in the light most favorable to the plaintiffs, a loan for $157,496.12 in which the points and fees exceed 5% is a "high-cost mortgage loan" and subjects defendants to the GFLA provisions that plaintiffs claim were violated.[8] Consequently, the undersigned **RECOMMENDS** that the Motion to Dismiss be **DENIED** as to plaintiffs' GFLA claims.[9]

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[8] In support of their argument that the loan was not a "high-cost mortgage loan," defendants submitted the HUD-1 Settlement Statement. (Def.'s Ex. C [15-4].) Although plaintiffs allude to "loan documents" in their pleading (Am. Compl. ¶ 14), the HUD-1 Settlement Statement is not referenced in the Amended Complaint. Therefore, it may not be considered here on the Motion to Dismiss. See Brooks, 116 F.3d at 1369 (permitting court to consider documents part of the pleadings for purposes of Rule 12 motion "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim") (emphasis added). The Court could consider that document and convert the motion to one for summary judgment. However, that document would not establish the absence of genuine disputes of material fact. (See Pls.' Resp. 8-11.)

[9] As noted above, defendants raise no defenses against plaintiffs' claims for statutory damages. (See Defs.' Mot. 1, 12-21.) The Court observes that plaintiffs' claim against Beneficial Mortgage for statutory damages under the GFLA is timely because it is "brought within five years after the date of the first scheduled payment by the borrower under the home loan." O.C.G.A. § 7-6A-7(h). However, a claim for statutory damages against an assignee must be brought within one year of the violation. See id. § 7-6A-6(c)(3). Thus, the damages claim against Beneficial Financial does not appear timely.

IV. CONCLUSION

For the above reasons, the undersigned **RECOMMENDS** that defendants' Motion to Dismiss [15] be **DENIED**.

SO RECOMMENDED, this 4th day of May, 2011.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
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FRED BERRY JR. and HENRY IDA BERRY, Plaintiffs, v. BENEFICIAL MORTGAGE CO. OF GEORGIA, and BENEFICIAL FINANCIAL, INC., Defendants.	CIVIL ACTION FILE NO. 1:10-CV-3259-GET-WEJ

ORDER FOR SERVICE OF
NON-FINAL REPORT AND RECOMMENDATION

Let this Non-Final Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72(b), and the Court's Local Rule 72.1B, be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Non-Final Report and Recommendation within fourteen (14) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to any transcripts if applicable) and shall be served upon the opposing party. The party filing objections

will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Non-Final Report and Recommendation may be adopted as the opinion and order of the District Court, and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983) (per curiam).

The Clerk is directed to submit the Non-Final Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

SO ORDERED, this 4th day of May, 2011.

Walter E. Johnson

WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE