UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MAREEYO MINNIE CALHOUN	*	**CIVIL ACTION**
	*	
VERSUS	*	**NO. 09-4568**
	*	
HOMEOWNERS FRIEND MORTGAGE COMPANY, INC., ET AL	*	**SECTION "L" (1)**
	*	

ORDER AND REASONS

Before the court is Defendant Homeowners Friend Mortgage Co, Inc.'s Motion to Dismiss the Complaint (Rec. Doc. No. 7). For the reasons stated herein, the motion IS DENIED.

I. BACKGROUND

In November 2006, the Plaintiff executed an adjustable rate balloon note (the "Note") and mortgage to refinance an existing loan and mortgage on her home with Defendant lender Homeowners Friend Mortgage Co, Inc. ("Homeowners"). On the night of November 6, 2006, a closing agent for Homeowners visited Plaintiff at her home to effectuate the closing of the Note. While the closing did occur, the Plaintiff claims that she did not receive a copy of any of the closing papers. Furthermore, Plaintiff did not receive the documents informing her of the terms of her Note, documents explaining how an adjustable rate mortgage works, or properly completed written notice of the right to cancel the loan within three days. At some point, Defendant Homeowners then executed a "purported assignment" of the Note to Defendant Saxon Mortgage, Inc. ("Saxon"), dated November 3, 2006[1]. After execution of the Note the rights therein were purportedly assigned to Mortgage Electronic Registration Systems, Inc. ("MERS"). Following this first assignment, a second assignment was purportedly made to Deutsche Bank National Trust Company ("Deutsche Bank"). Deutsche Bank claims the Note is among the assets held by Saxon Asset Security Trust,

[1] The Court notes that this date is pre-closing, which remains unexplained by either Plaintiff or Defendant. However, for the purposes of the instant motion, the date is not material.

of which Deutsche Bank claims to be Trustee[2].

On March 26, 2009, more than two years after closing the loan, Plaintiff mailed a letter to Homeowners declaring her intent to exercise her right of rescission, effectively cancelling the loan. Plaintiff claimed this right via 15 U.S.C. § 1635(f), which allows an extended three year right of rescission. Upon receipt of this letter, Homeowners mailed a photocopy of the rescission letter to Saxon, which was also received on March 26, 2009. Despite the notice of rescission, Plaintiff alleges that Homeowners did not take the steps required of it under 15 U.S.C. § 1635(b) to rescind the loan.

Accordingly, Plaintiff has brought suit for damages and declaratory relief against Defendants for their violation of the Truth in Lending Act, 15 U.S.C. §§ 1601-1666 ("TILA") and Regulation Z. It is important to note that Plaintiff has not sought a forfeiture of the loan money given to her by the Defendant.

II. PENDING MOTION

In its' motion to dismiss the plaintiff's complaint, Homeowners argues that the TILA provides for a one year statute of limitations which would effectively bar the Plaintiff's claim because, they argue, the violation complained of occurred during the closing of the Note in 2006. Furthermore, Homeowners maintains that the three year extended period created by TILA does not apply to them because the Note had been assigned prior to Plaintiff's attempt at rescission.

Conversely, Plaintiff contends that her claim is timely and not barred by the one year statute of limitations proffered in the Defendant's motion. The Plaintiff admits that the TILA, in 15 U.S.C. § 1640(e), does establish a one year statute of limitations to bring a suit for damages. However,

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[2] The Plaintiff claims Defendant has used ambiguous language in claiming the loan was assigned. Hence, they are unsure the loan has been assigned at all. Defendant's language, if taken as unambiguous, leads to the conclusion that the loan was assigned twice and is currently held by Deutsche Bank.

Plaintiff claims she has met the statute of limitations because the violation complained of is Homeowners' failure to rescind, which occurred less than a year ago. Furthermore, the Plaintiff argues she is entitled to the benefit of the three year extended rescission period of 15 U.S.C. § 1635(f) because she never received the material disclosures or rescission forms regarding her Note, and that the extended three year extension period therefore applies.

The Defendant contends that the Plaintiff may not maintain an action for a rescission violation because the Plaintiff has not returned any monies advanced to her by the Defendant. The Plaintiff, on the other hand, asserts that the TILA requires the lender to return the borrower's money before the borrower returns any advances given by the lender.

Defendant has also challenged Plaintiff's request for accounting and declaratory relief, stating that no facts have been alleged which entitle the plaintiff to recovery. Homeowners maintains that the Plaintiff has not set forth a claim for declaratory relief. The complaint, in the opening paragraph, refers to declaratory relief only once. At no point are any facts or allegations associated with the need for declaratory relief. Hence, the Defendant equates this to providing mere "labels and conclusions" which do not set forth a basis for relief. *Bell Atlantic Corp. V. Twombly*, 55 U.S. 544, 555 (2007). Furthermore, Homeowners posits that a request for accounting should be denied because the loan has been assigned and was done so immediately. Thus, Homeowners does not have the ability to proffer a competent accounting.

In Homeowners reply to the Plaintiff's opposition, it also maintains that what the Plaintiff seeks does not constitute a request for accounting. The Plaintiff has asked for all fees associated with the transaction to be disclosed by Homeowners. Homeowners claims this request is not complex enough to warrant an accounting awarded through equity. Accordingly, it has asked the court to deny the Plaintiff's request of an accounting and declaratory relief.

Plaintiff responds by pointing out that her argument for an accounting and declaratory relief rests under Louisiana Law, not Federal Law. The gist of her argument is that Louisiana Law allows her the right to ask for the specific funds she should receive back upon rescission. Accordingly, she has asked to court to order an accounting so all her funds may be properly accounted for.

III. LAW AND ANALYSIS

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, a district court must accept the factual allegations of the complaint as true and resolve all ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff. *See Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). Unless it appears "beyond a doubt that the plaintiff can prove no set of facts in support of his claim," the complaint should not be dismissed for failure to state a claim. *Id.* at 284-285 (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed.2d 80 (1957)). However, conclusory allegations or legal conclusions masquerading as factual conclusions will not defeat a motion to dismiss. *See Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (*citing Fernandez-Montes*, 987 F.2d at 284).

A. The applicable statute of limitations under the TILA

The TILA was enacted in 1968 "to promote the 'informed use of credit' by 'assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him.'" *Bustamante v. First Fed. Sav. and Loan Ass'n of San Antonio*, 619 F.2d 360, 364 (5th Cir. 1980) (quoting 15 U.S.C. § 1601). The two TILA provisions pertinent in this case are § 1635(f) and § 1640(e). At first blush, § 1635(f) and § 1640(e) seem to embody contradictory positions on the subject of the statute of limitations. However, upon closer inspection, it is clear to the Court that the provisions are merely overlapping and not contradictory.

The pertinent provisions of § 1635(a) read:

> *[T]he 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*...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 Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

15 U.S.C. § 1635(a) (emphasis added).

Thus, an obligor generally has three days to rescind a transaction entered into with a creditor. However, this short time period is extended whenever the "information and rescission forms" and "material disclosures" are not delivered during the course of the transaction. In such a case, the right to rescind will remain open until the appropriate forms are delivered. The term "material disclosure" has been defined as "information that would affect the credit shopper's decision to utilize the credit". *Bustamante*, 619 F.2d at 364 (*citing Ivey v. United States Dep't of Hous. and Urban Dev.*, 428 F.Supp. 1337, 1342-43 (N.D.Ga.1977)); *see also Harris v. Tower Loan of Mississippi, Inc.*, 609 F.2d 120, 122-23 (5th Cir. 1980) (holding that an understated finance charge is a material nondisclosure). Thus, if § 1635(a) stood alone, the right to rescind would remain open indefinitely until the proper "information and rescission forms" are delivered. However, pursuant to § 1635(f) this right expires after three years. The pertinent provisions of § 1635(f) read:

> An obligor's right of rescission *shall expire three years after* the date of consummation of the transaction or upon the sale of the property, whichever occurs first, *notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered.*

15 U.S.C. § 1635(f) (emphasis added). Hence, even if the proper forms are never delivered, the right to rescind is extinguished after three years.

This right to rescind differs from the right to bring suit. Defendant relies on § 1640(e) which deals with the statute of limitations for bringing a suit for damages. Importantly, § 1640(e), states in part:

> *Any action under this section may be brought* in any United States district court, or in any other court of competent jurisdiction, *within one year from the date of the occurrence of the violation.* This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

15 U.S.C. § 1640(e) (emphasis added). This rule simply allows a plaintiff one year to bring a claim after a violation has occurred. It does not deal with the right to rescind. A violation is, as described in 15 U.S.C. § 1640(a), the failure of a creditor to abide by any of the provisions and requirements in § 1635. Therefore, a lawsuit based on any violation of § 1635 may be brought one year after its occurrence.

The Plaintiff is predicating her right to rescind, and not to bring suit, on the three year extended period granted in § 1635(f). She may claim the use of this provision based on her allegations that she did not receive the proper material disclosures or rescission paperwork discussed in § 1635(a). Thus, she would have had three years from November 2006 to attempt rescission, a time period she met with her rescission notice. However, it is important to note that this failure to provide material disclosures did not give the Plaintiff her current cause of action. It was Homeowners alleged violation of the § 1635 rescission mandates which gave rise to a cause of action for damages, found in § 1640. The alleged violation was Homeowners refusal to rescind her loan. This cause of action, by virtue of § 1640(e), had a one year statute of limitations placed on it from the time the violation occurred. The Plaintiff, by filing suit on July 29, 2009, also met this time restraint. Therefore, based on the statutory language, it appears that the Plaintiff's claim is not

barred by the statute of limitations.

B. Order of Returning Funds

The portion of the TILA governing the process of rescission, § 1635(b), states the following:

> *When an obligor exercises his right to rescind* under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. *Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.* If the creditor has delivered any property to the obligor, the obligor may retain possession of it. *Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value.* Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. *The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.*

15 U.S.C. § 1635(b) (emphasis added). The plain language of this statute establishes that the creditor must return the money or property to the obligor first. Following the return of this money, the obligor is then required to tender the loan money that they initially received, or its value in kind, to the obligor.

However, the Fifth Circuit has been willing to alter this order of repayment in forfeiture cases. These cases arise when a plaintiff argues that a creditor's failure to comply with the statutory requirements of § 1635(b) justifies the forfeiture of the loan money by the creditor. *See Gerasta v. Hibernia Nat. Bank*, 575 F.2d 580 (5th Cir. 1978). In *Bustamante v. First Federal Savings and Loan Association of San Antonio*, the Fifth Circuit found that the forfeiture provision is triggered only if both the creditor and borrower have first performed the actions required of them and then the

creditor does not accept the obligor's tender. 619 F.2d at 364. In that case, the borrower rescinded the loan and then attempted to claim that the lender had forfeited their interest in the property because they failed to follow the forfeiture provisions. *Id.* at 365. The court dismissed that argument and held that the borrower must tender back the lender's property and it must be refused for the forfeiture provision to become applicable. *Id.*

Here, the Plaintiff has not asked for the forfeiture provision to take effect. The Plaintiff has only asked that the Defendant properly rescind the loan as per the TILA. Therefore, there is no reason to apply the alternate order of repayment urged by Defendant at this time. However, the Court is mindful that one objective of the TILA is to return all involved parties to the status quo ante. If it later appears to the Court that this goal would not be furthered by adherence to the repayment order dictated by § 1635(b), the Court may alter this order as expressly provided for in the statute. Accordingly, it is not appropriate to dismiss Homeowner's on this basis.

C. Accounting and Declaratory Relief

The arguments regarding accounting and declaratory relief, while important in computing damages and possible equitable relief, do not effect the current motion at hand. The Court need not decide what relief is required at this stage of the case. Thus, this argument does not serve as a foundation to grant the Defendant's Motion to Dismiss.

D. Assignment

Homeowners claims they were not responsible for the rescission violation because they assigned the Note prior to the rescission. Thus, they argue that they were incapable of rescinding the Note and a violation can not be predicated on their misfeasance or nonfeasance in regards to their rescission duties. They simply had no way and no duty to react to the rescission notice.

Ultimately, the argument of assignment is not material to the issue at hand. As per the TILA,

it is immaterial whether the loan has been assigned or not. As Defendant correctly points out, 15 U.S.C. § 1641 allows a plaintiff to predicate any of the TILA claims against an assignee of a loan. However, this provision does not require the plaintiff to bring the claim exclusively against the assignee. It allows a plaintiff to maintain an action against the original creditor. This is evident in the manner the TILA defines a creditor. As per TILA's definition, a creditor "is the person to whom the debt arising from the consumer credit transaction is *initially payable* on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement." 15 U.S.C. § 1602 (emphasis added). Accordingly, any of the Plaintiff's claims may be brought against Homeowners because they were the entity who was initially payable for the debt, and none of these claims are superseded by the section regarding assignments.

IV. CONCLUSION

For the foregoing reasons, IT IS ORDERED that Homeowner's Motion to Dismiss (Rec. Doc. No. 7) IS DENIED.

New Orleans, Louisiana, this 29th day of April, 2010.

Eldon E. Fallon
District Court Judge