AO 450 (Rev. 5/85) Judgment in a Civil Case ●

Clearinghouse No. 43,745A (?) or 43,765A (?)

FILED

AUG 24 1988

CLERK

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United States District Court

MIDDLE DISTRICT OF TENNESSEE

DIANE JETTON, et al.

V.

HOWARD CAUGHRON, et al.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:87-0126

Judge Higgins

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Court finds in favor of the plaintiffs, Diane Jetton and Betty Waters, and against the defendant, Howard Caughron. The defendant, Howard Caughron, shall refund the plaintiffs the amount of $498.74.

The defendant, Howard Caughron's counterclaim for breach of contract is dismissed.

The Court finds in favor of the cross-plaintiff, Howard Caughron, and against the cross-defendant, Robert E. Poole. The cross-plaintiff, Howard Caughron, is hereby awarded $12,643.02.

The plantiffs, Diane Jetton and Betty Waters, shall recover the costs of this action, together with a reasonable attorney's fee, from the defendant, Robert E. Poole.

THE CURRENT POST-JUDGMENT INTEREST RATE IS: 7.95.

August 24, 1988

Date

Juliet Griffin

Clerk

Suzanne Wilcox

(By) Deputy Clerk

This document was entered on the docket in compliance with Rule 58 and/or Rule 79 (a), FRCP, on 8/25/88. By: K. Sanders

78

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DIANE JETTON, et al.	]	
	]	
v.	]	No. 3-87-0126
	]	Judge Higgins
HOWARD CAUGHRON, et al.	]	

O R D E R

In accordance with the memorandum contemporaneously filed, the credit transaction secured by the plaintiff Diane Jetton's residence has been rescinded pursuant to 15 U.S.C. § 1635. The deed of trust executed by the plaintiffs and dated February 20, 1985, is void, and the defendant Howard Caughron is directed to release the deed of trust of record. Accordingly, the Court finds in favor of the plaintiffs and against the defendant Mr. Caughron. The defendant Mr. Caughron shall refund the plaintiffs the amount of $498.74. Judgment shall be entered accordingly.

The defendant Mr. Caughron's counterclaim for breach of contract is dismissed.

The Court finds in favor of the cross-plaintiff Mr. Caughron and against the cross-defendant Mr. Poole. The cross-plaintiff Mr. Caughron is hereby awarded $12,643.02. Judgment shall be entered accordingly.

The plaintiffs shall recover the costs of this action, together with a reasonable attorney's fee, from the defendant Mr. Poole, pursuant to 15 U.S.C. § 1635(g). Application for award of costs and fees shall be made in accordance with Rule 13, Local Rules of Court.

THE CURRENT POST-JUDGM
INTEREST RATE IS: 7.95

It is so ORDERED.

Thomas A. Higgins
United States District Judge
8-24-88

71

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DIANE JETTON, et al.]
]
v.] No. 3-87-0126
] Judge Higgins
HOWARD CAUGHRON, et al.]

M E M O R A N D U M

The plaintiffs, Diane Jetton and Bettie Waters, originally brought this action against the defendants, Howard Caughron, individually and d/b/a Inter-South Realtors (Mr. Caughron), and Robert E. Poole, individually and d/b/a Colonial Construction Co. (Mr. Poole), on February 12, 1987. The plaintiffs allege violations of the Truth-in-Lending Act, 15 U.S.C. § 1601 et seq., and Regulation Z, 12 C.F.R. § 226.1 et seq. The plaintiffs seek a declaration that the credit transaction at issue has been rescinded pursuant to 15 U.S.C. § 1635 and 12 C.F.R. § 226.23, in addition to damages, costs and attorneys' fees pursuant to 15 U.S.C. § 1640(a). The plaintiffs also made an application for a preliminary injunction preventing certain of the defendants from foreclosing on real property which is the subject of the credit transaction at issue. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 1604(e).

The plaintiffs applied contemporaneously for a temporary restraining order which was issued by the Court on February 13, 1987. On February 18, 1987, the plaintiffs filed an

amended complaint adding Edward Stone as a party plaintiff and Chester G. Melvin as a party defendant. The plaintiffs' application for a preliminary injunction was heard on February 23, 1987. By an order entered February 24, 1987, the temporary restraining order, previously entered, was extended pending a ruling by the Court on the plaintiffs' application for a preliminary injunction. On April 4, 1987, the Court granted the plaintiffs' application for a preliminary injunction.

On November 6, 1987, the defendant Mr. Caughron filed a counterclaim against the plaintiffs, alleging a breach of contract, and a crossclaim against the defendant Mr. Poole, alleging breach of statutory warranties.

By an order entered December 2, 1987, a default judgment was entered against the defendant Mr. Melvin.

This action was tried without the intervention of a jury on March 21 and 22, 1988.

I.

The plaintiff, Diane Jetton, is the owner of the residence at 3237 Hummingbird Drive, Nashville, Tennessee. The plaintiff, Bettie Watters, is Diane Jetton's mother. The plaintiff, Edward Stone, is Diane Jetton's half-brother.

In February 1985, the plaintiffs entered into a transaction with the defendant, Robert Poole d/b/a Colonial Construction Co., for work to be performed on Diane Jetton's residence. This agreement was evidenced by a written contract, dated February 13, 1985, listing the work to be performed and the contract price. The document was signed by the plaintiffs and by the defendant Mr. Poole d/b/a Colonial Construction Co. Another

document, a right of cancellation notice, in the format specified by the Truth-in-Lending Act and Regulation Z, bearing the date February 13, 1985, was also signed by the plaintiffs.

The employees of Colonial Construction Company began construction on Diane Jetton's residence on the date these documents were signed.

The transaction between the plaintiffs and the defendant Mr. Poole was financed by a credit agreement entered into between the defendant Mr. Poole and the plaintiffs. The credit agreement was secured by Diane Jetton's residence. In connection with this transaction, the plaintiffs signed the following documents, all bearing the date February 20, 1985: a note, a closing statement, a loan disclosure statement, a right of cancellation notice and a deed of trust. The deed of trust was subsequently recorded.

At trial, the plaintiffs testified that the materials for the construction job were delivered and the work called for in the contract was completed or substantially completed prior to the delivery of and execution by the plaintiffs of the credit disclosures, dated February 20, 1985, and the right of cancellation notice furnished with those disclosures. In his "supplemental and revised proposed findings of fact" submitted March 31, 1988, the defendant Mr. Poole conceded that "the materials for the [Jetton] job were delivered and the work called for in the contract was performed or partly performed prior to the execution by and delivery to the plaintiffs of the credit disclosures in connection with this transaction."

The plaintiffs paid on the note on a regular basis until the summer of 1986. On or about September 18, 1986, the defendant Mr. Pool sold and assigned the note to the defendant Mr. Caughron. Prior to the closing on the sale of the note, the defendant Mr. Caughron was informed that the plaintiffs were in arrears in their payments but that the plaintiffs intended to bring the note current some time toward the end of the month. At the time of the sale of the note, the unpaid balance thereon, including accrued interest, was $12,144.28. The defendant Mr. Caughron paid that amount for the note. Mr. Poole endorsed the note "Without Rec - Robert E. Poole 9/17/86." By an undated letter, Mr. Caughron sent notice to the plaintiffs that he had acquired the note (plaintiffs' exhibit 9). This letter also informed the plaintiffs that they were in default. In October, 1986, the plaintiffs made a $250 payment to the defendant Mr. Caughron. This was the last payment the plaintiffs made on the note.

The note remained in arrears and on December 16, 1986, the defendant Mr. Caughron, sent written notice to the plaintiff Ms. Jetton that the subject property would be sold at a foreclosure sale on January 15, 1987. On January 12, 1987, the plaintiff Ms. Jetton delivered a notice of her election to rescind and cancel the credit transaction to the defendants Messrs. Caughron and Poole. On January 21, 1987, the defendant Mr. Caughron rejected the plaintiff's rescission and stated his intention to proceed with foreclosure under the deed of trust. The plaintiffs then filed this action.

II.

It is uncontested that the transaction entered into between the plaintiffs and the defendant Mr. Poole is a credit transaction subject to the provisions of the Federal Truth-in-Lending Act, 15 U.S.C. § 1601 et seq. and Regulation Z, 12 C.F.R. §226.1 et seq. Under 12 C.F.R. § 226.23, a right of rescission, subject to certain exemptions, is created in a consumer whose principal place of dwelling is or will be subject to a security interest. 12 C.F.R. § 226.23 provides in pertinent part:

> Right of rescission
>
> (a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction. . . .
>
> (2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. Notice is considered given when mailed, when filed for telegraphic transmission or, if sent by other means, when delivered to the creditor's designated place of business.
>
> (3) The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section or delivery of all material disclosures,[2] whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of

certain administrative proceedings, the rescission period shall be extended in accordance with § 125(f) of the act.

(4) When 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.

(b) Notice of right to rescind. In a transaction subject to rescission a creditor shall deliver 2 copies of the notice of the right to rescind to each consumer entitled to rescind. The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(1) The retention or acquisition of a security interest in the consumer's principal dwelling.

(2) The consumer's right to rescind the transaction.

(3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(4) The effects of rescission, as described in paragraph (d) of this section.

(5) The date the rescission period expires.

(c) Delay of creditor's performance. Unless a consumer waives the right of recission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

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[2]The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. (Footnote within the above quotation)

As a consumer whose ownership interest in her residence is subject to a security interest given in connection with the credit transaction at issue in this case, the plaintiff, Diane Jetton, had the right to rescind the credit transaction at issue in this case until midnight of the third business day following the delivery of all the material disclosures. 12 C.F.R. § 226.23(a). In addition, the defendant Mr. Poole was prohibited from delivering materials or performing services pursuant to the contract until the rescission period had expired and he was reasonably satisfied that the plaintiff Ms. Jetton had not rescinded. 12 C.F.R. § 226.23(c).

The defendant Mr. Poole has conceded that materials were delivered to the Jetton residence and work called for in the contract was performed, at least in part, prior to delivery to the plaintiffs of the material disclosures required by 12 C.F.R. § 226.23, which in this case are the credit disclosures. Accordingly, the defendant Mr. Poole violated Regulation Z, § 226.23(c), by causing materials to be delivered and services under the contract to be performed prior to the expiration of the rescission period.

Because the defendant Mr. Poole violated the provisions of § 226.23(c), the plaintiff Ms. Jetton remained entitled to rescind the credit transaction until three years after the consummation of the transaction, in accordance with 12 C.F.R. § 226.23(a)(3) and 15 U.S.C. § 1635(f). It is uncontested that the plaintiff exercised her right to rescind in a timely manner.

The Truth-in-Lending Act provides: "Any consumer who has the right to rescind a transaction under Section 1635 of this

title may rescind the transaction as against any assignee of the obligation." 15 U.S.C. § 1641(c). Accordingly, a consumer's right to rescind applies against an assignee of the obligation; and, in this case, Ms. Jetton's right to rescind applies against Mr. Caughron.[1]

Therefore, on January 12, 1987, the plaintiff Ms. Jetton was entitled to rescind the credit transaction at issue and her notice of rescission was effective.

Accordingly, the Court finds that the credit transaction at issue has been rescinded.

III.

The procedure to be followed when a customer exercises the right to rescind is provided in 15 U.S.C. § 1635(b):

> Return of money or property following rescission
>
> (b) 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

[1] As the plaintiffs were entitled to rescind the credit transaction, Mr. Caughron's counterclaim against the plaintiffs for breach of contract is without merit. Accordingly, Mr. Caughron's counterclaim is hereby dismissed.

> 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.

Accordingly, the plaintiffs are not liable for any finance or other charge, and the security interest in Ms. Jetton's residence is void. The deed of trust executed by the plaintiffs on February 20, 1985, is void, and the defendant Mr. Caughron shall release the deed of trust of record.

In addition, in accordance with 15 U.S.C. § 1635(b) and 12 C.F.R. § 226.23(d)(2), the defendant Mr. Caughron is required to return to the plaintiffs any money or property given by the plaintiffs in the transaction. The statute and regulation further provide that once the defendant Mr. Caughron has complied with his obligations, the plaintiffs shall tender to him the property received in the transaction or else its reasonable value. 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d). In this case, the parties have stipulated that the sum of $5,229.46 has been paid on the note by the plaintiffs. The defendant Mr. Caughron therefore must refund the plaintiffs $5,229.46 less the reasonable value of the property received in the transaction.

At trial, the plaintiffs introduced the testimony of James Belcher, the sole proprietor of Plan Service, a drafting

and consulting service in connection with residential and commercial construction, to establish the value of the improvements made on the Jetton home by Colonial Construction Company. The Court deems Mr. Belcher qualified as an expert witness. Mr. Belcher testified that the reasonable value of the work as specified in the contract, including profit and overhead, is $4,442.12. Mr. Belcher further testified that there were defects and omissions in the work performed by Colonial Construction Company and that the cost of correcting those defects is $919.44. Therefore, according to Mr. Belcher, the net value of the work performed by Colonial Construction and received by the plaintiffs is $3,522.68. Mr. Poole testified that the value of the work performed by Colonial Construction Company, including profit and overhead, is the contract price of $11,970.00. The Court credits the testimony of Mr. Belcher and rejects the testimony of Mr. Poole, and finds the net value of the work performed to be $3,522.68.[2]

The plaintiffs received another benefit in addition to the value of the work performed by Colonial Construction Company. Three years of property taxes and insurance coverage in the total

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[2]At trial, in response to the Court's question, Mr. Poole admitted that he testified falsely at the hearing on the plaintiff's application for a preliminary injunction. Therefore, the Court finds that the oath to tell the truth has no real significance to Mr. Poole. Accordingly, the Court will not credit the testimony of Mr. Poole.

amount of $1,208.04 were paid out of the loan proceeds.[3] Therefore, the total value of the property received by the plaintiffs is $4,730.72 ($3,522.68 + $1,208.04).

As noted above, the parties stipulated that the plaintiffs have paid the sum of $5,229.46 on the note. Accordingly, the plaintiffs are entitled to recover the sum of $498.74 ($5,229.46 - $4,730.72) pursuant to the rescission of the credit transaction. The defendant Mr. Caughron shall refund the plaintiffs $498.74.

IV.

The plaintiffs also contend that they are entitled to recover statutory damages against the defendant Mr. Caughron pursuant to 15 U.S.C. § 1640(a) which provides in pertinent part:

> Civil liability
>
> Individual or class action for damages; amount of award; factors determining amount of award
>
> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of --
>
> (1) any actual damage sustained by such person as a result of the failure;

[3]The plaintiffs owed $302.42 in back taxes for 1981, $385.69 in back taxes for 1982 and $324.93 for taxes in 1984. In addition, insurance was acquired for the property on February 2, 1985, for a term of one year for the cost of $196.

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
>
> . . . .
>
> (3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court.

The defendant Mr. Caughron contends that he is not a creditor for the purposes of the Truth-in-Lending Act and that, therefore, he is not liable under 15 U.S.C. § 1640(a). The plaintiffs concede that the defendant Mr. Caughron does not meet the definition of creditor set forth in 15 U.S.C. § 1602(f). However, the plaintiffs assert that under the circumstances of this case, the defendant Mr. Caughron nevertheless should be found liable for the damage remedy pursuant to 15 U.S.C. § 1640(a). The Court disagrees.

The liability of assignees is explicitly set forth in 15 U.S.C. § 1641, which does not provide for an award of statutory damages. As the Truth-in-Lending Act includes a provision which sets forth the liability of assignees, the Court will not impose liability on an assignee under a provision which sets forth the liability of creditors. Accordingly, the Court

finds that the defendant Mr. Caughron is not liable for damages pursuant to 15 U.S.C. § 1640(a).

V.

As cross-claimant, the defendant Mr. Caughron has sued the defendant Mr. Poole for breach of statutory warranties implied with his transfer and endorsement of the deed of trust note. The warranties which are made by a person who transfers a negotiable instrument for consideration are set forth in Tenn. Code Ann. § 47-3-417(2) as follows:

> Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by endorsement to any subsequent holder who takes the instrument in good faith:
>
> (a) he has good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
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> (b) all signatures are genuine or authorized; and
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> (c) the instrument has not been materially altered; and
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> (d) no defense of any party is good against him; and
>
> (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of any unaccepted instrument.

Tenn. Code Ann. § 47-3-417(3) provides that transferring "without recourse" limits the obligation in 2(d) above to "a warranty that he (transferor) has no knowledge of such defense."

In this case, the defendant Mr. Caughron is the defendant Mr. Poole's immediate transferee. Accordingly, the

defendant Mr. Poole sold the note to the defendant Mr. Caughron subject to the warranties of Tenn. Code Ann. § 47-3-417(2).[4]

The defendant Mr. Poole concedes that he regularly participates in the extension of credit as described in the Truth-in-Lending Act. In addition, the defendant has been sued for violations of the Truth-in-Lending Act and Regulation Z in the past. Therefore, the defendant Mr. Poole is familiar with the federal requirements for the extention of credit. As noted above, in his supplemental and revised proposed finding of facts, the defendant Mr. Poole admitted delivering materials to the job site and performing services under the contract before the period of rescission had expired. Accordingly, the defendant Mr. Poole must have been aware that the plaintiffs had a good available defense against the holder of the note. Therefore, the defendant Mr. Poole breached his warranty under §§ 47-3-417(2) and (3) and is liable to the defendant Mr. Caughron.

The defendant Mr. Caughron is entitled to recover from the defendant Mr. Poole damages which will place him as nearly as possible in the same position he would have been in had the breach of warranty not occurred. Therefore, the defendant Mr. Caughron is entitled to recover the value of the consideration given for the note, $12,144.28, plus the payments

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[4]The Court rejects the argument of the defendant Mr. Poole that the defendant Mr. Caughron did not take the note under the warranties of § 47-3-417(2) because the defendant Mr. Caughron is not a holder in due course as defined in § 47-3-302. The warranties under Tenn. Code Ann. 47-3-419(2) do not require that the transferee be a holder in due course. See Hart and Willier, Commercial Paper under the U.C.C. (1988).

the defendant Mr. Caughron has been ordered to pay the plaintiffs in this action in the amount of $498.74. Accordingly, the defendant Mr. Caughron shall recover of the defendant Mr. Poole damages in the amount of $12,643.02.

An appropriate order will be entered.

Thomas A. Higgins
United States District Judge
8/24/88