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UNITED STATES **DISTRICT** COURT
MIDDLE **DISTRICT** OF FLORIDA
TAMPA DIVISION

JOHN H. **NOONAN**, **et al**.

Plaintiffs,

V S .

CHASE HOME **MORTGAGE** CORPORATION,

Defendant.

Case No. **94-1224-Civ-T-24(B)**

1017055
(9pp.)

ORDER

This cause is before the Court on Defendant Chase Home Mortgage Corporation's ("CHASE") Motion to Dismiss with Prejudice or, in the Alternative, for Summary Judgment (**Doc**. No. 10, filed September 22, 1994) and plaintiff John H. **Noonan's ("NOONAN")** Memorandum in Opposition thereto (**Doc**. No. 13, filed October 5, 1994). CHASE filed a Reply on November 16, 1994 (**Doc**. No. 18). A hearing on the motion was held by the Court on February 7, 1995 in which an oral order denying the motion was entered. This written order follows.

NOONAN's Complaint states a class action based **upon** CHASE's alleged failure to **abide** by the Truth **in Lending** Act **("TILA")** and **Regulation Z**, 12 **C.F.R.** §226 ("Regulation Z"). **NOONAN** alleges that CHASE failed to abide by the disclosure requirements as set forth in **TILA** and Regulation Z in connection with **refinancing** non-owner-occupied rental **property**.

59.

CHASE has filed a motion to dismiss or, in the alternative, for summary judgment. A court should not grant a motion to dismiss a complaint for failure to state a claim unless it appears beyond a doubt that a plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-47 (1957). Moreover, a court, in deciding a motion to dismiss, is required to view the complaint in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (-1947). When deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept all material allegations as admitted. Jenkins v. McKeithen, 395 U.S. 411, 421-22, (1969). Under this standard, 'the Court must take as true allegations of Defendants' state of mind and Plaintiffs' suffering . . . [which] involve determinations that must be made by the trier of fact. " McCray v. Holt, 777 F. Supp. 945, 946-47 (S.D. Fla, 1991) (citing Ponton v. Scarfone, 468 So. 2d 1009, 1011 (Fla. 2d DCA), rev. denied, 478 So. 2d 54 (Fla. 1985)). Thus, for purposes of considering CHASE's motion to dismiss, the Court must assume that CHASE excluded certain items from the 'finance charge" and thereby violated TILA and Regulation Z. Therefore, the only issue now before tbe Court is whether the transaction is treated as a refinance of non-owner-occupied rental property or personal residential property.

In the alternative, CHASE motions this Court for summary judgment. In deciding a motion to dismiss pursuant to Rule 12(b)(6), if matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment. This Court, in reviewing a motion for summary judgment, is guided by the standard set forth

in Fed. R. Civ. P. 56(c). [1] The moving party bears the burden of meeting this exacting standard. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, there can be no genuine issue as to any material fact, or evidence on which the jury could reasonably find for tbe non-movant. Id. This Court must examine whether there is a genuine issue of material fact as set forth in the pleadings.

I. Complaint Allegations

The Complaint was filed in this cause of action on August 4, 1994. The Complaint alleges the following;

1. Lenders prepare TILA disclosure statements according to standardized policies and procedures.

2. It is and was the policy and practice of CHASE, when making these disclosures, to exclude from the 'finance charge' and include in the "amount financed" charges for the transportation of documents and checks, for copies and deliveries and for certified copies.

3. As a result of this policy and practice, the "amount financed" was overstated, and the "finance charge" was understated on numerous credit transactions.

4. A class of persons, including NOONAN, entered into a transaction documented as a consumer credit transaction, where TILA disclosures were provided.

5. NOONAN asserts that the exclusion of certain items from the "finance charge" violated TILA and Regulation Z.

[1] Fed. R. Civ. P. 56(c) states in relevant part, as follows:
The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no* genuine *issue* as to any material fact and that the moving party is entitled to judgment as a matter of law.

II. Undisputal Material Fact5

NOONAN purchased residential property at 40 Mercer Street in 1981 and lived in the house until 1992. While residing at the home, NOONAN took out a first and second mortgage on the property. The majority of the proceeds were used to pay for repairs to the home.[2] In 1993, NOONAN entered into a mortgage loan transaction with Powder House Mortgage Co. who subsequently assigned the loan to CHASE. The interest rate on the CHASE loan was substantially lower than the rate on either the first *or* second mortgage. The entire proceeds of the CHASE loan were used to pay off the first and second mortgages and to pay closing costs.[3]

In connection with his mortgage transaction, NOONAN signed several uniform documents. Among the forms was a Form 1003 Uniform Residential Loan Application, which listed the subject property of the mortgage as 40 Mercer Street. 'Form 1003 indicated that the purpose of the loan was to refinance a mortgage secured by real property located at 40 Mercer Street. The property was designated as "Investment" property. Form 1003 also stated the property was designated as "rental being held for income.. A second form ("Form

[2] In 1986, NOONAN borrowed $65,000 from First American Bank. He used over $40,000 from the loan to pay for repairs. NOONAN used $12,000 from the loan to make a down payment on a vacation home and $2,000 to fund an IRA. The remaining $1,000 was invested in some mutual funds.

A short time after executing the First American mortgage, NOONAN obtained a $13,000 second mortgage from a company called Key, which was used to make further repairs on the property. (NOONAN Complaint p.2).

[3] The gross amount due from borrower was $64,917.99. Of that amount, $57,918.55 was used to pay off the loan from Litton Mortgage, $4,783.98 was used to pay off Key, and $2,214.46 was consumed by settlement charges. Of the $64,917.99, $63,000 was provided by the principal of the new loan, while NOONAN paid the remaining $1,917.39.

1009") further stated that NOONAN 'does not occupy the Property as [NOONAN's] principal residence and does not intend to do so." On the date that NOONAN and Powder House entered into tbe mortgage, NOONAN was leasing the subject property to a tenant.

In connection with the loan, NOONAN received a TILA disclosurestatement ('disclosure"), The disclosure included various overhead costs of the lender as part of the "amount financed."[4] These amounts should have been included in "finance charges." As a result, the disclosure was inaccurate.' In addition, the disclosure failed to disclose that a security interest was being taken in Plaintiffs personal property.

III. Arguments, Resented

A. CHASE Moves This Court To Dismiss Count I Because NOONAN's Mortgage Was For Primarily Business Purposes, and Therefore TILA is Inapplicable

CHASE correctly cites to TILA as excluding from its coverage "[c]redit transactions involving extensions of credit primarily for business, commercial . . . purposes." 15 U.S.C. §1603(1). Moreover in referring to a "consumer credit transaction," TILA notes that "the transaction [is] one in which the party to whom credit is offered or extended is a natural

[4] The overhead costs were $62.50 and included:
a. A $30 charge for delivering checks or documents by Federal Express.
b. A $25 charge for copies and deliveries.
c. A $7.50 charge for certified copies.

[5] Liability for inaccurate disclosures is contained in 15 U.S.C. §1641, which states in pertinent part:

> For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

15 U.S.C. §1641(a) (emphasis added).

person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. 61602(h). CHASE also cites the accompanying Official Staff Interpretations that interpret the business-purpose exemption as encompassing non-owner-occupied rental property. 'Credit extended to acquire, improve, or maintain rental property . . . that is not owner-occupied is deemed to be for business purposes. " Regulation Z, 12 C.F.R. §226.3(a), Supp. I (1995).[6]

CHASE advances the argument that a full and accurate disclosure is unnecessary because 40 Mercer Street falls within the "non-owner-occupied rental property' exception to TILA. NOONAN leased the property to a tenant from November 1, 1992 through November 1, 1994, within which time the loan was made. Thus, CHASE argues the property is non-owner-occupied rental property and not entitled to protection under the TILA disclosure requirements. However, the exception in TILA presupposes that the loan is a new commercial loan, a business transaction, and that the funds will be used to maintain or improve non-owner-occupied commercial property. Rather, in the instant case, the use of the loan funds was not intended to maintain or improve commercial property, but to simply pay off a previous residential mortgage. TILA does apply to credit used for *personal* purposes even though the security is business property.

[6] Both parties concede that the official Staff Interpretations, 12 C.F.R. $226.3(a), Supp. I, are dispositive unless 'demonstrably irrational.' First Nat'l Bank of Council. Bluffs v. Office of the Comptroller of the Currency, 956 F.2d 1456, 1460-61 (8th Cir. 1992).

B. NOONAN Argues That a Loan Is Characterized By the Use Of the Loan Funds, Not the Nature Of the Security

NOONAN cites to 12 C.F.R. §226.3(a) and Supp. I (1995) to offer examples of consumer-purpose a-edit; e.g., "a loan secured by a mechanic's tools to pay a child's tuition' is similar to a loan secured by NOONAN's rental property to pay a personal first and second mortgage. (Plaintiff's Memorandum in Opposition to CHASE's Motion to Dismiss p.5). In both cases, the original obligation was consumer-'credit, and since the use of the funds is what controls, it follows that the refinancing was consumer credit. it is the nature of the debt that controls.' Additionally, NOONAN cites a number of cases that utilize a 51% test to determine whether a credit transaction is business or personal.* Following those decisions that look to the use of 51% or more of the funds to determine whether a credit transaction is business or personal, this Court finds that it is clear that more than 50% of the new funds advanced were used to satisfy an existing personal debt on residential property.

Secondly, NOONAN asserts that no distinction is to be made where the new loan is merely a refinance of an original obligation. See Semar v. Platte Valley Fed. Sav & Loan

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[7] Under controlling Eleventh Circuit authority, it is the purpose of the credit, not the collateral, that governs. Sherrill v. Verde Capital Corp., 719 F.2d 364, 367 (11th Cir. 1983) (holding that "[t]his Circuit has consistently held that in determining whether a particular transaction falls within the Truth In Lending Act exemption of credit transactions for business or commercial purposes, the purpose of the transaction or extension of credit is controlling, and not the property on which a security interest is retained'),

[8] NOONAN cites Semar v. Platte Valley Fed. Sav & Loan Ass'n, 791 F.2d 699, 704 n. 11 (9th Cir. 1986) (holding that where 10% of the loan proceeds were used for business purposes the primary purpose of the loan was consumer). See also Bokros v. Associates Fin., Inc., 607 F. Supp. 869 (N.D. Ill. 1984); Maddox v. St. Joe Papermakers Fed. Credit Union, 572 So. 2d 961, 963 (Fla. 1st DCA 1990).

Ass'n, 791 F.2d 699,704 n. 11 (9th Cir. 1986) (refinancing of consumer purpose mortgage is consumer use); Federal Land Bank of Jackson v. Kennedy, 662 F. Supp. 787, 790 (N.D. Miss. 1987) (where more than 50% of proceeds of loan were used to refinance existing loans that had been used to purchase land for farming, transaction was within agricultural purpose exemption). In support of this argument, NOONAN states that the fact he was given TILA disclosures during the closing of the Powder Mill mortgage (subsequently assigned to CHASE) is evidence that the loan was consumer based. There is no requirement to make TILA disclosures in business transaction loans.

Lastly, NOONAN argues that a subsequent change in the use of the property is immaterial for purposes of determining the applicability of TILA. See Searles v. Clarion Mortgage Co., No. 87-3495, 1987 U.S. Dist. LEXIS 11468 (E.D. Pa. 1987). The Searles court held "[t]he current use of the property or the use made of the property some six months after the loan is of no consequence' and "[t]he relevant inquiry is the purpose for which the credit was extended at the time the loan was consummated rather than six months thereafter." Id. at *8.

IV. Conclusion

CHASE motions this Court to determine that no material issue exists because the loan is a business-purpose loan and, therefore, exempted from TILA. However, this Court finds that a genuine issue of material fact exists as to whether this loan is a consumer-credit transaction or a business-purpose transaction. It is clear from NOONAN's Complaint that the proceeds of the loan were to be used to extinguish an existing personal mortgage on residential property. Therefore, CHASE has failed to negate the existence of any genuine

issue of material fact that would support the granting of a motion to dismiss or, in the ah-native, the granting of summary judgment.

Accordingly, it is ORDERED AND ADJUDGED that Defendant's Motion to Dismiss with Prejudice or, in the Alternative, for Summary Judgment (Doc. No. 10) is DENIED.

DONE AND ORDERED at Tampa, Florida, this 14 day of June, 1995.

Susan C. Bucklew
United States District Judge

Copies to:

All Parties and Counsel of Record