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

LOUIS H. SWAYZE and MARGARET SWAYZE, Plaintiffs, v. AMERIQUEST MORTGAGE COMPANY, Defendant.	CIVIL ACTION FILE NO. 1:03-CV-733-BBM

ORDER

This action, which was brought under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666, is before the court on plaintiffs' Motion for Leave to File Amended Complaint [Doc. 14], plaintiffs' Motion for Extension of Deadline for Filing Reply [Doc. 18], and defendant's Motion to Allow Supplemental Brief [Doc. 20].

For reasons stated below, plaintiffs' Motion for Leave to File Amended Complaint [Doc. 14] is **GRANTED**. For good caused shown, plaintiffs' Motion for Extension of Deadline for Filing Reply [Doc. 18] is **GRANTED nunc pro tunc**. Finally, although sur-reply briefs are generally not allowed, defendant's Motion to Allow Supplemental Brief [Doc. 20] is also **GRANTED nunc pro tunc**. The information contained in defendant's supplemental brief is relevant, and plaintiffs addressed its merit in their response to defendant's motion.

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I. DISCUSSION OF MOTION TO AMEND

Plaintiffs' original complaint seeks to enforce plaintiffs' purported right to rescind a consumer credit transaction they entered into with defendant and to recover statutory and actual damages for defendant's alleged violations of TILA and its implementing regulation, known as "Regulation Z," 12 C.F.R. Pt. 226. (Doc. 1 ¶ 1).[1] Plaintiffs contend that they entered into a "consumer credit transaction" with defendant in August 2002, which resulted in defendant obtaining a security interest in their home. (Id. ¶¶ 6,8). Plaintiffs further contend that defendant failed to provide certain disclosures during the transaction, in violation of TILA and Regulation Z. (Id. ¶ 12). If true, they obtained a continuing right to rescind the transaction under 15 U.S.C. § 1635 and Regulation Z, 12 C.F.R. § 226.23. (Id. ¶¶ 11, 13).

On January 18, 2003, plaintiffs sent a rescission notice to defendant, which they contend resulted in an automatic rescission of the transaction. (Id. ¶¶ 14-15). In response to the notice, defendant professed its belief that it had provided proper

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[1]The Board of Governors of the Federal Reserve System promulgated Regulation Z pursuant to § 1604 of TILA. Courts are to defer to the interpretations and commentary within Regulation Z, as long as it is not irrational or inconsistent with congressional purpose. See Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-69, 100 S.Ct. 790, 62 L.Ed.2d 22 (1980); Besaw v. General Finance Corp. of Georgia, 693 F.2d 1032, 1034 (11th Cir. 1982).

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disclosures and stated that it would not agree to rescind the transaction. (Id. ¶ 17). Plaintiffs ask the court, among other things, to "declare that Plaintiffs' rescission of the transaction at bar had the immediate automatic effect, on January 18, 2003, of rendering void and unenforceable all contractual obligations arising from or connected with the transaction . . . and of returning Plaintiffs and Defendant to the status quo ante." (Id. at 5).

In plaintiffs' proposed amended complaint, they seek to add new factual allegations regarding incidents that occurred after they filed their original complaint. These allegations are as follows: (1) Several months after plaintiffs filed this civil action, they entered into a contract for the sale of their home to a third party; (2) defendant conditioned release of its security interest in plaintiff's home on payment of $210,481.98; (3) plaintiffs protested this amount, contending that it exceeded the amount permitted by the rescission provisions of TILA; and (4) plaintiffs nonetheless paid the amount requested by defendant due to their financial need to sell their home quickly. (Doc. 14 at 1-2). Plaintiffs also seek to clarify that their claim for actual damages under TILA includes a claim for the difference between the amount demanded by defendant

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to release its security interest ($210,481.98) and the amount plaintiffs contend they should have paid.[2]

The parties do not dispute that defendant is a "creditor" within the meaning of TILA, 15 U.S.C. § 1602(f), and that the transaction in question was a "consumer credit transaction," 15 U.S.C. §§ 1602(e), 1602(h); 12 C.F.R. § 226.2(a)(11),(14). Accordingly, the transaction is governed by TILA and Regulation Z, which require the material terms of consumer credit transactions to be disclosed "clearly and conspicuously in writing," see 15 U.S.C. § 1638(a); 12 C.F.R. § 226.17(a)(1), thereby promoting the informed use of credit by consumers, see Rodash v. AIB Mortgage Co., 16 F.3d 1142, 1144 (11th Cir. 1994), abrogated on other grounds by Veale v. Citibank, F.S.B., 85 F.3d 577, 579-80 (11th Cir. 1996). TILA's language must be liberally construed in favor of the consumer, and creditors must strictly comply with its requirements. Rodash, 16 F.3d at 1144.

Defendant opposes plaintiffs' Motion to Amend, contending that the proposed amendment would be futile because exercise of plaintiffs' rescission right is time barred. (Doc. 16 at 2-5). According to defendant, plaintiffs' right to rescind, and to obtain

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[2]Plaintiffs' proposed amended complaint also deletes a prior claim for equitable relief. Defendant expresses no opposition to this proposal.

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damages based on defendant's failure to rescind, expired when plaintiffs sold their home. (Id. at 2-4, citing 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23; Meyer v. Ameriquest, 342 F.3d 899, 902 (9th Cir. 2003)). Apparently, defendant intends to argue that – even if plaintiffs had a right to rescind prior to the date they sold their home, or at the time they filed this lawsuit – that right automatically expired and became unenforceable on the date of the sale.[3]

Under TILA's rescission provision, a consumer has the right to rescind a consumer credit transaction involving a security interest on his or her principal residence (1) within three business days following the finalization of the transaction, or (2) if the creditor fails to make all of the disclosures required by TILA, within three years of the transaction date *or upon sale of the property,* whichever occurs first. 15 U.S.C. § 1635(a),(f).[4]

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[3]As plaintiffs point out, this argument goes to the heart of their complaint. A finding in defendant's favor on this point would require a similar finding with respect to plaintiffs' original complaint. Thus, the argument would have been more appropriately raised in a motion for judgment on the pleadings or for summary judgment. Nonetheless, the court will address it here.

[4]The relevant statutory language is as follows:

> (a) Disclosure of obligor's right to rescind
>
> [I]n the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any

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As an initial matter, the court finds that, even if rescission were no longer available due to the sale of plaintiffs' home, it does not necessarily follow that plaintiff's right to seek damages based on defendant's failure to rescind has also expired. In this regard, defendant states merely that plaintiffs have no claim for damages, "as this would be a rescission damage claim, and the Swayzes no longer have a rescission right or claim." (Doc. 16, Def. Brf. at 4).

> 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. . . .
>
> (f) Time limit for exercise of right
>
> 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 to the obligor . . . .

15 U.S.C.A. § 1635(a),(f).

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Claims for damages under TILA are subject to a different statute of limitations than that imposed on rescission. The relevant section states that an action for damages must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Plaintiffs filed this action on March 18, 2003. They entered into the disputed transaction less than a year earlier, in August 2002. Accordingly, any alleged TILA violations, and the consequent damages, clearly fell within the limitations period.

Furthermore, TILA's civil liability provision states that a creditor "who fails to comply with *any* requirement imposed . . . under section 1635 of this title . . . is liable" for damages. 15 U.S.C. § 1640(a)(emphasis added). One requirement of § 1635 is that a creditor "return to the obligor any money or property given as earnest money, downpayment, or otherwise, and . . . take any action necessary or appropriate to reflect the termination of any security interest created under the transaction" within 20 days of receiving a bona fide notice of rescission from the obligor. 15 U.S.C. § 1635(b). If the court were to find that plaintiff's notice of rescission was bona fide, the court sees no reason why damages should not be awarded based on defendant's failure to take these actions, even if the court were unable to effect the rescission. Indeed, even the case relied on by defendant implies that a claim

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for damages may be available under these circumstances. See Meyer v. Ameriquest, 342 F.3d 899, 902 (9th Cir. 2003)(finding that, once the obligors sold their home, "the TiLA rescission provision no longer applied and only the damages provision remained as a cause of action," and stating that the issue before the court was whether the one-year statute of limitations on damages had expired).

More to the point, the court also finds that plaintiffs made a timely assertion of their right to rescind and that TILA's statute of limitations does not prevent this court from enforcing that right, in spite of the fact that plaintiffs have since sold their home. Statutes of limitation do not ordinarily require a claim to be *resolved* before the conclusion of the limitations period, but rather merely to be asserted. Under defendant's interpretation of the statute, a creditor could avoid its statutory obligation to take certain steps within 20 days of receiving a bona fide rescission notice merely by claiming that the rescission is not valid, and it could thereafter avoid all liability for its inaction if the court called upon to determine the validity of the rescission were to fail to issue a decision before the obligor was forced to sell. This interpretation certainly does not comport with the requirement that TILA be liberally construed in favor of the consumer. See Rodash, 16 F.3d at 1144; see also Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 707-08 (11th Cir. 1998)(finding that TILA's statute of

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limitations for a damages claim, § 1640(e), is subject to equitable tolling, in part, because TILA is "a consumer protection statute which . . . is remedial in nature and therefore must be construed liberally in order to best serve Congress' intent").

The better interpretation of TILA's rescission provision is, as proposed by plaintiff, that rescission is automatic upon the posting of a *bona fide* rescission notice.[5] Defendant, of course, disputes that a bona fide notice was posted in this case. Nonetheless, if the court finds in plaintiffs' favor on this point, it has the power to declare the notice bona fide *at the time it was issued*. Such a retroactive ruling is commonplace in a wide variety of legal contexts.

This interpretation of TILA's rescission provision is supported by the Official Staff Interpretation of Regulation Z, which states that "[a]ny security interest giving rise to the right of rescission becomes void when the consumer exercises the right" and that the "security interest is automatically negated" at that time. 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretation of

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[5]Regulation Z states: "To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail . . . . Notice is considered given when mailed . . . ." 12 C.F.R. § 226.23(a)(2). (The 20-day time period for the creditor's performance under § 1635(b) "does not begin to run until the notification has been received." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretation of § 226.23(a)(2).)

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§ 226.23(d)(1). Federal courts are required to treat Federal Reserve Board opinions as dispositive unless they are "demonstrably irrational." See Ford Motor Credit Co., 444 U.S. at 565-69.

This interpretation is also indirectly supported by Williams v. Homestake Mortg. Co., 968 F.2d 1137 (11th Cir. 1992), a case relied on by plaintiffs. In Williams, the Court of Appeals for the Eleventh Circuit observed that "[t]he sequence of rescission and tender set forth in [TILA] is a reordering of common law rules governing rescission." 968 F.2d at 1140. Under common law, the party seeking rescission was required first to tender the property he or she received in the transaction; the transaction became void only after tender. Williams, 968 F.2d at 1140. "Under § 1635(b),[6]

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[6]Section § 1635(b) states:

> **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 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

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however, all that the consumer need do is notify the creditor of his intent to rescind. The agreement is then *automatically rescinded* and the creditor must, ordinarily, tender first." Id. (emphasis added).

The issue in Williams was whether courts may impose conditions upon the voiding of a creditor's security interest in a rescinded consumer credit transaction. Williams, 968 F.2d at 1137. The creditor in that case conceded that rescission was appropriate, and the lower court had declared the transaction rescinded as of the date of the debtors' notice. Id. at 1138-39. The creditor merely sought modification of the normal post-rescission sequence of events specified in TILA's rescission provision. Id. at 1138. Ultimately, the court – relying on the last sentence of § 1635(b), which gives courts authority to modify post-rescission procedures – held that the debtor could be ordered by a court to take certain actions *before* requiring the creditor to void the security interest. Id. at 1142.

Although the Court of Appeal's specific holding is not applicable to the issue currently before the court, the reasoning

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> . . . . The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

15 U.S.C. § 1635(b) (emphasis added).

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employed by the Court to reject an argument raised by the debtors is pertinent. The debtors argued, relying on language in Regulation Z,[7] that the district court could not require them to take any action (other than providing notice of rescission) prior to requiring the creditor to void its security interest in their property. Williams at 1141. The Court of Appeals rejected this argument by drawing a distinction between rescission on the one hand

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[7]The relevant portion of Regulation Z is as follows:

> (d) *Effects of rescission.*
>
> (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.
>
> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.
>
> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor or, where the latter would be impracticable or inequitable, tender its reasonable value. . . .
>
> (4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

12 C.F.R. § 226.23(d).

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and *the procedures required to effect the rescission* on the other. See id. at 1141-42. The court concluded that both § 1635 and the relevant portion of Regulation Z do basically three things: First, and of most importance for the instant case, they provide that "rescission is automatic upon the consumer's notice"; second, they establish a framework for the post-rescission exchange of property; and third, they give courts the power to modify that framework. Id. at 1141. According to the court, the regulation's "acknowledgment that the courts may modify the procedures prescribed in subsections (d)(2) and (d)(3) [which concern the exchange of property], but not those of subsection (d)(1) [which states that the security interest becomes void when the consumer rescinds], is at once, then, both a recognition of the court's power to change the statutory framework for *effecting* rescission and *a reaffirmation of the Act's intent to make rescission automatic upon notification.*" Id. at 1141-42 (emphasis added).

Applying this reasoning to the case at bar, no other conclusion can be reached than that a bona fide rescission is automatic upon notification from the debtor. This does not mean, as a case relied upon by defendant argues, that "a borrower could get out from under a secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed any." Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003)(finding that rescission is

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automatic upon notice only when the rescission is not contested; when contested, the security interest becomes void only after "the right to rescind is determined in the borrower's favor"). Yamamoto overlooks the possibility of a court *retroactively* declaring the validity of a security interest.[8] If a creditor believes that no TILA violation has occurred, it can stand its ground (as defendant did in this case) and refuse to release the security interest until ordered to do so by a court. Thus, a debtor could not get out from under a secured loan simply by *claiming* TILA violations. If challenged by the creditor, the debtor would also have to prove its claim. Although this interpretation certainly requires the creditor to assume the risk of paying damages for its delay in *effecting* the rescission (if the court ultimately finds in the debtor's favor), this burden is entirely consistent with TILA's function as a consumer-protection statute.

Defendant cites three additional cases in support of its position – Large v. Conseco Finance Servicing Corporation, 292 F.3d 49 (1st Cir. 2002); Thompson v. Irwin Home Equity Corp., 300 F.3d 88

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[8]Yamamoto also involved a fact scenario different from that currently before the court. The issue was "whether a court may order [bankrupt] borrowers who seek recission of a mortgage under [TILA] to show that proceeds can be tendered if they prevail." Yamamoto, 329 F.3d at 1168. Moreover, to the extent Yamamoto is inconsistent with this court's holding, the court finds its reasoning unpersuasive and inconsistent with Williams.

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(1st Cir. 2002); and Meyer v. Ameriquest, 342 F.3d 899 (9th Cir. 2003) – all of which the court finds unpersuasive because they are inconsistent with Williams, are not well reasoned, and/or involve markedly different factual scenarios.

In Large, the Court of Appeals for the First Circuit considered whether a debtor's assertion of a right to rescind "has the effect of voiding the transaction without resort to the arbitration procedure called for by a provision in the loan agreement between the parties." 292 F.3d 49, 50 (1st Cir. 2002). The debtor argued that the arbitration clause, which appeared in their loan agreement, had been automatically rescinded, along with the remainder of the loan contract, when the debtor gave the creditor notice of rescission. Large, 292 F.3d at 51-52. Relying on the Federal Arbitration Act, which embodies a liberal federal policy favoring arbitration agreements, and a Supreme Court opinion concluding that an arbitration clause is severable from the contract in which it is embedded, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-07, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the court concluded that the arbitration clause was binding in spite of the rescission. See id. at 52-53. The court could have based its holding solely on this reasoning, but it went only to address the debtor's claim that their rescission notice "did not simply demand rescission of the transaction, but in fact rescinded the transaction

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the moment it was mailed." Large at 54. The First Circuit concluded that "[n]either the statute nor the regulation establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract." Id. As in Yamamoto, the court stated that, "[i]f a lender disputes a borrower's purported right to rescind, the designated decision maker – here an arbitrator – must decide whether the conditions for rescission have been met. Until such decision is made, the Larges have only advanced a claim seeking rescission." Large at 55. Because these statements are inconsistent with Williams and were made in a context quite different from that currently before the court, the court finds them unpersuasive.

In Thompson, the Court of Appeals for the First Circuit reiterated its holding in Large, stating, "we rejected the argument that a demand for rescission under TILA is somehow self-executing and results in the automatic voiding of the loan agreement." 300 F.3d at 90. For the same reasons stated above, the court finds this statement unpersuasive.

Finally, in Meyer, the Court of Appeals for the Ninth Circuit held, with little discussion, that the sale of the debtors' home *after* they had provided the creditor with a notice of rescission and after they had filed a lawsuit seeking enforcement of that rescission resulted in a loss of their rescission claim, but not

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necessarily their claim for damages (which the court found barred for different reasons). Although the factual scenario in Meyer is very similar to plaintiff's situation, the court finds the reasoning, or lack thereof, to be unpersuasive, particularly in light of Williams.

II. CONCLUSION

For the reasons stated, the court finds that plaintiffs' rescission claim is not barred by TILA's statute of limitations, in spite of the fact that plaintiffs have sold their home, because plaintiffs exercised their purported right to rescind before the sale.

The following motions are hereby **GRANTED**: plaintiff's Motion for Leave to File Amended Complaint [Doc. 14], plaintiffs' Motion for Extension of Deadline for Filing Reply [Doc. 18], and defendant's Motion to Allow Supplemental Brief [Doc. 20]. The Clerk of the Court is **DIRECTED** to file the amended complaint attached to plaintiff's Motion to Amend. (Doc. 14, Exh. B).

IT IS SO ORDERED, this 8th day of March, 2004.

Gerrilyn G. Brill

GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

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