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

DEC 17 1993

JOHN N. WARD,

Plaintiff,

vs.

QUALITY HOMES COMPANY, and GREEN TREE FINANCIAL CORP.,

Defendants,

CIVIL ACTION

1:92-CV-2644-RHH

O R D E R

After having carefully reviewed the record, the transcript and the Magistrate Judge's Report and Recommendation in this case, the Magistrate Judge's Report and Recommendation is received with approval and adopted as the opinion and order of the court. Plaintiff's motion for summary judgment is GRANTED IN PART AND DENIED IN PART. Green Tree's motion for summary judgment against the plaintiff is DENIED. Green Tree's motion for summary judgment against defendant, Quality Homes Company, is GRANTED.

SO ORDERED, this 17th day of December, 1993.

Robert H. Hall

ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

AO 72A
(Rev. 8/82)

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

JOHN N. WARD,	:	CIVIL ACTION
Plaintiff,	:	NO. 1:92-CV-2644-RHH
vs.	:	
QUALITY HOMES COMPANY, and GREEN TREE FINANCIAL CORPORATION,	:	
Defendants.	:	

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 500-1. Let the same 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 report and recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript 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 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 (11th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED, this 20th day of October, 1993.

William L. Harper

WILLIAM L. HARPER
UNITED STATES MAGISTRATE JUDGE

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

JOHN N. WARD,	:	CIVIL ACTION
Plaintiff,	:	NO. 1:92-CV-2644-RHH
vs.	:	
QUALITY HOMES COMPANY, and GREEN TREE FINANCIAL CORPORATION,	:	
Defendants.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, John N. Ward, filed this complaint pursuant to the Truth-in-Lending Act, 15 U.S.C. § 1601, et seq. on November 10, 1992, against Quality Homes Company. Plaintiff Ward and defendant Quality Homes Company both consented to proceed before a United States Magistrate Judge, and the above-captioned matter was referred to the undersigned Magistrate Judge in accordance with 28 U.S.C. § 636(c). (Docket No. 11). Plaintiff amended his complaint July 2, 1993, to add Green Tree Financial Corporation as a party defendant. (Docket No. 21). A review of the file and docket entries does not indicate that defendant Green Tree Financial Corporation has consented to proceed before a United States Magistrate Judge. Accordingly, the undersigned Magistrate Judge submits this report and recommendation with respect to the pending motions for summary judgment.

Plaintiff entered into a contract with Quality Homes Company on November 12, 1991, and executed a "Property Improvement Contract" for remodeling and repair work on his home. Quality Homes began work on plaintiff's house on November 16, 1991, and performed repairs on November 21, 22, and 23, 1991.

On November 21, 1991, Quality Homes extended consumer credit to the plaintiff, and the parties executed a retail installment contract and security agreement. Plaintiff's home was security for the indebtedness. Quality Homes assigned its interest in plaintiff's residence to Green Tree Acceptance, Inc. (now Green Tree Financial Corporation). Quality Homes assigned its interest in the retail installment contract and security agreement to Green Tree on November 26, 1991. Plaintiff mailed a written notice of rescission to Quality Homes on November 10, 1992, which was received prior to November 16, 1992. Plaintiff sent a written notice of rescission to Green Tree on November 10, 1992, which notice of rescission was received on November 12, 1992.

Green Tree refused to terminate their security interest in plaintiff's home.

The contract of November 12, 1991, between plaintiff and Quality Homes called for the contract amount of $17,500.00 to be payable in cash upon completion of the work and also provides: "(t)o facilitate payment, the Purchaser agrees to permit the contractor to attempt to obtain a loan or loans for him". (Plaintiff's First Amended Complaint, Exhibit A; Docket Item 21).

Plaintiff contends that the transaction entered into on November 12, 1991, was not truly a cash transaction, but was in reality a credit transaction from the beginning. (Plaintiff's Response to Defendant's Statement of Material Facts, p. 1; Docket No. 35-2).

NOTICE OF RIGHT TO RESCIND

Quality Homes gave plaintiff a notice of right to cancel his contract on November 21, 1991, the same date the parties entered into the "Retail Installment Contract and Security Agreement." (Exhibits B, C, and D, First Amended Complaint; Docket No. 21).

15 U.S.C. § 1635(a) provides with respect to the three day cooling off period that "[t]he 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." (Emphasis added).

The regulations adopted by the Board with regard to the notice of right to rescind provide in part as follows:

> (c) Delay of creditor's performance. Unless a consumer waives the right of rescission 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.

12 CFR § 226.23(c). (Emphasis added).

Mayfield v. Vanguard Savings and Loan Association, 710 F.Supp. 143, 145 (E.D. Penn. 1989) provides:

> Whenever a consumer credit transaction results in a creditor acquiring a security interest in an obligor's home, as is the case here, § 1635(a) gives the obligor "the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures

required under this part, whichever is later . . ." 15 U.S.C. § 1635(a). Section 1635(a) requires the creditor to disclose this right to rescind in accordance with regulations promulgated by the Federal Reserve Board. Id. Failure to properly complete the right to rescission form or to provide the consumer with the material disclosures required to be made under TILA extends the rescission period until three days after the disclosures are properly made. Id.; Williamson v. W.E. Lafferty, 698 F.2d 767, 768 (5th Cir. 1983). If the disclosures are never properly made, the rescission period runs for three years from the consummation of the transaction. 15 U.S.C. § 1635(f); Williamson v. W.E. Lafferty, 698 F.2d at 768.

Plaintiff concedes that the notice of right to cancel correctly advised him that he had until November 25, 1991, to cancel the contract. However, plaintiff contends that the notice of right to cancel as given by Quality Homes did not meet the requirements of the Act and the regulations because work had commenced on his home on November 16, 1991, and continued on November 21, 22, and 23 in violation of the regulations enacted by the Board as set out above, therefore interfering with his right to make a decision about incumbering the family home without undue pressure.

Jetton v. Caughron, No. 3-87-0126, (J. Higgins) (M.D. Tenn. 1988), provides with respect to this issue:

> 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 CFR § 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 CFR § 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 CFR § 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 CFR § 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.

Where a home improvement contractor undertakes the improvements contracted for during the cooling off period, the home owner is denied an effective opportunity to act on the notice of right to cancel. Debtor Creditor Law, Matthew Bender, ¶ 3.01[F]. Creditor must delay performance during rescission period. But see, Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3rd Cir. 1990) (premature performance is a violation of 12 CFR § 226.23(c) but not a violation of § 226.23(b) which would extend the recessionary period.) See also, Smith v. Capitol Roofing Co. of Jackson, Inc., 622 F.Supp. 191 (S.D. Miss. 1985) (a technical violation).

Quality Homes violated the provisions of § 226.23(c), therefore, the plaintiff was entitled to rescind the credit transaction during the three years after consummation of the transaction. 12 CFR § 226.23(a)(3); 15 U.S.C. § 1635(f).

The undersigned Magistrate Judge, for the reasons set forth above, finds that the credit transaction at issue has been rescinded.

DISCLOSURE OF FINANCE CHARGE

Plaintiff contends that the contract price of $17,500.00 contained in the contract signed on November 12, 1991, contained an undisclosed finance charge. Plaintiff contends that the fair market value of the work contracted for was $10,889. Therefore, the contract price of $17,500.00 contained an undisclosed finance charge of $6,711. (See, Affidavit of William M. Garwood, Exhibit G, Plaintiff's First Amended Complaint; Docket No. 21).

Daniel P. Ridgeway, the salesman employed by Quality Homes Company, testified by deposition that he priced the job contracted for by plaintiff Ward, and that it would cost Quality Homes Company between $13,500.00 and $14,000.00 in actual cost to perform the contract. "And then I would put overhead and profit in there." (Ridgeway Deposition, p. 20). It may be inferred that on this $17,500.00 contract, Quality Homes had approximately $4,000.00 for overhead and profit.

Under the Federal Rules of Civil Procedure, summary judgment is proper "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 a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). On summary judgment, the parties must satisfy the following burdens of proof:

> The party moving for summary judgment bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed. R. Civ. P. 56(c)). An issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Once the moving party meets this initial burden, summary judgment is then appropriate as a matter of law against the nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552. In making a sufficient showing, the nonmoving party must "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324, 106 S.Ct. at 2553 (quoting Fed. R. Civ. P. 56(e). In opposing summary judgment, the nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole. See United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. Instead, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970). If, so viewed, a rational trier of fact could find a verdict for the

nonmoving party under the substantive evidential standard, the nonmoving party can defeat summary judgment. Id. 477 U.S. at 252, 106 S.Ct. at 2512.

Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998-9 (11th Cir. 1992).

In order to grant plaintiff's motion for summary judgment on the issue of an alleged failure to disclose the true finance charge, the court would have to weigh the evidence and make a credibility determination with respect to the deposition testimony of Daniel P. Ridgeway and the affidavit of plaintiff's expert witness, William Garwood. This the court cannot do. Therefore, plaintiff's motion for summary judgment must be denied as to this issue.

GREEN TREE'S MOTION FOR SUMMARY JUDGMENT

Defendant Green Tree's motion for summary judgment must also be denied for the same reasons set forth above.

RELIEF REQUESTED

Plaintiff seeks statutory penalties against both defendants, rescission of the credit transaction at issue, and the return of all payments made to the defendants together

with costs and attorney's fees. Plaintiff is entitled to recover statutory damages against defendant Quality Homes Company for its violation of 12 CFR § 226.23(c) (materials delivered and services performed during three day cooling off period). Plaintiff is entitled to recover statutory damages against defendant Green Tree for its failure to make a timely termination of the security interest in plaintiff's home. 15 U.S.C. § 1635(b); 12 CFR § 226.23(d)(2). Sheppard v. Quality Siding and Window Factory, Inc., 730 F.Supp. 1295, 1308 (D. Del. 1990); Aquino v. Public Fin. Consumer Discount Co., 606 F.Supp. 504 (E.D. Penn. 1985).

Green Tree's failure to terminate the security interest in plaintiff's home entitles plaintiff to retain proceeds and property given to him pursuant to this transaction. 15 U.S.C. § 1635(b); 12 CFR § 226.23(d).

The plaintiff is required to tender to the defendant the reasonable value of the property received by him. This amount is in dispute, as the defendants contend plaintiff received home improvements valued at $17,500.00 and plaintiff contends that the fair market value was $10,881.00. This dispute remains for trial unless the parties can reach an agreement.

The plaintiff would be entitled to costs and attorney's fees, and may submit an application therefor in accordance with the Local Rules of this court.

THE CROSS CLAIM

Defendant Green Tree Financial Corporation has filed a motion for summary judgment on its cross claim against Quality Homes Company based on an indemnity agreement between the parties. Green Tree seeks judgment against Quality Homes Company for all damages assessed against Green Tree pursuant to this transaction, together with all expenses and attorney's fees.

The affidavit of Paul Robinson, Regional Manager of Green Tree Financial Corporation, indicates that Green Tree paid Quality Homes $17,500.00 for the assignment of the contract entered into between plaintiff and Quality Homes Company.

Local Rule 220-1(b)(1) provides in relevant part that "[f]ailure to file a response [to a motion] shall indicate that there is no opposition to the motion." Accordingly, as no timely response was filed to defendant's motion for summary judgment, the undersigned Magistrate Judge deems this motion to be unopposed.

The applicability of Local Rule 220-1(b)(1) in the specific context of a motion for summary judgment was considered by the Eleventh Circuit Court of Appeals in Dunlap v. Transamerica Occidental Life Insurance, 858 F.2d 629 (11th Cir. 1988). In upholding the District Court's grant of summary judgment in favor of defendant, the court noted:

> In Simon v. Kroger Company, 743 F.2d 1544 (11th Cir. 1984) this court upheld the entry of summary judgment under similar circumstances. The result in Simon was based upon both a finding that the summary judgment motion was well supported and a finding that a local rule in the Northern District of Georgia--which apparently was the predecessor to one of these local rules--was properly applied.
>
> Had the district court based its entry of summary judgment solely on Local Rule 220-1(b), a different question would be presented. Local Rule 220-1(b)(1) might well be inconsistent with Fed.R.Civ.P. 56 if it were construed to mean that summary judgment could be granted as a sanction for failure to respond to a motion for summary judgment. Cf. Arundar v. DeKalb Cty. School Dist., 620 F.2d 493 (5th Cir. 1980). In this case, however, Transamerica's motion was supported by evidentiary materials of record, and the district court's orders indicate that the merits of the motion were addressed.

Dunlap, 858 F.2d at 632. See also, Kinder v. Carson, 127 F.R.D. 543, 545 (S.D. Fla. 1989).

In its motion for summary judgment, Green Tree has produced evidence of the existence of an indemnity agreement between itself and defendant Quality Homes. Accordingly, the undersigned finds that defendant's motion for summary judgment on its cross claim is well supported. Accordingly, the undersigned finds that defendant's motion for summary judgment on its cross claim against defendant Quality Homes should be GRANTED.

Should the parties be unable to agree on the costs and attorney's fees to be awarded, motions may be submitted in accordance with the Local Rules.

MAGISTRATE JUDGE'S RECOMMENDATION

The undersigned Magistrate Judge, for the reasons set forth above, recommends that plaintiff's motion for summary judgment be GRANTED IN PART AND DENIED IN PART as set forth above. It is further recommended that Green Tree's motion for summary judgment against the plaintiff be DENIED and that

Green Tree's motion for summary judgment against defendant, Quality Homes Company, be GRANTED.

IT IS SO REPORTED AND RECOMMENDED, this 20th day of October, 1993.

William L. Harper

WILLIAM L. HARPER

UNITED STATES MAGISTRATE JUDGE