RECEIVED, 3/30/2017 8:59 PM, Mary Cay Blanks, Third District Court of Appeal

IN THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

Case No. 3D17-0001

JOHN M. BENNETT, and
NANCY L. BENNETT, his wife

Appellants/Petitioners,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
HOME LOAN ALLIANCE, LLC
F/K/A LEVERAGE FINANCIAL, LLC D/B/A LF LOANS,
JAMAL M. WILSON, and
GTE FEDERAL CREDIT UNION,

Appellees/Respondents.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
Lower Court Case No. 12-41600-CA-22

REPLY BRIEF

REX E. RUSSO, ESQ.
Attorney for Appellants/Petitioners
1550 Madruga Ave., #323
Miami, FL 33146
305-442-7393
e-Mail: RexLawyer@prodigy.net

TABLE OF CONTENTS

(Bookmarks (tabs) should be opened in the pdf reader to "jump" to the content items. The referenced pages of this brief may also be quickly accessed by using the page locator of your pdf reader.)

Table of Citations... 3

Cases... 3

Statutes... 3–4

Rules... 4

Other... 4

Argument in Rebuttal.. 5

JUST THE FACTS, NOTHING BUT THE FACTS............................. 5

TILA RESCISSION IS A RIGHT, NOT AN EQUITABLE REMEDY 9

NOT AN ACTION FOR FRAUDULENT INDUCEMENT.................. 10

RELYING UPON A FORGED DOCUMENT IS NO EXCUSE........... 12

THE ADDITIONAL PMI AMOUNT WAS TILA INTOLERABLE..... 14

TILA'S COOKIE JAR PROVISION... 16

THERE IS AN "ALICE IN WONDERLAND" ANALOGY................. 18

Certificate of Font Size, Certificate of Service, Signature, Bar Number........... 19

TABLE OF CITATIONS

CASES:

Beach v. Great Western Bank, 670 So. 2d 986 (Fla. 4th DCA 1996)........................ 9

Beach v. Great Western Bank, 692 So. 2d 146 (Fla. 1997)....................................... 9

Davis v. Wells Fargo Bank, N.A., No. C 10-0489 PJH,
(U.S.D.C. N.D. Cal., September 26, 2011) (unpublished).. 16

In re Sterten, 546 F.3d 278 (3rd Cir. 2008).. 14

Inge v. Rock Financial Corp., 281 F.3d 613 (6th Cir., 2002)................................... 14

Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015).......................... 9

Knight Energy Services, Inc. v. Amoco Oil Co., 660 So. 2d 786 (Fla. 4th DCA 1995) 5

Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973)....................... 10

Pridegon v. Gates Credit Union, 683 F.2d 182 (7th Cir. 1982)................................ 10

Rowland v. Magna Millikin Bank, 812 F. Supp. 875 (C.D. Ill. 1992)....................... 12

Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407 (7th Cir. 1980)............. 10

STATUTES AND REGULATIONS:

(All cited federal statutes and regulations remain unchanged from time of the initiation of this action before the lower court in 2012, or the closing of the subject transaction. References to Regulation Z provisions codified at 12 C.F.R. §1026.1 *et seq.* are to the regulations as put into effect on 12/30/2011.)

12 CFR §1026.18d.1.. 15

12 CFR §1026.18s.3.i.D.. 13

12 CFR §1026.19a.1.i.. 10

12 CFR §1026.19a.1.ii... 11

12 CFR §1026.19a.2... 11

12 CFR §1026.19a.4... 11

12 CFR §1026.22a.. 16

12 CFR §1026.23g.1.. 15

12 CFR §1026.23g.2.. 16

15 U.S.C. §1601 .... 10, 13

15 U.S.C. §1605(f).. 15

15 U.S.C. §1640(b)... 17

RULES:

Fla. R. App. P. 9.210(a)(2)... 19

OTHER AUTHORITIES/PUBLICATIONS:

Alice in Wonderland: the never-ending adventures
The Guardian, March 20, 2015, by Robert Douglas-Fairhurst......................... 18

ARGUMENT IN REBUTTAL

Appellants introductory statement and terms from the Initial Brief are incorporated herein. Use of the term "defendants united" herein refers to all the appellees to this action as defendants in the court below who filed a single answer and a single motion for summary judgment.

JUST THE FACTS, NOTHING BUT THE FACTS

While the homeowners, as the non-moving party for summary judgment, may apply inferences from the identified, but unverified, documents placed in the record by defendants united — the same does not hold true for defendants united. *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 788 (Fla. 4th DCA 1995). Only if the defendants had tendered competent evidence in support of their motion would the burden have fallen upon the homeowners to come forward with opposing evidence demonstrating that a question of material fact exists. *Knight Energy* at 788. The recitations of defendants' counsel do not amount to facts (note the frequent absence of record references in the answer brief), nor do references to matters outside the record constitute facts. Accordingly, the following are some of the more noteworthy statements asserted by defendants united as "facts," but which are not:

- *"Borrowers repeatedly signed numerous documents under oath and penalty of perjury acknowledging that there would be private mortgage insurance..."* See, page 2 of the Answer Brief.

  "Borrowers ... acknowledged, under oath, that there would be PMI on this loan in both the application and the Truth-in-Lending Disclosure Statement." See page 2 of the answer brief.

There are no such documents. The initial TILA disclosures were signed only to acknowledge receipt [Ax 270; Ax 278]. The loan applications only acknowledged that the homeowners' disclosures (not the then unknown lender's disclosures) contained accurate and truthful information [Ax 117, ¶IX(1); Ax 248, ¶IX(1); Ax 267, ¶IX(1)]. More importantly, as argued later below, those documents do not result in the conclusion that the homeowners were acknowledging that "there would be PMI" on the loan. Accordingly, the homeowners have no obligation for paying PMI.

- *"At some point after the closing, Borrowers received a monthly statement from GTE that included as part of the charges an amount for PMI in the amount of $100.92 to go into the Borrowers' escrow account."* See page 3 of the answer brief.

We have no way of knowing that the PMI payments went into the escrow account, or that a portion of the monthly payment were suppose to go into escrow for PMI as opposed to being paid directly to the mortgage insurer. We have no knowledge because there is no affidavit or other attestation to those assertions.

- *"JAMAL WILSON of LF LOANS, the original lender, responded to Borrowers' attorney advising that mortgage insurance was a requirement on all HARP loans during the refinance process and that the Borrowers were aware of the requirement."* See page 4 of the answer brief.

While it is true that the mortgage broker responded with such a statement, there has been no proffered document or reference to any regulation or law supporting the allegation of PMI being a HARP requirement. Mortgage broker did not state the homeowners were aware of the PMI requirement for the closed loan, nor have the

defendants united presented an affidavit or other attestation asserting that the homeowners were aware of the HARP requirement. All the mortgage broker was stating [Ax 243] is the same argument now propounded by his counsel which treats the homeowner's claim as alleging fraud in the inducement — that being, the homeowners knew of the possibility of a PMI obligation because buried in their application was an amount for "**proposed** mortgage insurance" (note it does not state "**required** mortgage insurance") [Ax 115, ¶V; Ax 265, ¶V]. Likewise the referred to initial TILA disclosures, lacking any line entry specifically for a PMI amount, disclose nothing regarding a PMI payment [Ax 269, Ax 277].

- *"On October 17, 2012, GTE sent the borrower the monthly payment statement which now reflected that the PMI charge had been removed."* See page 5 of the answer brief.

While the homeowners admit to receiving a statement dated October 17, 2012 (for the payment due November 1, 2012), which for the first time correctly reflected the monthly statement amount disclosed, there is no affidavit or other attestation asserting that in fact the statement was mailed on October 17, 2012. Nevertheless, that date was already more than 60-days past the time allowed by the homeowner's demand. For their part, the homeowners' affidavit attests that they did not receive the statement dated October 17, 2012 until **after** their lawsuit had been filed on October 23, 2012 [Ax 310, ¶5, ¶8].

- *"The [homeowners'] affidavit did not controvert any of the evidence or arguments Appellees had made other than to claim that the lawsuit was filed on October 23rd without the Appellants having yet received the monthly statement dated October 17th which statement no longer had PMI contained on it. [bracketed word added for clarity]."* See page 9 of the answer brief.

This misstatement fails to disclose that the homeowner's affidavit verified that the Payment Letter to Borrower they received from the mortgagee contained forged signatures [Ax 309, ¶2, ¶4, ¶6]; that the homeowners did not agree to pay PMI [Ax 309, ¶3]; that the homeowners did not want PMI [Ax 309, ¶3]; that the homeowners knew they had a final right any time prior to closing to either accept or reject the loan [Ax 309, ¶3]; that the homeowners received a copy of the forged Payment Letter to Borrower from the mortgage lender [Ax 309, ¶6]; and, that the defendants' delays leading to the filing of the lawsuit caused the homeowners to incur additional attorney's fees and costs beyond those originally demanded [Ax 309, ¶5, ¶7, ¶8].

- *"Borrowers were never damaged since payment of money into their own escrow account is not legal damage on top of which the $302.76 were returned before the pleading was filed [sic]."* See page 12 of the answer brief.

No affidavit or other attestation supports this assertion. Furthermore, the united defendants admitted at page 5 of their answer brief that the $302.76 was tendered **after** the lawsuit had been filed [see also the check at Ax 89, and see homeowners' affidavit in opposition Ax 309, ¶7].

- *"Given the written documents in July of 2012 verifying that PMI was no longer charged on this loan, there was no actual doubt or controversy when the lawsuit was filed."*

There is no such document. Apparently, this reference is to the letter from the mortgage broker stating that the mortgagee was "able to remove" the PMI from the loan [Ax 257]. However, PMI was not removed from the statement sent in August 2012 for September 1st's payment [by inference, and see Ax 309, ¶5], nor from the statement sent in September 2012 for October 1st's payment [Ax 262].

TILA RESCISSION IS A RIGHT, NOT AN EQUITABLE REMEDY

Defendants united, led by the mortgage originator, continue to mine factual statements hoping to build an equitable argument as to why rescission of the mortgage was denied the homeowners. Disclosure violations under TILA lead to a right of rescission as a matter of law. *Beach v. Great Western Bank*, 670 So. 2d 986, 992 (Fla. 4th DCA 1996), affirmed by *Beach v. Great Western Bank*, 692 So. 2d 146 (Fla. 1997) (note court did not agree that rescission was an equitable right under common law, but instead found that under TILA rescission is a new statutory right). Rescission under TILA stands in stark contrast to common law rescission. TILA is not a codification of equitable rescission. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 793 (2015).

TILA demands exactness in the loan disclosure process and metes out severe remedies against lenders who violate its provisions. These civil remedies, the most severe of which is rescission of the mortgage, are geared precisely to dissuade lenders from improper competition in the form of contrived disclosures to borrowers. As

stated by the Supreme Court in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 at 363-65 (1973), TILA is intended to cure abuses arising from consumer ignorance by requiring lender disclosures in the hope that consumers might then intelligently shop for credit by comparing uniform terms. See also 15 U.S.C. §1601. Allowable remedies under TILA often lead to some head scratching when the borrower's entitled recovery appears to be disproportionate to the harm caused. "The damages under the statute serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations, but the measure of damages is not so severe as to render it penal." *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407 (7th Cir. 1980) overruled on other grounds, *Pridegon v. Gates Credit Union*, 683 F.2d 182 (7th Cir. 1982).

NOT AN ACTION FOR FRAUDULENT INDUCEMENT

Loan applications do not contain disclosures nor commitments from lenders. In the application process, the borrower commences shopping for a competitive mortgage by submitting an application to a lender. TILA requires that the lender respond with an the initial Truth-in-Lending disclosure statement.[1] 12 CFR §1026.19a.1.i. The disclosure must state somewhere that the borrower is not required to complete the agreement merely because they received the preliminary

[1] For loans closed after October 3, 2015, the initial Truth-in-Lending disclosure is now called a loan estimate, and the final Truth-in-Lending disclosure required before closing is called the Closing Disclose.

disclosures or signed a loan application. 12 CFR §1026.19a.4. Borrowers then use the initial disclosures to decide whether to proceed further with the application process by submitting an application fee and documents in support of their application. 12 CFR §1026.19a.1.ii. Accordingly, initial TILA disclosure statements contain the following phrase: "This is neither a contract nor a commitment to lend." [Ax 269; Ax 277, just below document title]. Furthermore, there is nothing on the TILA initial disclosure statements delineating an amount that would be paid for PMI. In fact, PMI appears to be excluded in those initial TILA disclosure statements by the reference: "Est. Taxes + (plus) Insurance (Escrow) - (minus) Includes Private Mortgage Insurance" (words "plus" and "minus" added for clarity). Compare the initial TILA disclosures [Ax 269, Ax 277] with the final disclosure just prior to closing which clearly does not include mortgage insurance [Ax 97].

In any event, it would be a mistake to go off on a tangent regarding whether the initial disclosures included an amount for PMI. Defendants united apparently wish to have this court view the homeowners' allegations for rescission as something akin to fraud in the inducement and twist every allegation toward that objective by repeating allegations out of context. The only TILA disclosure that ultimately matters is the final TILA disclosure prior to closing. The final disclosure can be made up to seven days prior to the actual closing. 12 CFR §1026.19a.2. In other words, acknowledgments of the final TILA disclosures could have been "**previously signed**

for the loan given" [see Ax 15, ¶9, ¶19, ¶35 of the second amended complaint], or, as they were, signed at the closing table. Homeowners never contend that they were tricked or deceived into signing the mortgage, which has never been the reason for the action filed, and accordingly homeowners' action does not sound remotely similar to an action for fraud in the inducement.

PMI was not in the final disclosures for the closed loan. When the mortgagee nevertheless charged PMI to the homeowners (because according to them it was a HARP requirement), TILA was violated. Whether the homeowners knew or did not know that PMI **might be** charged as part of the loan that closed is irrelevant. In fact, if one of the final disclosure documents had disclosed the PMI amount in the calculations, for instance the Payment Letter to Borrower, and another document did not include the PMI, for instance the Truth-In-Lending Disclosure of the APR, then the conflicting disclosures would overall be insufficient thus favoring the homeowners. *Rowland v. Magna Millikin Bank*, 812 F. Supp. 875, 879–880 (C.D. Ill. 1992). TILA imposes strict liability. *Rowland* at 878.

RELYING UPON A FORGED DOCUMENT IS NO EXCUSE

Similar to the irrelevance of the initial disclosure, the forged Payment Letter to Borrower is generally irrelevant. The importance of that forged letter is that it was being presented by the mortgagee as its justification for charging the PMI amount. Homeowners' pleadings asserted that the document was forged in order to make it

clear that the mortgagee had a problem if it were to assert that TILA disclosure requirements had been met — thus justifying its charge for PMI. On the other hand, the forged Payment Letter to Borrower is very relevant to the action asserting fraud in the execution of the document (i.e. forgery).

Yes, "TILA is quite specific in stating that it applies to disclosures that are part of the closing of a loan." 15 USC §1601 *et seq* [see page 18 of the answer brief]. The final disclosures made to the homeowners at closing were that they would be charged a monthly amount of $1,237.96 [Ax 99]. Instead, they were charged the undisclosed monthly amount of $1,338.88 [Ax 39]. That alone is a TILA violation. 12 CFR §1026.18s.3.i.D. That the mortgagee presented a forged Payment Letter to Borrower admittedly has nothing to do with the improper disclosure of the monthly payment amount — other than being presented by mortgagee as justification for the improper charge. If there were no forged document, since an undisclosed monthly amount was charged, there would still be a TILA violation. Defendants' belief that the forged document somehow rendered the final disclosures proper escapes all logic.[2]

---

[2] Defendants united go so far as to assert that, "Since Borrowers claimed that there never was PMI on this loan, the disclosures at closing were completely correct." [See page 19 of the answer brief.] But if the disclosure was correct, and PMI was required for all HARP loans as alleged by the mortgage broker, then why was PMI omitted from the final disclosures, yet nevertheless billed to the homeowners? In fact, PMI was never contractually a part of the loan as it was not included in the final disclosures to the homeowners. PMI was nevertheless made part of the loan by the mortgage originator, because according to him it was required. It was billed although not disclosed.

Defendants' united argument is essentially that a lack of disclosure of any PMI amount brings the matter outside of TILA, whereas a disclosure of a PMI amount that was less than the actual PMI amount would have been potentially actionable. Likewise, defendants' united argument is that reliance upon a forged document as the reason for charging an undisclosed amount is excusable, but reliance upon an authentic document for charging an undisclosed amount would not have been excusable. If the defendants' united argument were correct, then forging a document as the reason for charging an undisclosed amount would be the perfect ruse. But, defendants united are not correct. It does not matter what reason leads to the charge of an undisclosed amount, the mortgage holder is ultimately liable for rescission.

THE ADDITIONAL PMI AMOUNT WAS TILA INTOLERABLE

Defendants united never raised an affirmative defense asserting that the TILA violation was within an allowed tolerance [see page 19 of the answer brief] and thus immaterial, nor did they make it an issue supporting their motion for summary judgment. *Inge v. Rock Financial Corp.*, 281 F.3d 613, 621 (6th Cir., 2002) (tolerance limitation "does not impose an independent pleading hurdle for TILA plaintiffs"; the tolerance provision is best construed as "a potential affirmative defense"). Although the tolerance provision is best construed as "a potential affirmative defense," it is not a defense that is waived if not pled. *In re Sterten*, 546 F.3d 278, 287 (3rd Cir. 2008) (tolerance provision "is not an affirmative defense that

must be pled specifically by a defendant"). Still, the potential defense should have been raised by defendants united at the time of their motion for summary judgment for the issue to be relevant here. In any event, defendants united now point to the tolerance issue as a factual dispute in the belief that this factual dispute supports their argument. One suspects that if defendants united had considered stating such a defense, they shied away from it because the PMI amounts billed to the homeowners each month far exceeded the very narrow tolerance allowed the mortgagee under 15 U.S.C. §1605(f) as further promulgated by Regulation Z.

The tolerance under 12 CFR §1026.18d.1 allows the disclosed finance charge to be considered accurate "if the amount disclosed as the finance charge: **i.** Is understated by no more than $100; or **ii.** Is greater than the amount required to be disclosed." Neither exception (i) nor (ii) apply. In fact, the amount of $100.00 was exceeded by just the first month's PMI charge of $100.92, which is equally applicable to the analysis under 12 CFR §1026.23g.1.

The tolerance under 12 CFR §1026.23g.1, which governs the homeowners' rescission remedy, allows the disclosed finance charge to be considered accurate "if the disclosed finance charge: **i.** Is understated by no more than ½ of 1 percent of the face amount of the note or $100, whichever is greater; or **ii.** Is greater than the amount required to be disclosed. Neither exception (i) nor (ii) apply. An increase of $100.92 over the $1,237.96 (the disclosed monthly payment amount) can clearly be seen as greater than ½ of 1 percent.

The tolerance under 12 CFR §1026.23g.2 is not applicable. Although the homeowners' loan with the mortgage broker did entail "refinancing of a residential mortgage transaction with a new creditor," and there was "no new advance and no consolidation of existing loans," the transaction is pulled out of 12 CFR §1026.23g.2 by the parenthetical phrase "other than a transaction covered by §1026.32. Even if the 1% tolerance rule under 12 CFR §1026.23g.2 did apply, the mortgagee would still clearly find itself in violation of TILA. The $100.92 monthly increase, as a percentage of the "face amount of the note" [promissory note at Ax 180] charged on a monthly basis is readily seen as an increase of nearly 10% over the $1,095.18[3] stated in the note. Accordingly, it is clear that the addition of the undisclosed PMI charge brought both "the amount financed and the annual percentage rate" over a 1% discrepancy. See, 12 CFR §1026.23g.2.

TILA'S COOKIE JAR PROVISION

There is no "60-day" cure provision in Regulation Z, Subpart D, as stated by the Defendants' counsel. However, there is a 60-day cure provision found in TILA

---

[3] The "face amount of the note," does not include additional expenses that factor into the cost of the loan. When factoring in the additional expenses to arrive at the APR as required by TILA and Regulation Z, the total amount financed increases, the amount of the monthly payment increases, and the annual percentage rate increases thus providing a truer cost of the loan. See, *Davis v. Wells Fargo Bank, N.A.,* No. C 10-0489 PJH, (U.S.D.C. N.D. Cal., September 26, 2011) (unpublished). See also 12 CFR §1026.22a.

at 15 U.S.C. §1640(b), which states:

> A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, **and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor**, the creditor or assignee notifies the person concerned of the error **and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed**, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower **[bold emphasis added]**.

In order for the mortgagee to have availed itself of this qualified cure provision, and stuff the cookie back in the jar with impunity, the mortgage lender essentially had to slap its own hand before being found out, and then timely make "whatever adjustments in the ... account [were] necessary to assure that the [homeowners would] not be required to pay an amount in excess of the charge actually disclosed" [bracketed words substituted for clarity]. Here, the error was disclosed by the homeowners, which automatically removed this exemption from the mortgagee's reach. Furthermore, even after being notified by the homeowners, the mortgagee failed to make the required adjustments within 60-days of such notice, and instead continued to bill the homeowners an amount "in excess of the charge actually disclosed." Accordingly, the only way the mortgagee could have obtained immunity

from the homeowners' legal action would have been for the mortgagee to fully and timely comply with the homeowners' demands.

THERE IS AN "ALICE IN WONDERLAND" ANALOGY

> "*Alice's Adventures in Wonderland* is infinitely greater than its critics. Of the thousands of books and articles it has inspired over the past 150 years, very few treat it simply as a piece of joyful nonsense. More often it has been viewed as a mystery requiring a solution, with every detail being cross-examined ..." *The Guardian, March 20, 2015, by Robert Douglas-Fairhurst*

Just like *Alice's Adventures in Wonderland*, TILA is often "viewed as a mystery requiring a solution, with every detail cross-examined." While TILA can not compete with *Alice's Adventures in Wonderland* when it comes to longevity, TILA has been around for over nearly 50 years.[4] That is long enough for TILA to have also proven itself "greater than its critics," especially those who read TILA as a fairytale. Full of actual complexities, unlike the metaphoric quandaries found in *Alice's Adventures in Wonderland*, TILA has never been treated by the courts as "a piece of joyful nonsense."

WHEREFORE, the relief as demanded by the initial brief should be granted, the summary judgment reversed, and the case remanded for further proceedings consistent with the law.

---

[4] The Truth in Lending Act was originally Title I of the Consumer Credit Protection Act, Pub.L. 90–321, 82 Stat. 146, enacted June 29, 1968.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), that the preceding computer generated brief has been prepared in Times New Roman 14-point font and is proportionally spaced.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Scott Jay Feder, attorney for the Appellees/Respondents herein, Defendants below, by e-mail delivery to scottj8@aol.com, on this March 30, 2017.

/s/

Rex E. Russo
Florida Bar #0331597

[An electronic copy of this brief was sent via e-mail to the court pursuant to administrative order, A03D05-1.]