

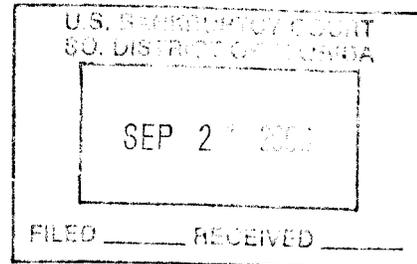
SEP 21 2006

ORDERED in the Southern District of Florida on _____



Paul G. Hyman

Paul G. Hyman, Judge
United States Bankruptcy Court



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

CASE NO.: 06-11385-BKC-PGH

Joan A. Figueroa,
Debtor.

CHAPTER 13

Joan A. Figueroa,
Plaintiff,

ADV. NO.: 06-1515-BKC-PGH-A

v.

Nicole Smith, Mauricio N.
Smith, et. al.,
Defendants.

ORDER GRANTING MOTIONS TO DISMISS ADVERSARY COMPLAINT AS TO
DEFENDANTS AMERICA'S WHOLESALE LENDER, WELLS FARGO BANK, N.A. AND
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

THIS MATTER came before the Court on September 7, 2006 upon America Wholesale Lender's, Wells Fargo Bank, N.A.'s ("Wells Fargo"), and Mortgage Electronic Registration Systems, Inc.'s ("MERS") (collectively the "Movants") Motions to Dismiss Adversary

Complaint with Prejudice (the "Motions").¹ On August 31, 2006, Joan A. Figueroa (the "Debtor") filed a response to the Motions (the "Response"). The Court, having considered the Motions, Response, applicable law, argument of counsel, and being otherwise fully advised in the premises, **GRANTS** the Motions and dismisses the adversary complaint against the Movants.

ALLEGATIONS OF THE COMPLAINT

The Debtor owned and resided at real property (the "Property") located in Boca Raton, Florida, in which she has claimed an equitable and homestead interest.² In May of 2005, Debtor had an existing mortgage to Citifirst Mortgage for approximately \$145,000. Debtor, anxious to supplement her limited income, consulted with potential lenders in the contemplation of obtaining a reverse mortgage on the Property. Debtor met with defendant Nicole Smith ("Ms. Smith"), a licensed mortgage broker employed with defendant Signature Lending Group,

¹ On July 24, 2006, defendant America's Wholesale Lender filed a Motion to Dismiss Adversary Proceeding. Also on July 24, 2006, defendant Wells Fargo Bank, N.A., filed a Motion to Dismiss Adversary Proceeding. Also on July 24, 2006, defendant Mortgage Electronic Registration Services filed a notice of Joinder to America's Wholesale Lender's Motion to Dismiss and adopted and supplemented the existing Motions to Dismiss. Because all three motions advance identical arguments, they will be identified as "the Motions."

² The facts are taken from the allegations of the complaint, which are taken as true for purposes of the motion to dismiss. See Marsl v. Butler County, 268 F.3d 1014, 1023 (11th Cir. 2001) (en banc).

Inc. Ms. Smith represented to Debtor that she was not eligible for any kind of mortgage because her credit scores were too low. Ms. Smith also informed Debtor that the property was about to be foreclosed upon by Citifirst Mortgage, and that because of this a lis pendens was filed. Ms. Smith proposed that Debtor sell the Property to Ms. Smith, who would lease the Property back to Debtor for a year, with an option to repurchase the Property.

On May 20, 2005, the Debtor entered into a transaction to sell the Property to Ms. Smith. The transaction was memorialized by a warranty deed and bill of sale in Ms. Smith's favor. The Debtor and Ms. Smith also signed a separate document titled "Real Estate Lease and Option Agreement" through which the Debtor leased the property back from Ms. Smith and was given an option to repurchase it for one year, until May 19, 2006. This document was not recorded until June 16, 2005.

Ms. Smith financed the purchase of the Property with a loan from Wells Fargo. On May 20, 2005, Ms. Smith executed a promissory note in favor of Wells Fargo in the amount of \$216,000. Also on May, 20, 2005, Ms. Smith secured the promissory note by signing a mortgage. The Debtor was not a party to the transaction between Wells Fargo and Ms. Smith.

After May 20, 2005, Debtor continued to reside at the Property. Ms. Smith has never resided at the Property.

On January 6, 2006, Ms. Smith refinanced the property and

paid off Wells Fargo with a \$291,000.00 loan from America's Wholesale Lender. Ms. Smith signed a promissory note and mortgage. The mortgage designated MERS as mortgagee and as America's Wholesale Lender's nominee. As in the original mortgage transaction, the Debtor was not a party.

On May 22, 2006, Debtor filed this adversary proceeding to determine the validity, priority and extent of interest in the Property held by all defendants. The Debtor's complaint seeks a judgment against Ms. Smith, and individuals and corporations related to her (the "Smith-Related Defendants") for fraudulent inducement into the sale and leaseback transactions. The Debtor alleges the Smith-Related Defendants defrauded her out of the equity in her property by underpaying for it, charging excessive transaction costs, and diverting funds at closing to repay non-existent liens. The Movants are not accused of participating in the alleged fraud.

Debtor's complaint also seeks a determination that all defendants have violated the Federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, and 12 § C.F.R. 226.1 ("Regulation Z"). She alleges the sale and leaseback to Ms. Smith constituted a mortgage loan transaction, and that the rent she paid actually were installment payments. Debtor asserts the transaction was governed by TILA and subject to the right of rescission in 15 U.S.C. § 1635 and Regulation Z. Debtor seeks to

rescind the loans made by Wells Fargo and America's Wholesale Lender, in addition to damages and attorney's fees. The Debtor claims a right to quiet title against Wells Fargo and America's Wholesale Lender.

In the Motions, Movants argue that Debtor lacks standing to sue them under TILA. Movants also argue that the questions of whether the Smith-Related Defendants committed fraud or whether TILA governs the sale and leaseback transactions between the Debtor and Ms. Smith are not germane to the Movants. Therefore, Movants conclude that the complaint should be dismissed as to them.

CONCLUSIONS OF LAW

A. *Motion to Dismiss*

A defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as adopted by Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure, should be granted when the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Welt v. Leshin (In re Warmus), 252 B.R. 584, 588 (Bankr. S.D.Fla. 2000), aff'd, 275 B.R. 688 (S.D. Fla. 2002) (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In making this determination, the court must "take all the allegations in the complaint as true and view the complaint in the light most favorable to the plaintiff." Martinez v. American Airlines,

Inc., 74 F.3d 247, 248 (11th Cir. 1996). The Court's task in ruling on a motion to dismiss is not to determine whether the plaintiff is likely to prevail on the merits of the complaint, "but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test." Phelps v. Kapnolas, 308 F.3d 180, 184-185 (2d Cir. 2002) (quoting Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998)). For the reasons discussed below, the Court finds that the Movants have met their burden under the motion to dismiss standard and that the Motions should be granted.

B. *The Debtor Was Not Entitled to Receive TILA Disclosures From the Movants Because the Movants' Loan Transactions With Ms. Smith Were Not Rescindable*

TILA was enacted for the "broad purpose of promoting 'informed use of credit' by assuring 'meaningful disclosure of credit terms to consumers.'" Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 559, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980) (quoting 15 U.S.C. § 1601). TILA requires that disclosures be made "to the consumer who is obligated ... on a consumer credit transaction." 15 U.S.C. §§ 1631(a), 1638; 12 C.F.R. §§ 226.2, 226.17. Consumer generally refers to the person to whom credit is extended, i.e., the borrower. 15 U.S.C. § 1602(h); 12 C.F.R. § 226.2(a)(11).

TILA provides additional protections in loan transactions

secured by the borrower's principal dwelling. The most important of these is the right to rescind the transaction within a specified period of time. See generally, 15 U.S.C. § 1635; 12 C.F.R. § 226.23

Regulation Z, issued by the Federal Reserve Board to elaborate and expand upon the legal framework established by TILA, sets forth detailed disclosure requirements to be made to consumers. MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885, 899 (N.D. Ill. 2000). Pursuant to Regulation Z, the definition of "consumer" is expanded when a loan transaction is rescindable under TILA. See 15 U.S.C. § 1635; 12 C.F.R. § 226.2(a)(11). If a transaction is rescindable under TILA, a "consumer" is defined as "a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest." 12 C.F.R. § 226.2(a)(11).

While the Debtor concedes that she was not a borrower on the Movants' loan to Ms. Smith, she alleges satisfying the broader definition of "consumer" applicable to a rescindable transaction.

The Movants disagree that the Debtor retained an ownership interest after the sale and leaseback transaction with Ms. Smith, and additionally argue that the Court need not even consider the ownership interest because under TILA the loan transaction was not rescindable.

In order for a mortgage loan transaction to be rescinded, it must fall within the scope of 15 U.S.C. § 1635. Subsection (a) of Section 1635 states that:

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any 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...

15 U.S.C. § 1635(a) (emphasis added).

The Property was not the principal dwelling of the person to whom credit was extended. The allegations of the complaint and the exhibits attached thereto show that Ms. Smith was the person to whom credit was extended. The complaint also states that Ms. Smith never resided at the Property. The Debtor has been the sole resident at the Property at all times material to this proceeding. In paragraphs 107 and 119 of the adversary complaint, Debtor states that "[t]he described property is used as [the Debtor's] principal dwelling and was so at the time of the credit transaction."

Debtor argues that the residency of Ms. Smith is immaterial

to the Debtor's rights under TILA. Debtor argues that because she maintained an ownership interest in the Property and made the Property her primary dwelling on and after May 20, 2005, she was entitled to receive a TILA disclosure statement and accompanying notice of right to cancel. However, such a reading of TILA and Regulation Z directly contradict the plain meaning of the statute. In order to be rescindable, the property must be used as the principal dwelling of the person to whom credit is extended. See 15 U.S.C. § 1635. If the transaction is rescindable under § 1635, only then must the broader definition of "consumer" be taken into account. 12 C.F.R. § 226.2(a)(11). The factual allegations in the complaint establish that the loans were not rescindable under 15 U.S.C. § 1635.

Additionally, the HUD-1 statement filed as Exhibit F to the adversary complaint establishes that Ms. Smith obtained the loan from Wells Fargo in order to fund her acquisition of the Property from the Debtor. "Residential mortgage transactions" are exempt from rescission under 15 U.S.C. § 1635(e)(1). The subsection provides that rescission does not apply to "a residential mortgage transaction as defined in section 1602(w) of this title." 15 U.S.C. § 1635(e)(1). Section 1602(w) defines a "residential mortgage transaction" to include a "mortgage, deed of trust ... or equivalent consensual security interested **created or retained against the consumer's dwelling to finance the**

acquisition or initial construction of such dwelling.” 15 U.S.C. § 1602(w) (emphasis added). The HUD-1 statement establishes that the loan was obtained by Ms. Smith to finance the acquisition of the Debtor's Property. Under 15 U.S.C. § 1635(e)(1) and § 1602(w), the loan was a residential mortgage transaction and thus exempt from rescission under TILA.

Because the Movants loans to Ms. Smith were not rescindable, only the person to whom credit was extended - Ms. Smith - was entitled to receive TILA disclosures. See 15 U.S.C. §§ 1602, 1631, 1635, 1638; 12 C.F.R. §§ 226.2, 226.23. The Movant's were not required to provide disclosures to the Debtor. In reaching the conclusion that the loans are not rescindable, the Court will grant the Motions. However, the Court will not determine the ownership interest possessed by Debtor in the Property, the arguments of which are based upon the assumption that the loans are rescindable.

CONCLUSION

The Court finds that TILA was not violated by the Movants. Assuming all the allegations of the Debtor as true, the Debtor has failed to state a cause of action under TILA. Thus, the Motions to Dismiss must be granted as to Counts III and IV, which are hereby dismissed with prejudice. Because the Debtor has not alleged any other basis to maintain to maintain her action to quiet title against the Movants, Count IX of the Debtor's

adversary complaint is also dismissed with prejudice as it pertains to the Movants.

ORDER

Having reviewed the submissions of the parties, applicable law, and otherwise being fully advised on the premises, it is hereby:

ORDERED AND ADJUDGED that:

1. The Movants' motions are **GRANTED**.
2. Counts III and IV of the Debtor's adversary complaint are **DISMISSED WITH PREJUDICE**.
3. Count IX of the Debtor's adversary complaint is **DISMISSED WITH PREJUDICE** as it pertains to the movants.

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Copies Furnished to:

Philip J. Landau, Esq.

William P. Heller, Esq.

Sherri B. Simpson, Esq.

William P. Heller, Esq. and Philip J. Landau, Esq. are directed to serve copies of this order upon all interested parties and to file a certificate of service with the court.