

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Bradley R. Thayer and Judith N. Thayer,

Debtors.

Chapter 7 Bankruptcy

Bky 04-32735 (GFK)

In re:

American Residential Mortgage, LP

Plaintiff

Adv 04-3338

v.

Bradley R. Thayer and Judith N. Thayer,

Defendants.

**PLAINTIFF'S OBJECTION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

1. American Residential Mortgage, LP (“ARM”) the Plaintiff in this adversary proceeding, files this Objection to Defendants’ Motion for Summary Judgment and states as follows:

2. Bradley and Judith Thayer (“Defendants”) have moved for summary judgment on Counts I and II set forth in ARM’s Complaint, and on Counts I and II asserted by Defendants against ARM as counterclaims.

STANDARD OF REVIEW

3. Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate where “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.” Fed. R. Civ. P. 56(c). The party seeking summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and 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, 322-23 (1986) (quoting Fed. R.Civ.P. 56(c)). ““On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.”” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Econ. Housing Co. v. Cont’l Forest Prods., Inc.*, 757 F.2d 200, 203 (8th Cir. 1985).

4. The Supreme Court has explained that summary judgment is appropriate when a party, after adequate time for discovery, “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. In order for summary judgment to be appropriate “[a]ll the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the non-moving party.” *Johnson v. Minnesota Historical Soc’y*, 931 F.2d 1239, 1244 (8th Cir. 1991). Here, ARM has not yet answered the Defendant’s counterclaims, and neither party has conducted discovery. ARM is interested in resolving this matter quickly and does anticipate moving to the summary judgment stage quickly. Indeed, if the Court concurs with ARM’s legal analysis as set forth below and in ARM’s Motion to Dismiss, many of the issues in this litigation will be resolved and summary judgment may be unnecessary. As discussed below, ARM maintains that Defendants have not properly

introduced, or even alleged, facts that would provide a basis for summary judgment in their favor. However, should the Court determine that the Defendants have established such facts, it would be inappropriate to grant summary judgment in favor of Defendants without affording ARM an opportunity to conduct discovery with respect to such facts.

**COUNT I OF ARM'S COMPLAINT AND COUNTS I AND II OF DEFENDANTS'
COUNTERCLAIMS**
Effect of the Rescission on the TCF Note

5. Count I of ARM's Complaint and Counts I and II of Defendants' counterclaims turn on whether the TCF Note as defined below, was indefeasibly paid with proceeds of a loan that Defendants rescinded.

6. The parties are in agreement on the following facts relevant to Count I of ARM's Complaint and Counts I and II of the Defendants' Counterclaims:

(a) On September 11, 2002, Defendants executed a note and mortgage in favor of ARM in the original principal amount of \$157,700 secured by their residence. (the "TCF Note" and the "TCF Mortgage" respectively). The TCF Note and Mortgage were shortly thereafter assigned to TCF Mortgage Corporation ("TCF").

(b) On August 25, 2003, Defendant Bradley Thayer¹ signed a new note in the principal amount of \$170,000 and both Defendants executed a new mortgage on their home with ARM (the "Cancelled Loan"). The proceeds of the new note were to be used, in part, to pay the entire outstanding balance of on the TCF Note. The Cancelled Loan was rescindable under 12 C.F.R. § 226.23 ("Regulation Z"), and the initial three-day rescission period expired at midnight on August 28, 2003.

¹ In paragraph 11 of the Defendants' Memorandum of Law in Opposition to Motion to Dismiss and in Support of Cross Motion for Summary Judgment, Defendants assert that both of the Thayers signed the note. This is not correct but the difference is not relevant to the issues presented.

(c) On August 28, 2003 the Defendants rescinded the new ARM loan by signing the Notice of Right to Cancel and mailing the cancellation to ARM. The rescission notice was received by ARM sometime during the day on August 29, 2003. There is no dispute that the Cancelled Loan was properly rescinded.

(d) Sometime during the day on August 29, 2003, *after* the expiration of the three-day rescission period, the proceeds of the Cancelled Loan were disbursed,² including a disbursement to TCF to be applied to the TCF Note. There has been no allegation that the proceeds were knowingly disbursed by ARM, and in fact, the funds were disbursed before ARM had received and processed the rescission notice.

(e) ARM never filed the mortgage with respect to the Cancelled Loan.

7. What *is* in dispute with respect to Count I of ARM's Complaint and Counts I and II of Defendants' Counterclaims is the effect of the rescission on the purported payoff to TCF.

8. As set forth in the Affidavit of Ann Weinberg ("Weinberg Affidavit") submitted herewith, after receiving the cancellation notice, ARM contacted TCF recover the erroneous payment. (Weinberg Affidavit ¶ 4). TCF agreed to treat the payment as the purchase price for the TCF Note and TCF Mortgage, and ARM purchased the TCF Note and TCF Mortgage from TCF for \$151,061.76. (Weinberg Affidavit ¶ 5).

9. Defendants argue that, having received and applied the payment in error, TCF could not voluntarily reapply the payment in accordance with the wishes of all affected parties. The Defendants argue that they should receive a windfall, enjoying both the rescission of the Cancelled Loan and the payoff of the TCF Note with funds from the Cancelled Loan. Neither the facts nor the law support such a finding.

² ARM notes that pursuant to standard Minnesota practice, the checks were disbursed by the title company that closed the Cancelled Loan, not ARM.

10. ARM asserts that as a matter of law Defendants cannot argue both (rather than in the alternative) that a rescission occurred *and* that they should reap the benefits of the rescinded transaction. Upon rescission, the statute contemplates “a return to the *status quo ante*.” *Thorp Loan & Thrift Co. v. Buckles (In re Buckles)*, 189 B.R. 752, 765 (Bankr. D. Minn. 1995). Following this principle, upon rescission ARM, with the cooperation of TCF, took steps to restore the status quo and give the Defendants the benefit of their voluntary rescission. Moreover, ARM and TCF were able to reach a solution that did not require the Defendants to come up with the cash to restore the status quo, a significant benefit to the Defendants and wholly consistent with the Defendants’ arguments that ARM was required to take steps to preserve the benefits of their rescission. Because the Defendants had through their rescission of the Cancelled Loan instructed ARM, although not in time, that the proceeds of that loan should not be disbursed on their behalf, TCF and ARM were able to quickly agree that the payment to TCF was not on the Defendants’ behalf, but was a payment from ARM to TCF for the purchase price of the TCF Note and Mortgage. TCF agreed to this, ARM agreed to this, and the only other people affected, the Defendants, were by this agreement between TCF and ARM restored to the position vis-à-vis the TCF Note and TCF Mortgage that they had requested and expected when they rescinded the Cancelled Loan. Thus, they are not in a position to complain of the result.

11. This was not an instance in which any violation of the Truth in Lending Act, 15 U.S.C. § 1635 (“TILA”) or of Regulation Z, occurred. It is undisputed that the loan proceeds were distributed after the expiration of the three-day rescission period, and there has been no allegation that ARM had actual knowledge of the Defendants’ rescission in time to prevent the title company from distributing the checks. Defendants have alleged no violation of TILA or of

Regulation Z, but are basing their arguments on a purported violation of guidance set forth in the Official Commentary to Regulation Z. Official Staff Commentary to Regulation Z, Comment 23(c). As set forth below, the Defendants do not have standing to assert claimed prepetition TILA violations against ARM. Moreover, “the Truth in Lending Act by its terms imposes liability only for the violation of the statute, not for violations of Official staff commentary” *Shelton v. Mutual Sav. & Loan Ass’n, F.A.*, 738 F. Supp. 1050, 1059 (E.D. Mich. 1990) (specifically rejecting Comment 23(c) as a basis for liability). ARM, acting at all times in accordance with TILA, Regulation Z and the Defendants’ wishes, upon learning of the Defendants’ rescission, took steps to restore the status quo to the extent possible. Defendants are not entitled to a windfall in their favor, and their request for summary judgment should be denied.

12. The authorities cited by Defendants in support of their position that a payment by check is final are inapposite. The cited authorities regarding payments by check primarily address timing of such payments and do *not* hold, as Defendants suggest, that once a check has been cashed, willing parties cannot correct payments made or applied in error. The cases cited for the proposition that “once a check is presented and honored full payment is accomplished and the underlying debt is extinguished,” Defendants’ Memorandum p. 15, do not stand for, or even address, such proposition. In *Village of New Brighton v. Jamison*, 278 N.W. 2d 321 (Minn. 1979) the court addressed when a party obtains control of funds paid by check in the context of whether a lien is a charging lien or a retaining lien. The court in *Olsen v. Preferred Risk Mut. Ins. Co.*, 170 N.W.2d 581, 585 (Minn. 1969) determined that when a check was returned for non-sufficient funds upon presentment, the purported payment by check was not completed even if there had been sufficient funds when the check was mailed to the creditor. Indeed, the result the

Defendants assert would wreak havoc upon commerce, prohibiting the correction by willing parties³ of any payment errors, not just the payment error in this case. Thus, Defendants' arguments fail as a matter of law, and Defendants are not entitled to summary judgment on this basis.

13. In support of their Motion, Defendants claim that someone or something (at least two of the letters proffered may have been generated by an automated system) at TCF informed them that the TCF Note was paid. Defendants have not proffered any sworn statement from anyone at TCF competent to testify as to what particularly happened with respect to the TCF Note, and the third party letters attached to the affidavit submitted by Defendants are inadmissible hearsay. Fed. R. Evid. §§ 8.01(c) & 8.02. Thus, the Court should accord those letters no weight in this matter. Moreover, Defendants were fully aware that they had rescinded the loan that would have resulted in a payoff to TCF, thus were in no position to reasonably believe that a payoff had actually occurred.

14. Because Defendants as a matter of law cannot prevail on their assertion that the TCF Note has been paid in full and have not submitted any admissible evidence in support of such assertion, the Defendants' summary judgment motion with respect to Count I of ARM's Complaint and Counts I and II of Defendants' counterclaims must be denied.

COUNT II OF ARM'S COMPLAINT
Non-dischargeability

15. Although Defendants have moved for summary judgment on Count II of ARM's complaint, which addresses the non-dischargeable nature of any of ARM's claims arising from

³ ARM does not assert, as Defendants suggest, that the rescission automatically undid all payments made by ARM on Defendants' behalf. Discover was unwilling to cooperate in returning the payment it received in the amount of \$8,548.34, and ARM asserts that amount as a general unsecured claim against Mr. Thayer arising from the rescission.

the rescission, Defendants have not addressed Count II in their memorandum or motion. Defendants' entire allegations and discussion regarding Count II of ARM's Complaint consist of the following sentence: "The dismissal of Count II of [ARM's] Adversary Complaint is dependant (sic) on this Court granting all or part of the relief requested by Defendants based on mootness." Defendants' Motion ¶ 7, Defendants' Memorandum, p. 2. From this sentence, ARM cannot discern what grounds, either factual or legal, the Defendants are asserting, or may assert in the future, as a basis for their request for summary judgment (or dismissal) on the non-dischargeability issue. Because the Defendants have not provided either ARM or this Court with any factual or legal basis for summary judgment or dismissal on Count II, Defendants' motion with respect to Count II of ARM's Complaint should be denied.

COUNT I OF DEFENDANTS' COUNTERCLAIMS
Remaining Claim

16. In addition to the dispute that is at the heart of this adversary proceeding-- the survival of the TCF Note-- it appears that Defendants may have requested an additional item of relief in Count I of their counterclaims. At the end of paragraph 69 of Defendants' Answer and Counterclaims, the Defendants request an order "that [ARM]'s claims be disallowed"; however, the remainder of the paragraph and the Count only addresses the TCF Note issues. Although the Defendants' Motion and Memorandum are confusing on this issue, there is a possibility that Defendants are requesting that all of ARM's claims, including its general unsecured claim, be disallowed, apparently based on a purported violation of TILA.⁴ Thus, ARM believes it needs to respond to any summary judgment motion with respect to this possible claim.

⁴ As discussed in Paragraph 8 above, there has been no actual violation of TILA upon which liability could be predicated, even if Defendants had standing to assert such claims.

17. Any claim based on alleged violations of TILA is not the Defendants' to bring. Defendants in their bankruptcy schedules listed "claims arising under the Truth in Lending Act, 15 U.S.C. 1601 et seq. and related state consumer protection statutes as well as relevant common law claims against American Residential Mortgage LP #XIV and/or American Residential Mortgage Limited Partnership" as an asset. Pursuant to 11 U.S.C. § 541, all such pre-petition claims became part of the Defendants' bankruptcy estate.

18. The Defendants assert that they tendered funds to Patti J. Sullivan, the chapter 7 trustee, (the "Trustee") to purchase such claims. However, the Defendants do not contend that the Trustee sold or assigned the TILA to the Defendants. To the contrary, the Defendants agree that ARM was the winning bidder for the claims and are separately attacking the Trustee's assignment of such claims to ARM.

19. As set forth in ARM's Motion to Dismiss, and as will be more fully addressed in ARM's Reply to Defendants' Memorandum,⁵ what is undisputed that the Trustee did *not* assign the estate's TILA claims to Defendants. Even assuming *arguendo* that this Court were to find that the Trustee did not have the ability to assign such claims to ARM, the result would be that the claims remain in the estate, subject to administration by the Trustee.

20. In the time since the filing of ARM's Motion to Dismiss, the Bankruptcy Appellate Panel for the Eighth Circuit has issued an opinion directly on point, reiterating that debtors do not have standing to bring actions that belong to the estate and such proceedings must be dismissed. *Harrison v. Singer Asset Fin. Co. (In re Harrison)*, 314 B.R. 751 (8th Cir. B.A.P. 2004). In this case, the parties agree that the Trustee administered the TILA claims by selling them to the highest bidder-- ARM. While the parties dispute whether such sale was possible, it

⁵ Partially due to time constraints, and to ensure that each issue is separately and properly addressed, ARM will be submitting a separate Reply regarding its Motion to Dismiss.

is undisputed that that bidder was not the Defendants and that the Trustee has not, through any word, deed or court action, assigned the claims to the Defendants. Therefore, the Defendants have no standing to assert TILA claims against ARM, and any claim predicated on TILA claims must be dismissed, and any summary judgment based on such claims must be denied.

CONCLUSION

The Defendants cannot, as a legal matter, argue both that the Cancelled Loan was rescinded and yet claim the benefits of the rescinded loan, and they have not provided any legal basis or factual basis for such a finding by this Court. Therefore, their request for summary judgment with respect to Count I of ARM's Complaint and Counts I and II of their counterclaims should be denied.

Defendants have not asserted any legal or factual argument with respect to Count II of ARM's Complaint, and any Motion for summary judgment on this count should be denied.

With respect to any remaining claims in Count I of the Defendants' counterclaims, with respect to which Defendants are raising TILA claims, it is undisputed that the Defendants do not own such claims and have no standing to assert them. Therefore, Defendants' Motion for summary judgment on such claims should be denied.

WHEREFORE, ARM requests that the Court deny the Defendants' Motion for Summary Judgment and grant such other relief as the Court deems just and equitable.

Date: October 20, 2004

/e/ Heather B. Thayer
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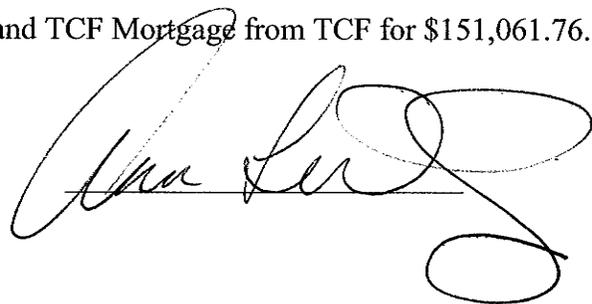
**AFFIDAVIT OF ANN WEINBERG IN SUPPORT OF
PLAINTIFF'S OBJECTION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Being duly sworn, Ann Weinberg states:

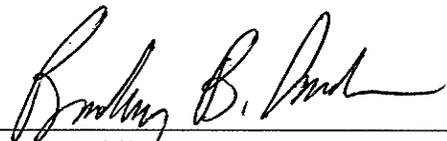
1. I am Operations Manager of American Residential Mortgage, L.P. ("ARM"), which presents this affidavit in opposition to Defendants' Motion for Summary Judgment.
2. The facts set forth in this Affidavit are based on my personal knowledge.
3. The facts set forth in ARM's Objection to Defendants' Motion for Summary Judgment are true and correct, according to the best of my knowledge, information and belief.
4. After receiving the cancellation notice from the Defendants, Bradley and Judith Thayer, ARM contacted TCF Mortgage Corporation ("TCF") to recover the payment erroneously sent to TCF.

5. TCF agreed to treat the payment as the purchase price for the TCF Note and TCF Mortgage, and ARM purchased the TCF Note and TCF Mortgage from TCF for \$151,061.76.

Further Affiant sayeth not.



Subscribed and sworn to before me
this 20th day of October, 2004



Notary Public

