SCAN

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. THOMAS A ADAMS,
Supreme Court Justice

FORECLOSURE PART
NASSAU COUNTY

HSBC USA, NATIONAL ASSOCIATION AS TRUSTEE FOR NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2,

Plaintiff

INDEX NO.: 5183/08
MOTION SEQ. # 3

Against

JOSEPH CHERNILAS, SHAUL HORAN, et al,

Defendants

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The plaintiff, HSBC Bank USA, National Association as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-through Certificates Series 2006-AF2, (hereafter HSBC) moves this Court for Summary Judgment dismissing the Answer of the Defendant, Joseph Chernilas, (hereafter Chernilas), pursuant to CPLR §§ 3211 and 3212 and for permission to treat said Answer as a Limited Notice of Appearance. Further, HSBC moves for the appointment of a Referee to determine the amount due and to ascertain whether the premises may be sold in parcels and for permission to drop "John Doe" as a party as well as to delete the address of the plaintiff. HSBC requests that the caption of the action be amended to reflect such changes. The defendant opposes the Motion for Summary Judgment and Order of Reference.

This action is one to foreclose on a mortgage in the amount of $1,330,000.00, held by the plaintiff on premises known as 22 Shore Park Road, Great Neck, New York. HSBC commenced the action on or about March 19, 2008 with the filing of the Summons and Complaint. The defendant served a Verified Answer, Affirmative Defense and Counter-claim dated May 23, 2008, to which the plaintiff replied on May 30, 2008. On June 16, 2008 the defendant made a request for production. Subsequently, on or about January 9, 2009 the plaintiff filed its first motion for summary judgment and an order of reference. The defendant cross-moved for a response to his

request for production. On April 28, 2009, the Court denied the plaintiff's motion and ordered it to respond to the defendant's discovery demand. The plaintiff has now filed the instant motion.

In order to establish a prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default. (**US Bank National Association v Alvarez,** 49 AD3d 711 [2nd Dept. 2008]). The burden then shifts to the defendant to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud or oppressive or unconscionable conduct on the part of the plaintiff. (**Nassau Trust Co. v Montrose Concrete Products Corp.**, 56 NY2d 175, 183 [1982]).

Here, by submitting the mortgage, unpaid note and affidavits by Jaime Walls, a default litigation specialist of the loan servicer, Wells Fargo Bank, N.A. detailing the default, the plaintiff has established a prima facie entitlement to summary judgment.

In order to preclude the granting of the plaintiff's motion, the burden now shifts to the defendant to establish that there is a triable issue of fact. The defendant asserts that the plaintiff cannot foreclose on the mortgage because he is permitted to, and has elected to, rescind the mortgage, pursuant to the federal Truth in Lending Act (TILA).

Congress enacted TILA in order to protect consumers and enable them to understand the ramifications of the extension of credit. The Federal Reserve Board (FRB), which administers TILA, has in turn, promulgated a comprehensive set of rules known as Regulation Z.

Independent of any asserted TILA violations that may have occurred, the Court must first consider whether or not Chernilas is a protected consumer, entitled to relief under TILA. Regulation Z defines "consumer" as follows:

> Consumer means a cardholder or a natural person to whom consumer credit is offered or extended. However, for purposes of rescission under (12 CFR) §§ 226.15 and 226.23, the term also includes 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 CFR § 226.2(a)(11). *See also*, **In re Crevier**, (1987. CA9 Cal) 820 F2d 1553.

In the instant case, Chernilas, on October 19, 2007 executed a document transferring ownership of the mortgaged property from himself to Shaul Horan. The transfer was recorded at the Nassau County Clerk's office on November 14, 2007. As a result, when this foreclosure action was commenced, Chernilas was not the owner of the mortgaged property and no longer had a security interest in the dwelling. As such, as per the applicable TILA regulation, he is not entitled to exercise the right of rescission. The fact that on January 29, 2009, Shaul Horan executed a bargain and sale deed, transferring the mortgaged premises back to Chernilas, does not change this result. The second

transfer occurred well after the March, 2008 commencement of the foreclosure action, and even after the filing of Chernila's answer.

In any case, even if the defendant was a protected consumer, as per the statute, he has not sustained his burden of demonstrating a triable issue of fact.

It is the defendant's contention that since the copies of the Notice of Right to Cancel, (NCR), prepared pursuant to TILA, did not disclose the date that the three day rescission period expired, the normal three day period is extended to three years.

12 C.F.R. § 226.1, requires creditors to disclose clearly and accurately all material terms of a credit transaction.

> With respect to non-purchase-money mortgages on residential dwellings-the type of credit transaction at issue here-the TILA confers upon the debtor a right to rescind within three days of the transaction's consummation or three days from the delivery of the material disclosures, whichever occurs later. *See,* 15 USC § 1635(a). The creditor also must clearly disclose this rescission right to the debtor. *See*, 12 CRF § 226.23(b)(1). Should a creditor fail to deliver any of the required material disclosures (including notice of the right to rescind), the debtor may rescind at any time up to three years following the consummation of the transaction. See id § 226.23(a)(3). . . (**Megitt v Indymac Bank**, F.S.B., 547 F.Supp.2d 56 [USDC Mass.2008], quoting **Palmer v Champion Mort.**, 465 F3d 24 [1st Cir.2006]).

In the instant case, there is a conflict as to whether or not the defendant's representative, at the time of closing, received a rescission notice on which the actual date of rescission was filled in. The defendant claims that on the notice provided to his representative the rescission date was left blank. The plaintiff claims that the rescission date was in fact written on the document. Both sides have submitted copies of the rescission notice that back up their claims. While ordinarily this would constitute an issue of fact that would preclude granting summary judgment to the plaintiff, the instant case can be decided on the law, making this issue of fact irrelevant.

This court concludes that here, as in **Palmer** and **Megitt**, even if the notices provided to the plaintiff's representative left blank the date by which rescission could occur, i.e., "no later than midnight of _____," the notices were objectively reasonable as a matter of law. See **Megitt**. The notice clearly and conspicuously indicated that the debtor can rescind within three business days from whichever of three enumerated event occurs last. The notice clearly states that the date of the transaction was February 16, 2006. Here, as in **Palmer** and **Megitt**, the statement concerning when the defendant's right to cancel expires specifies, parenthetically, "(or midnight of the third business day following the latest of the three events listed above)." As in **Megitt** and **Palmer**, the court "fail(s) to see how any reasonable alert person–that is, the average consumer-

reading the Notice would be drawn to the (blank) deadline without also grasping the twice-repeated alternative deadlines." **Megitt** at 60. The notices being quite clear, did not trigger an extended right of rescission under the TILA.

The next issue raised by the defendant concerns the discrepancy between TILA Disclosure Statement and the Itemization of the Prepaid Finance Charge, dated February 16, 2006, and the HUD-1 Uniform Settlement Statement, dated February 3, 2006. On the HUD-1 form, item number 801 lists the Loan Origination Fee as $16,625.00. The TILA Disclosure Statement lists the Prepaid Finance Charge as $9,535.56. Later in that same document at item number 801 the Loan Origination Fee to: Broker is listed as $5000.00. It is the defendant's contention that according to TILA § 1635, he is entitled to exercise his right to rescission at any time within three years from the date of the closing based upon the discrepancy in the finance charges. 15 USCA § 1635(i)(2) reads in pertinent part:

> (F)or the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for the purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35. . .

It is this court's analysis that there is no discrepancy in excess of $35. On the TILA Disclosure statement, the Loan Origination Fee paid to the broker of $5000.00 when added with the Prepaid Finance Charge of $9,535.56 is within $35.00 of the total Loan Origination Fee listed on the HUD-1 form. The HUD-1 form merely grouped together the prepaid finance charge and the fee paid to the broker, both of which can be considered components of the loan origination fee.

Lastly, even if the defendant was entitled to rescind based upon the grounds he has asserted, he has not shown that he can tender to the plaintiff the balance of the loan proceeds he received. The equitable goal of the remedy of rescission under TILA is to restore the parties to the status quo ante. *See* **American Mortgage Network, Inc., v Shelton**, 486 F.3d 815, 820 (USCA, 4th Cir., 2007); **Yamamoto v Bank of New York**, 329 F3d 1167, 1172 (9th Cir.2003). In furtherance of that goal, it has been held that prior to ordering rescission based upon a lender's alleged TILA violations, a court may require a borrower to repay loan proceeds. (**Gzell v Novastar Mortgage, Inc.**, 2010 WL 3293537 [E.D.Cal.]). Moreover, it has been held, "(W)hen rescission is attempted under circumstances, which would deprive the lender of its legal due, the attempted rescission will not be judicially enforced unless it is so conditioned that the lender will be assured of receiving its legal due. (**Powers v Sims and Levin**, 542 F2d 1216, 1222, [4th Cir. 1976]). Here, the defendant makes no claim that he is ready or able to make the lender whole if the Court were to grant rescission. In addition, more than two years have elapsed since the commencement of this foreclosure and the defendant has made no further payments of principal or accrued interest on the loan.

Therefore, based upon the foregoing, the plaintiff's motion for summary judgment, dismissing the defendant's answer is granted, as is its motion to appoint a referee and amend the caption.

SO ORDERED:

DATED: OCT 06 2010, 2010
Mineola, NY

Honorable Thomas A. Adams
Supreme Court Justice

ENTERED
OCT 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE