IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE		: CHAPTER 13
		:
ANGELINA JOHNSON		:
	DEBTOR	: BANKRUPTCY NO. 01-17153SR
ANGELINA JOHNSON		:
	PLAINTIFF	:
V.		:
EMC MORTGAGE CORPORATION		:
	DEFENDANT	: ADVS. NO. 02-0030

OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

Introduction.

The Plaintiff filed an adversary proceeding alleging violations of the Truth in Lending Act[1], Pennsylvania Usury Law[2], and the Pennsylvania Uniform Trade Practices and Consumer Protection Law.[3] The TILA claim is an independent cause of action; the usury claim is in part independent and, in part, derivative of the TILA claim; and the UDAP claim is wholly derivative of the other causes of action. After traveling an unusually long and circuitous pre-trial path, the matter was finally heard on its merits in September 2004.

[1] 15 U.S.C. § 1601 et seq. (TILA)

[2] 41 P.S. § 101 et seq (Act 6)

[3] 73 P.S. §201-1 et seq. Like most American jurisdictions, Pennsylvania has enacted a statute which is generically known as a law prohibiting and punishing "unfair or deceptive acts and practices," i.e., a UDAP statute, specifically the Unfair Trade Practices and Consumer Protection law, 73 P.S. § 201-1, et seq. (referred to hereafter as "UDAP").

Background and Discussion.

Of the two parties, only the Debtor offered testimonial evidence. This consisted of testimony of the Debtor and an individual named Murray Levin. Numerous written Exhibits were also made part of the record. From her testimony at trial as well as a prior hearing (as stipulated by the parties), the Court has pieced together the Debtor's version of events as follows: Sometime before October 3, 1995,[4] she heard a radio advertisement for McGlawn and McGlawn, a mortgage broker. Transcript of 9/22/04 (T-04) 17. The Debtor contacted this company and Mr. McGlawn[5] came to her house to discuss a loan. *Id*. 10. Before he left, Mr. McGlawn left the Debtor with information regarding mortgage insurance, but nothing else. *Id.* 25. Mr. McGlawn would return at a later date with "a [Ms. Gross][6] from the EMC Mortgage people." *Id*. 11. Ms. Gross "brought a manilla envelope, which contained, she said, papers for the mortgage." Transcript of 12/19/01 (T-01) 24. She asked the Debtor "to sign them and I signed them and that was the end of that." *Id.* Among those documents was a blank loan application which Debtor signed understanding that Ms. Gross would complete the rest. T-04, 17-18. No copies of these documents were left with the Debtor after this second

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[4]This is the earliest date on any of the operative documents. *See* Loan Application, D-15.

[5]The transcript reads "McGlone" but the TILA Disclosure Statement and HUD-1 Settlement sheet show that "McGlawn and McGlawn" received a broker's fee. D-10, D-14.

[6]The Debtor has identified the lady as Ms. Toni Gross. That is the name which appears on the loan application as "interviewer." D-15.

visit. T-04, 25. At a third visit, Ms. Gross "returned with the manilla envelope and gave it to the Debtor and said these are all your papers." T-01, 24. The Debtor did not look at the documents at that time because she had just returned home and was cooking. T-04, 26, 29, 31. The Debtor then placed the envelope in her filing cabinet. T-01, 24. As to whether she ever read these documents, the Debtor testified that "at some point she skimmed through them."[7]

Sometime later, the Debtor became ill and was in arrears on the loan payments. T-04, 12, 23. Judgment in mortgage foreclosure was entered against her in August 1997 and the first of her five bankruptcies was filed that same year. Joint PreTrial Statement, § II, ¶¶ 5-6.

The TILA Claim

The Complaint alleges that the lender violated the Homeowner's Equity Protection Act (HOEPA), 15 U.S.C. § 1639, which is part of the Federal Truth in Lending Act. HOEPA requires the disclosure of costs attendant to certain residential mortgages when the fees and costs exceed a certain percentage of the loan. *See* 15 U.S.C. § 1602(aa)(1)(B)(i). The parties stipulate that the closing costs and fees charged exceeded the 8% maximum thereby requiring the HOEPA disclosure. Joint PreTrial Statement § II, ¶ 7. The dispute on this claim is, then, purely factual: Did the lender give the Debtor the HOEPA disclosure three days prior to closing? EMC's Exhibit D-3

[7]Her testimony as to the contents of the envelope is unclear. At one point, she said that it contained payment coupons. T-04, 24. Later, she would testify that it contained "some documents, …pink slips" to give to the creditors, and a check." *Id*. 26. And after that, she testified that, it was supposed to have contained a "mortgage book and the payment." T-04, 29.

purports to be a copy of that disclosure (the HOEPA Notice) signed by the Plaintiff. *See* D-3. Plaintiff denies ever receiving that document.

The burden of proving compliance with the TILA is upon a lender once a debtor has produced or provided some evidence or testimony that a TILA violation has occurred. *In re Cobb*, 122 B.R. 22, 26 (Bankr.E.D.Pa.1990); *see In re Herbert*, 86 B.R. 433, 438 (Bankr.E.D.Pa.1988), *aff'd sub nom. Herbert v. Federal Nat'l Mortgage Ass'n*, 102 B.R. 407 (E.D.Pa.1989); *In re Pinder*, 83 B.R. 905, 912-14 (Bankr.E.D.Pa.1988); and *In re Jones*, 2004 WL 1924888 *8 (Bankr.E.D.Pa.).

Specific Testimony Regarding the HOEPA Notice

Anticipating that EMC might confront the Debtor with the signed HOEPA notice, Debtor's counsel asked her client if she had, in fact, signed it:

> Q. Mrs. Johnson, do you recognize your signature on the document marked Exhibit D-3?
>
> A. It looks like my signature.
>
> Q. Do you recall signing this document, Ms. Johnson?
>
> A. No, not really.

T-04, 8. Moments later, she was asked directly if she ever received the HOEPA notice and she responded that she had not. T-04, 11-12. That is the extent of the direct examination of the Plaintiff on this point: she was presented with a copy of what purports to be a HOEPA notice with what appears to be her signature on it; however,

she denies ever receiving such a document.

For its part, EMC provided no direct testimony that it made the disclosure. It relies, instead, on the notice itself, and on certain circumstantial evidence: i.e., the testimony of Murray Levin, an individual retained by the title agent to appear at the closing. T-04, 37-38. Mr. Levin's function was to notarize documents and explain them to the Debtor. *Id*. 37. He testified that while he apparently closed the loan, he did not give the HOEPA disclosure. *Id.* 33. EMC had Mr. Levin identify a document titled Supplemental Closing Instructions to Closing Agent. D-6. Written presumably by the lender to the title agent, the document sets forth certain conditions required by the lender before it would advance the funds. Among the requirements is that the title agent obtain a "borrower acknowledged" HOEPA notice dated at least 4 days prior to the closing. D-6, ¶2. The supplemental instructions are dated October 20, 1995 and the purported HOEPA notice October 13. From this EMC would have the Court find that the disclosure must have been made; otherwise the lender would not have agreed to fund the loan.

The Credibility
of the Witnesses

Because the evidence offered is in direct conflict, the Court must assess the veracity of both witnesses. "[Q]uestions of credibility, of course, are basic to resolution of conflicts in testimony." *Zilich v. Reid*, 36 F.3d 317, 321 (3d Cir.1994) *quoting Townsend v. Sain*, 372 U.S. 317, 322, 83 S.Ct. 745 761, 9 L.Ed. 770 (1963).

A number of things severely impeach the Debtor's credibility. To begin with, she

testified that she needed the loan for home improvements (T-04, 21-22); however, the loan application states the purposes was to "refinance." D-15. Likewise, she wrote a letter to the lender explaining that she needed the loan to consolidate her bills. D-12. The Debtor admitted that the contents of that letter were "made up" by her. T-04, 28. The Court also notes that at the12/19/01 hearing she testified that the purpose of the loan was to pay bills. T-01, 22-23. And this was a Debtor not unsophisticated in matters of business and finance: she had operated a beauty salon. T-04, 13-16; D-22 and D-23.

Mr. Levin's testimony similarly undermined the Debtor's credibility. The Court is struck by the fact that in the Debtor's version of events, Mr. Levin does not even exist. The Debtor testified that in the three visits to her house, only Mr. McGlawn and Ms. Gross attended.[8] Significantly, she recalls Mr. McGlawn as being a "black guy" and Ms. Gross as "a black woman, [of] lighter complection." T-04, 11. Except for the appraiser, no white man came to her house as part of the loan process. *Id*. But Mr. Levin, who is a white male, testified credibly that although he had no specific recollection of going to the home to close this loan, his signature on the operative documents convinces him that he did in fact close the loan. *Id.* 40. Moreover, his recollection was refreshed after hearing the Debtor testify that she was a beautician and that she was trained at a vo-tech school: Mr. Levin recalled having discussed those matters with her at the closing. *Id*. Add to this that he was "strictly an outside closer" for the title agent, thus having no apparent motive to manufacture testimony, and that he recalls closing a beautician's

[8]A fourth visit was made by an appraiser; however, this person had nothing to do with loan documentation and thus does not matter. T-04, 21.

loan in the borrower's home, *Id*., and the probative weight of Mr. Levin's testimony tends to far outweigh the Debtor's.

The Court, in particular, finds the testimony of Mr. Levin, to be credible because there are no inconsistencies in it. Moreover, there is simply no reason for him not to have testified truthfully about his role in closing this loan. If the Court, as it does, accepts his testimony as credible, then the Debtor's testimony has little or no probative value; the differences between the two accounts are simply irreconcilable.

In sum, what little evidence there is preponderates in EMC's favor. To recapitulate that evidence, the Court relies first on the fact that it has before it the original HOEPA notice signed by the Debtor, dated October 13, 1995, which was seven days before the loan closing, in which the Debtor acknowledges receipt of a copy of the notice on the date she signed it. The Court notes further that in these proceedings the Debtor has testified that she knew she had a right to cancel the loan transaction, which is the very information the HOEPA notice provides (T-04, 12).[9] On this score, the Court further observes, but discounts, the Debtor's contention that even if she signed the HOEPA notice she was not timely provided with a copy of the notice, due 1) to the various inconsistencies in her sworn testimony, 2) to the fact that the Debtor repeatedly demonstrated through her sworn testimony a casual willingness and propensity to

[9] When questioned about this the Debtor stated that she learned of this fact when she was in high school. (T-04, 29) The Court has some skepticism as to this contention, as the loan application (Ex D-15) indicates that the Debtor at the time of the loan transaction was 48 years old. The Court notes that the TILA statute, with its three day recision right, was enacted in 1968, at which time the Debtor would have been beyond typical high school age.

misrepresent the truth when it serves her purposes,[10] and 3) to the fact that the Court deems the testimony of Mr. Levin concerning the circumstances of the actual loan closing to have credibility, whereas it finds the Debtor's to have little to none.

This is not to say that the Court finds that Mr. Levin gave the Debtor the HOEPA notice. Indeed, he agrees that he did not. The Court instead concludes that the Debtor possibly signed the pre-prepared HOEPA notice when the "insurance" paperwork was completed at the time when Mr. McGlawn paid his first visit to her home, and that a copy thereof was left with her then. Equally, if not more likely, is that there was in fact a fourth meeting at the Debtor's home. The Court draws this conclusion based on the Debtor's testimony concerning the meeting with Ms. Gross during which the loan application was completed (with false information) for the purpose, ostensibly, of securing underwriting approval. (T-27) In the Debtor's version of events, during the second meeting at her home, which was the first meeting attended by Ms. Gross, the loan closing took place. The Court finds implausible the notion that the closing took place at that meeting, when the application itself had not even been completed, or submitted, let alone approved.[11] The Court, in short, concludes that the Debtor signed and received a copy of the HOEPA notice either at the first meeting with Mr. McGlawn,

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[10] To reiterate, the Debtor concedes that she misrepresented the purposes of the loan (T-04, 22); that she "made-up" the contents of the letter marked D-12 (T-04, 28), and that she misrepresented the status of her unpaid bills. (T-04, 28)

[11] Of note here is the fact that the Debtor could not say whether she signed the mortgage and note at the time she signed the loan application, and, in fact, could not say when she actually signed the latter documents. (T-04, 27).

or at a subsequent pre-closing meeting with Ms. Gross. As these encounters preceded the actual loan closing it is likely that the Debtor simply mislaid the HOEPA notice and thus it never found its way into the manilla folder which contained the other loan documents she received on her third visit from Ms. Gross. The Court, therefore, finds that the HOEPA notice was given to the Debtor in compliance with and as required by the Truth in Lending Act.

New Claims Raised in the Joint PreTrial Stipulation

The Joint PreTrial Statement lists a legal issue new to this case: whether Debtor is precluded from proving various claims based upon EMC's alleged failure to give Debtor at the closing a HUD-1 Settlement Statement and a legible copy of the Truth in Lending Disclosure Statement "showing all payments made by the lender? *See* Joint PreTrial Statement, § V, ¶¶ 4-7. In this adversary proceeding which has been pending for over 2½ years, this new claim was neither pleaded in the Complaint nor listed among the disputed facts in the Joint PreTrial Statement.[12] The only mention of it is made in passing in the Debtor's Response to EMC's Motion for Relief from Judgment. *See* Docket # 67, Debtor's Response to Motion for Relief from Judgment, ¶19. The parties disagree on whether these new claims may be tried now.

[12]Strangely, EMC argued in its opening statement that these issues were disposed of in the Court's Order dated 11/20/03. T-04, 7. But that Order granted EMC's Motion for Relief from Summary Judgment on the question of TILA liability. It did not address this new issue or the state law usury claim. Most likely, EMC was referring to the 10/09/02 Opinion and Order granting summary judgment in Debtor's favor on the HOEPA and UDAP claims and in EMC's favor on the usury claim. But neither did that opinion address those issues.

It is well-established that a Joint PreTrial Statement supersedes the pleadings. *In re Williams*, 291 B.R. 636, 643 (Bankr.E.D.Pa.2003). However, it does not *amend* the pleadings. The PreTrial Order gave the Debtor ample time to request an amendment. To allow Debtor to try those claims now would subject EMC to unfair surprise. In a case involving an affirmative defense raised for the first time on the eve of trial, a court would explain the potential danger of allowing that new claim to be pressed:

> The first mention of the defense appeared in the Joint Final Pretrial Order filed five days prior to trial.
>
> Defendant's contention that because this Court's Pretrial Order provides that the final pretrial order supersedes all pleadings and orders its defense is timely raised, is ludicrous and desperate. Defendant is well aware that the statement merely indicates that if any previously plead claim or defense is not included in the final pretrial order, it shall be waived. To hold otherwise, would suggest that any party who failed to include a claim or defense could do so by merely including it in the final pretrial order. Certainly such a result would be manifestly unfair.

Alvarez v. Trans World Airlines, Inc., 1991 WL 328775 *2 (E.D.Mich.). Consistent with the foregoing, the instant Debtor's failure to seek prior leave to amend her claims in this adversary proceeding, which has been pending for 2 ½ years, bars her from pressing the legal issues stated in § V, ¶¶ 4-7 of the Joint PreTrial Statement.[13]

[13]And if new claims inserted into the Joint PreTrial Statement may not be tried, then certainly the same goes for claims raised for the first time in Debtor's closing argument at trial. Counsel for Debtor alleged after the close of her case that the evidence now shows that the Debtor did not receive her right to cancel until more than 3 days after closing. T-04, 53. That claim will not be considered for the same reason.

The Usury Claim

The Complaint alleges two separate violations of Act 6: one direct and the other derivative. The direct violation is that the rate of interest charged is excessive under Section 301 of Act 6; the second alleged that the failure to give the Debtor the HOEPA notice violates Section 401 of Act 6. *See* Complaint, ¶¶ 12-13.

The viability of the direct usury claim was tested on summary judgment. The Court found that the Debtor's claim that EMC had charged an illegal interest rate could not be sustained because Federal law preempted the state statute. *See* Opinion of October 9, 2002, pp.5-7. For its part, EMC appears to understand this claim to have been adjudicated. T-04, 7. Notwithstanding, the usury issues are listed in the Joint PreTrial Statement among the Legal Issues Presented. *See* Joint PreTrial Statement, § V, ¶¶ 4-7. The Court reemphasizes that its November 20, 2003 Order vacated that part of the October 9, 2002 ruling which entered judgment entered in Debtor's favor on her TILA/HOEPA claim. It did not affect the ruling which dismissed the Act 6 claim. The interest rate charged for this loan does not state a viable cause of action under Act 6.

Similarly futile is the Act 6 claim which is alleged to be derivative of the TILA/HOEPA claim. Having found, *supra*, that the evidence demonstrates that EMC gave the Debtor a HOEPA notice, the Debtor's Act 6 claim cannot be supported on that basis either.

The UDAP Claim

The last cause of action raises claims under the Pennsylvania Uniform Trade Practices and Consumer Protection Law. The UDAP claims, however, are wholly

derivative of the TILA and Act 6 claims. Complaint, ¶14. Having found that EMC did not violate either TILA or Act 6, any derivative claim under UDAP must similarly fail.

An appropriate Order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: October 26, 2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 13
	:
ANGELINA JOHNSON	:
DEBTOR	: BANKRUPTCY NO. 01-17153SR
ANGELINA JOHNSON	:
PLAINTIFF	:
V.	:
EMC MORTGAGE CORPORATION	:
DEFENDANT	: ADVS. NO. 02-0030

ORDER

AND NOW, it is, for reasons set forth in the within Opinion:

ORDERED, that judgment be and hereby is entered in favor of the Defendant, and against the Plaintiff in the above adversary action; and it is further:

ORDERED, that an evidentiary hearing to consider the liquidation of sanctions imposed against Defendant pursuant to this Court's Opinion and Order of August 4, 2004 shall be held on January 27, 2005, at 10:00 a.m., United States Bankruptcy Court, 900 Market Street, 2nd Floor, Courtroom No. 4, Philadelphia, Pennsylvania, 19107.

BY THE COURT:

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

DATED: OCTOBER 26, 2004

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