IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FANNIE L. BOLDEN, on her behalf and all others similarly situated,

Plaintiff,

v. No. 03-2827

AAMES FUNDING CORP., and AAMES HOME LOANS,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING DEFENDANTS' MOTION FOR RULE 11 SANCTIONS

The Plaintiff, Fannie L. Bolden, filed this action on behalf of herself and all others similarly situated[1] alleging that the Defendants, Aames Funding Corp. and Aames Home Loans (collectively referred to as "Aames" or "Defendants"), violated various federal and state statutes in the course of providing the Plaintiff a loan. Bolden seeks to recover under the Truth in Lending Act of 1995 ("TILA"), 15 U.S.C. § 1601 et seq., and the Home Ownership Equity Protection Act of 1994 ("HOEPA"), 15 U.S.C. § 1602(aa) et seq. In addition, she claims that the Defendants violated the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-101 et seq.[2] Before the Court are the Defendants' motions to dismiss pursuant to Rule

[1] Although the Plaintiff styles this lawsuit as a class action, a class has not been certified by the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure.

[2] In Bolden's complaint, she also makes reference to 15 U.S.C. § 1691 and 12 U.S.C. §§ 2601 and 2614 when discussing whether the Court has jurisdiction to hear the suit but does not

12(b)(6) and for sanctions under Rule 11, Federal Rules of Civil Procedure. As the Plaintiff has responded to the Defendants' motions, they are now appropriate for disposition.[3]

FACTS

The Plaintiff is a retired widow who owned a home located at 1580 Rice, Memphis, Tennessee. In 1997, Bolden was experiencing financial difficulties and contacted the Defendants about the possibility of obtaining a loan. (Class Action Compl. ¶ 1.) According to the Plaintiff, an agent of Aames went to her home and made numerous promises and statements to her concerning her ability to obtain the loan and to repay it. (Class Action Compl. ¶ 1.) Bolden informed the agent that she only received about $946.00 per month from her job and social security payments. On December 31, 1997, the Defendants issued a loan to the Plaintiff while taking a mortgage on her home as security for the loan. (See Notice Filing Omitted Attachments Certificate Service Defs.' Mem. Supp. Mot. Dismiss ("Defs.' Attachments") Ex. A & Ex. B.) Due to her age, health, and reduced earnings, Bolden was unable to meet the monthly payment obligations on the loan and was forced to file for Chapter 13 bankruptcy. (Class Action Compl. ¶ 1.) The Plaintiff filed numerous bankruptcies in an attempt to prevent foreclosure on her home. However, despite her efforts, the Defendants

---

discuss them in any other part of her complaint or in her response to Defendants' motions. Therefore, because Plaintiff has failed to state how the Defendants violated these sections, the Court GRANTS Defendants' motion to dismiss as to them and DISMISSES any claims related to these statutes for failing to state a claim. See Fed. R. Civ. P. 12 (b)(6).

[3] The Plaintiff failed to respond to the Defendants' motion to dismiss in accordance with this district's local rules. See LR7.2, Local Rules of the U.S. Dist. Ct. for the W. Dist. of Tenn. However, after the Court ordered Bolden to show cause why the Defendants' motion should not be granted, she filed a response in which she stated that she did not receive a copy of the Defendants' motion until approximately six months after it had been filed. Since there is no proof to the contrary, the Court will consider the Plaintiff's response as timely submitted.

proceeded with the foreclosure and took title to Bolden's house on November 7, 2002. (Class Action Compl. ¶ 1.)

Plaintiff filed this action on November 7, 2003, alleging that, in the process of obtaining the loan, Aames failed to provide necessary disclosures as required under HOEPA and TILA. Plaintiff also seeks to recover treble damages, attorney fees, and other relief pursuant to the TCPA. In their motion to dismiss, Defendants argue that the Plaintiff's claims are time-barred by the statutes of limitations applicable to each claim. Additionally, Defendants filed a motion for sanctions pursuant to Fed. R. Civ. P. 11, asserting that the Plaintiff's claims are frivolous since they are time-barred and lack evidentiary support.

STANDARD OF REVIEW

Rule 12(b)(6) permits the dismissal of a lawsuit for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The Rule requires the court to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998). A complaint need not "anticipate every defense and accordingly need not plead every response to a potential defense." Memphis, Tenn. Area Local, Am. Postal Workers Union v. Memphis, 361 F.3d 898, 902 (6th Cir. 2004). The court's narrow inquiry on a motion to dismiss under Rule 12(b)(6) "is based upon whether the claimant is entitled to offer evidence to support the claims, not whether the plaintiff can ultimately prove the facts alleged." Osborne v. Bank of Am., Nat'l Ass'n, 234 F. Supp. 2d 804, 807 (M.D. Tenn. 2002) (citations and internal quotations omitted).

ANALYSIS

I. Defendants' Motion to Dismiss

A. HOEPA & TILA

Plaintiff seeks rescission of the loan, damages, and attorney's fees and costs pursuant to HOEPA and TILA under 15 U.S.C. § 1640(a)(2)(A) & (B). Section 1640 authorizes private causes of action for violations of TILA and HOEPA and allows individuals to seek damages against "any creditor who fails to comply with any requirement imposed under this part." 15 U.S.C. § 1640(a). In her complaint, Bolden claims that the Defendants violated 15 U.S.C. § 1639(h) which prohibits a creditor from engaging in a pattern of "extending credit to consumers . . . based on the consumers' collateral without regard to the consumers' repayment ability." 15 U.S.C. § 1639(h). Plaintiff additionally contends that the Defendants failed to disclose certain information and failed to disclose it "not less than 3 business days prior to consummation of the transaction" as required by 15 U.S.C. § 1639. Section 1640(e) provides that an action under this section must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e).

In her complaint, Bolden also separately prays for rescission under 15 U.S.C. §§ 1635(a) & 1640(a) of TILA and § 226.23 of Regulation Z, 12 C.F.R. § 226.23. Section 1635(a) provides that "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 subchapter." 15 U.S.C. § 1635(a). Plaintiff argues that

the Aames' agent never disclosed this information nor provided her with the required forms for her to exercise her right of rescission. However, TILA provides that the "obligor's right of rescission shall expire three years after the date of consummation of the transaction." 15 U.S.C. § 1635(f). Further, 12 C.F.R. § 226.23 holds that if the "required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation." 12 C.F.R. § 226.23.

The Defendants assert that, because the loan closed on December 31, 1997 and Plaintiff instituted this action on November 7, 2003, the Plaintiff's causes of action are barred by the applicable statutes of limitations. A credit transaction where disclosures are required under HOEPA and TILA is considered complete when the contract is executed by both parties. See Wachtel v. West, 476 F.2d 1062, 1065-66 (6th Cir. 1973); see also Dryden v. Lou Budke's Arrow Finance Co., 630 F.2d 641 (8th Cir. 1980); Morris v. Lomas and Nettleton Co., 708 F. Supp. 1198 (D. Kan. 1989); In re Craig, 7 B.R. 864 (Bankr. E.D. Tenn. 1980). Thus, since the transaction in this case was consummated almost six years before Plaintiff filed suit, her claims for damages and rescission would seemingly be barred by the one year and three year statutes of limitations under 15 U.S.C. §§ 1640(e) and 1635(f), respectively.

Bolden argues, however, that the Defendants deceptively concealed its violations, and therefore, the equitable tolling doctrine should apply. In Ramadan v. Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998), the court stated that the equitable tolling doctrine applies to § 1640(e) and found that "allowing lenders to violate TILA, but avoid liability if they successfully concealed the violation from the debtor for a year, would undermine the core remedial purpose of TILA." The equitable tolling doctrine can suspend the one year statute of

limitations period until the borrower discovers or has reasonable opportunity to discover the fraud or nondisclosures. Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1041 (6th Cir. 1984). To satisfy the standard of equitable tolling in the fraudulent concealment context, a plaintiff must establish that: "'(1) the defendant took affirmative steps to conceal the plaintiff's cause of action; and (2) the plaintiff could not have discovered the cause of action despite exercising due diligence.'" Matthews v. New Century Mortgage Corp., 185 F. Supp. 2d 874, 883 (S.D. Ohio 2002) (quoting Jarrett v. Kassel, 972 F.2d 1415, 1423 (6th Cir. 1992)); see also Mills v. Equicredit Corp., 294 F. Supp. 2d 903, 908 (E.D. Mich. 2003). Additionally, Plaintiff contends that she did not discover the TILA violations until the Defendants filed the forcible entry and detainer suit and physically took possession of the home.

Aames asserts that the statute of limitations should not be tolled because Bolden has not presented any evidence in support of her claim of fraudulent concealment by the Defendants.[4] However, Plaintiff is not required, to rebut a motion to dismiss, to present evidence, but instead must only plead facts which establish a claim for relief. Osborne, 234 F. Supp. 2d at 807. "[A]t this stage of the litigation, we must accept [Plaintiff's] allegations as true." Jones, 747 F.2d at 1042.

Defendants also argue that, assuming Bolden had presented facts showing that the statute of limitation should be tolled, she had reasonable opportunity to discover any alleged fraud or nondisclosure when she first filed for bankruptcy protection and the six times thereafter. (Def.'s Reply Mem. Supp. Mot. Dismiss at 4.) In support of their argument,

[4] Defendants also contend that the statute of limitations is jurisdictional and therefore not subject to tolling. (Defs.' Reply Mem. Supp. Mot. Dismiss at 5-6.) However, the Sixth Circuit addressed that issue and held that 15 U.S.C. § 1640(e) limitations on actions was not jurisdictional in nature and was subject to tolling. See Jones, 747 F.2d at 1040-41.

Defendants point to Gray v. Home Bank of Tennessee, No. 94-5817, 1995 WL 35660, at *1 (6th Cir. Jan. 30, 1995), in which the Sixth Circuit concluded that, because the plaintiffs have been in bankruptcy proceedings for over three years, they "had reasonable opportunity to discover any problems with the loans as of the date of the report of the auditor was filed with the bankruptcy court." However, the court in Gray also based its decision on the fact that the plaintiffs signed the bank note in blank, which would have made them aware of the lack of disclosure as of that date. Id. Finally, the Defendants insist that Bolden's rescission claim is barred by 15 U.S.C. § 1635(f) which provides the obligor three years to exercise the right of rescission.

At this juncture, the Court finds that Plaintiff's HOEPA and TILA claims pursuant to 15 U.S.C. § 1640 survive Defendants' motion to dismiss while her rescission claim under § 1635 is time-barred. This case is similar to Jones v. TransOhio Savings Association in which the Sixth Circuit held that a plaintiff's complaint would survive a motion to dismiss when she "alleged knowing and fraudulent concealment of the variable interest rate provision and of the mortgage note itself." Jones, 747 F.2d at 1041. The court stated that "[w]e are unprepared to hold, prior to any discovery on the issue, that [a]ppellants can prove no set of facts consistent with these allegations sufficient to toll the statute of limitations." Id. Accordingly, the Court finds that Bolden should be allowed to present evidence establishing when she discovered the disclosure violations and whether she used due diligence even during her bankruptcy proceedings until she discovered the violations.[5] However, Plaintiff's claim for rescission is

[5] The Court would recognize that some other courts outside of this Circuit considering the question have held that a creditor's concealment of its failure to disclose certain required disclosures under the TILA does not toll the statute of limitations. See e.g., Boursiquot v. Citibank F.S.B., 323 F. Supp. 2d 350, 354 (D. Conn. 2004) ("it is generally established that mere

disallowed by the provisions of 15 U.S.C. § 1635(f) and 12 C.F.R. § 226.23. Section 1635(f) provides that the obligor's right of rescission expires three years after the date of consummation of the transaction. In Taylor v. The Money Store, the Sixth Circuit held that appellants' claim for rescission was barred since "[e]quitable tolling does not apply to rescission under this provision of TILA, because '§ 1635(f) completely extinguishes the right of rescission at the end of the 3-year period,' even if the lender has never made the required disclosures." Taylor v. The Money Store, No. 00-35930, 2002 WL 1769962, at *1 (6th Cir. 2002) (quoting Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412-13, 419, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998)); see also Arnold v. Waterfield Mortgage Co., 966 F. Supp. 387, 388 (D. Md. 1996). Accordingly, the Court GRANTS Defendants' motion to dismiss as to Plaintiff's rescission claim and DENIES the motion with respect to her claims pursuant to 15 U.S.C. § 1640.

B. TCPA

Bolden asserts that the Defendants engaged in "unfair and deceptive acts and practices" in violation of the TCPA and seeks treble damages, attorney fees, and other appropriate relief pursuant to Tennessee Code Annotated § 47-18-109. Section 47-18-109(a) allows "[a]ny person who suffers an ascertainable loss of money or property . . . as a result of the use of employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action." In her complaint, Plaintiff alleges that the Defendants engaged in unfair and deceptive practices when they: (1) imposed credit costs and fees during her bankruptcies that were prohibited; (2) failed to disclose in their promissory notes the Notice of Preservation

---

nondisclosures provide insufficient grounds for tolling the statute of limitations . . .") (citing Chevalier v. Baird Sav. Ass'n, 371 F. Supp. 1282, 1284 (E.D. Pa. 1974)). However, in light of the Sixth Circuit rulings on this issue, this Court is bound by such precedent.

of Claims and Defenses required by 16 C.F.R. § 433.2; (3) misrepresented the benefits of obtaining the loan; and (4) took advantage of Plaintiff's age and income status by not considering her ability to repay the loan. Tennessee Code Annotated § 47-18-110 provides that any action under § 47-18-109 must be commenced within one year from the discovery of the unlawful act or practice, "but in no event shall an action under § 47-18-109 be brought more than five (5) years after the date of the consumer transaction giving rise to the claim for relief." Tenn. Code Ann. § 47-18-110.

Defendants argue that this claim is time-barred because it was not instituted until after the five year outside limitations period had run. In response, the Plaintiff posits two arguments: (1) that she did not discover the violation until the Defendants foreclosed on her home and (2) that the Defendants engaged in ongoing fraudulent activities throughout the life of the loan by imposing unlawful fees against her. (Pl.'s Resp. Defs.' Mot. Dismiss Rule 11 Sanctions at 7-8.)

When interpreting a statute, if the language within the four corners of the statute is unambiguous, "the legislative intent must be derived from the statute's face." Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000). When a statute is unclear, the court must ascertain the legislature's intent, and in so doing, must "look to the entire statute in order to avoid any forced or subtle construction of the pertinent language." Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994) (citing McClain v. Henry I. Seigel Co., 834 S.W.2d 295 (Tenn. 1992)). As to Plaintiff's first argument, a plain reading of the statute would seem to bar her claim because the legislative intent was unambiguous in disallowing claims more than five years after the date of the consumer transaction. Tenn. Code Ann. § 47-18-110. Similar to the statute under consideration, the Tennessee medical malpractice statute of repose states that "[i]n no

event shall any . . . action be brought more than three . . . years after . . . the negligent act . . . occurred . . . . Tenn. Code Ann. § 29-26-116. Tennessee courts have interpreted this provision as imposing an absolute three-year limit on the time in which a medical malpractice action may be brought. See e.g., Mills v. Wong, __S.W.3d__, No. W2002-02353-SC-R11-CV, 2005 WL 357631, at 3 (Tenn. Feb. 16, 2005) (stating that § 29-26-116 "expresses a legislative intent to place an absolute three-year bar beyond which no medical malpractice right of action may survive" and that such "[s]tatutes of repose are substantive and extinguish both the right and the remedy") (citations omitted); Green v. Sacks, 56 S.W.3d 513, 518 (Tenn. Ct. App. 2001) (discussing the statute of repose for medical malpractice and stating that the statute cannot be tolled except as provided by the statute itself or "in another statute that specifically references the particular statute of repose"). Therefore, the Court concludes that the TCPA's express cap of not "more than five (5) years after the date of the consumer transaction" forecloses Plaintiff's claim in this case. Furthermore, in Wachtel, 476 F.2d at 1063, 1065, the Sixth Circuit specifically addressed the question of whether failing to make a required disclosure under TILA was a continuing violation. The court held that, because the Act requires disclosures to be made sometime before the extension of credit, the violation "occurs, at the latest, when the parties perform their contract." Id. at 1065. Therefore, as Bolden filed this action on November 7, 2003, over five years after the Defendants disbursed her loan, her claims that the Defendants failed to make certain disclosures and that they took advantage of her by not considering her repayment ability are barred by the statute of limitations. However, as to Bolden's claim that the Defendants imposed unlawful fees and charges against her throughout the life of the loan, the Court, at this time, is without sufficient information to determine

whether such actions by the Defendants take them outside the limitations period. In her complaint, the Plaintiff has not specified the dates that the unlawful charges were imposed, and thus, the Court is unable to conclude that the claim is time-barred at this time.

Accordingly, the Court GRANTS the Defendants' motion to dismiss Plaintiff's cause of action under the TCPA, except with respect to her claim of ongoing unlawful fees and charges against her, which is DENIED without prejudice at this time.

II. Defendants' Motion for Rule 11 Sanctions

Federal Rule of Civil Procedure 11 states that when an attorney presents a pleading, motion, or other paper to the court, he is certifying to the court, among other things, "that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," (1) it is not presented for an improper purpose; (2) the claims and defenses are warranted by existing law or by a nonfrivolous argument to change it; (3) the allegations have evidentiary support or are likely to after reasonable opportunity for further discovery. Fed. R. Civ. P. 11(b). The court may impose sanctions on its on initiative or upon motion of a party. However, when a party seeks sanctions, Rule 11(c)(1) requires that the motion be served on the opposing party but not presented to the court for twenty-one days to allow the opposing party to correct or withdraw the offending pleading. In their motion, Defendants state that they served on the Plaintiff's counsel Exhibit A, "attached hereto" which outlined the basis for the motion for sanctions. (Defs.' Mot. Mem. Supp. Mot. Rule 11 Sanctions at 2.) However, there are no documents attached to the Defendants' motion and memorandum. Because nothing in Aames' pleading indicates that they abided by the twenty-one day safe-harbor provision in Rule 11(c)(1), the Court will not impose Rule 11 sanctions on Plaintiff. See Cannon v. Cherry Hill

Toyota, Inc., 190 F.R.D. 147 (D.N.J. 1999) (finding that the plaintiff was not entitled to Rule 11 sanctions because the plaintiff failed to comply with the safe harbor provision and provide the court with a copy of the papers that were allegedly served on the opposing party). Furthermore, "[a]s a general proposition, a district court should be hesitant to determine that a party's complaint is in violation of Rule 11(b) when . . . there is nothing before the court, save the bare allegations of the complaint" which must be viewed in favor of the nonmoving party. Tahfs v. Proctor, 316 F.3d 584, 594-95 (6th Cir. 2003). Accordingly, the Court DENIES Defendants' motion for Rule 11 sanctions.

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss is GRANTED as to Plaintiff's claims for rescission under 15 U.S.C. § 1635 and damages under the TCPA, except with respect to her claim of ongoing unlawful fees which is DENIED without prejudice at this time. The Court DENIES Defendants' motion for sanctions and motion to dismiss as to Plaintiff's claims under TILA and HOEPA.

IT IS SO ORDERED this ___ day of April, 2005.

J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE