

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-7026

September Term, 1999

Theresa Duren

Filed On: June 7, 2000 [521923]

Appellant

v.

First Government Mortgage and Investors Corp.,
Central Money Mortgage Co., Inc.,
IMC Mortgage Co.

Appellees

and consolidated case Nos. 99-7033 & 99-7034

Appeals from the United States District Court
for the District of Columbia
(No. 97cv01790)

Before: WILLIAMS, GINSBURG, and SENTELLE, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia, the briefs filed by the parties, and the oral argument by counsel. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the judgment of the District Court be affirmed except insofar as the judgment against defendant First Government on plaintiff's Truth in Lending Act and D.C. usury

statute claims is vacated and remanded for further proceedings for the reasons set forth in the accompanying memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing en banc. *See* D.C. Cir. Rule 41(a)(1).

Per Curiam
FOR THE COURT:

Mark J. Langer, Clerk

MEMORANDUM

Plaintiff/Appellant Duren and her daughter, Hedda Phillips, entered into a series of five loans, some of them refinancing loans, between July 7, 1994, and May 15, 1996, all secured by their home. Only two of these loans are at issue here: (1) a loan of \$92,500 from First Government Mortgage and Investors Corp. (First Government) dated July 7, 1994; and (2) a loan of \$175,000 from Central Money Mortgage Co. (Central) dated May 15, 1996, and subsequently assigned to IMC Mortgage Co. (IMC).

As against First Government on the 1994 loan, Duren raised claims under the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. CODE ANN. § 28-3904 (Supp. 1996); the Truth In Lending Act (TILA), 15 U.S.C. §§ 1601 *et seq.* (1994); and the District of Columbia usury statute, D.C. CODE ANN. § 28-3301(f)(3) (Supp. 1996). The district court granted summary judgment in favor of First Government on Duren's CPPA claims. A jury found, however, that First Government failed to satisfy TILA disclosure requirements concerning a credit life insurance policy sold to Phillips. Considering itself bound by the jury's finding, the district court entered judgment against First Government on Duren's TILA claim, and awarded a statutory rescission remedy pursuant to TILA § 1635 and the D.C. usury statute in the amount of \$12,245.75, plus pre-judgment interest. Duren appeals from the district court's judgment against her on the CPPA claims. First Government cross-appeals the judgment and award on the TILA and usury statute claims on numerous grounds.

We affirm the district court's judgment against Duren on her CPPA claims. First Government argues that the CPPA does not apply to the transaction at issue because other laws like TILA and state usury statutes more specifically regulate mortgage lending. In response to our certification of this issue

in another case, however, the District of Columbia Court of Appeals recently held that the CPPA does apply to real estate mortgage finance transactions such as the one at issue here. *See DeBerry v. First Gov't Mortgage and Investors Corp.*, 743 A.2d 699, 703 (D.C. 1999). Nevertheless, Duren has offered no evidence from which a jury could find that First Government made misrepresentations in violation of the CPPA. Duren's statement that she was "led to believe" that the loan terms were favorable to her is inadequate to establish misrepresentation by First Government.

With respect to the TILA claim, however, the district court entered judgment in favor of Duren on the mistaken belief that it was bound by the jury's verdict with respect to the credit insurance disclosures. Duren sought rescission as a remedy for First Government's alleged TILA violation. Although TILA statutorily grants the right to rescind, rescission nevertheless remains an equitable remedy. *See Brown v. National Permanent Fed. Sav. and Loan Ass'n*, 683 F.2d 444, 447 (D.C. Cir. 1982). The district court erred in concluding that the rescission remedy's statutory origin changed its fundamentally equitable character. As a general matter, issues of equity are for the judge, not the jury, to decide. *See Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959)). We hold, therefore, that Duren was not entitled to jury consideration of her TILA claim. We therefore reverse the district court's judgment and award and remand for the district court to determine itself whether the disclosures were inadequate. That said, to guide the district court's determination, we nevertheless address a number of other arguments raised by First Government in challenging the judgment and award against it.

First, we reject outright First Government's nonsensical contention that the credit life insurance sold to Phillips, naming First Government as the beneficiary, was not in fact credit insurance merely because the policy covered only one-half of the loan. Second, we cannot accept First Government's argument that Duren failed to prove its status as a "creditor" as defined by TILA, 15 U.S.C. § 1602(f), as First Government acknowledged at oral argument that it could not in good faith claim that it is not within the scope of that definition and failed to preserve the issue in its pre-trial statement. Third, we reject First Government's assertion that the district court erred in its handling of credit math expert Elizabeth Renuart's testimony, particularly given that court's broad discretion over decisions regarding the admission or exclusion of evidence.

Fourth, we find no error in the district court's denial of First Government's motion for reconsideration pursuant to Federal Rule of Civil Procedure 60. First Government based the motion on its claim that it learned after judgment that the envelope in which the complaint was mailed was postmarked the day after the expiration of the three-year limitations period for exercising the TILA rescission right. Whether or not the complaint was mailed before the expiration of the limitations period, First Government was in possession of the postmarked envelope long prior to trial, so the envelope was not newly discovered evidence under Rule 60(b)(2); and First Government does not seriously contend fraudulent misrepresentation by Duren or her counsel sufficient to substantiate the application of Rule 60(b)(3). Fifth, we disagree with First Government's contention that the refinancing of the 1994 loan rendered unavailable TILA's statutory rescission remedy, notwithstanding the Ninth Circuit's terse suggestion to the contrary in *King v. State of California*, 784 F.2d 910, 913 (9th Cir. 1986).

Finally, First Government argues that the district court has no authority to award prejudgment interest in an action for rescission under § 1635 of the TILA. *Cf., e.g., Monessen S.W. Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988) (no prejudgment interest under Federal Employers' Liability Act); *Rodgers v. United States*, 332 U.S. 371, 373-74 (1947) (no prejudgment interest on penalty under Agricultural Adjustment Act). Alternatively, First Government argues the district court abused its discretion in awarding prejudgment interest where First Government's violation was at most technical and where Duren had the benefit of the loan before judgment. Because we reverse the district court's judgment on the TILA claim, we need not address either of these arguments at this time.

The district court also found a violation of the D.C. usury statute, D.C. Code § 28-3301(f)(3), concomitant with First Government's alleged TILA infringement, which First Government challenges on statute of limitations grounds. Yet the recognition of an accompanying usury statute violation added nothing to Duren's recovery. Given the lack of additional consequence, we see no need to offer guidance as to whether the usury statute, by incorporating TILA disclosure requirements, also adopted that statute's three-year limitations period for rescission.

As against Central and IMC with respect to the 1996 loan, Duren raised similar claims under the CPPA, TILA, and the common law of unconscionability. The district court granted summary judgment for Central and IMC on Duren's claim of misrepresentation under the CPPA, D.C. Code § 28-3904(a), (e), and (f), but sent the remaining claims to the jury. The jury rejected Duren's claim of inadequate disclosure under TILA, finding that she had received copies of the requisite documents. The jury nevertheless found the 1996 loan to be unconscionable under both the common law and CPPA § 28-3904(r), and awarded Duren \$9,281 in compensatory damages, which the court trebled

pursuant to § 28-3905(k)(1)(A) for a total award of \$27,843. Despite the verdict, however, the district court set aside the jury's finding of common law unconscionability and granted judgment as a matter of law for Central and IMC on the ground that Duren failed to establish the requisite elements of that offense. Finally, the district court denied a subsequent motion by Duren requesting equitable rescission of the 1996 loan on the bases that she had already been awarded a money judgment against Central on her CPPA claim and that IMC as assignee was not jointly liable for Central's violation of that statute. Duren appeals from the district court's judgments against her and from the district court's denial of her request for equitable rescission against IMC.

We reject all of Duren's challenges with respect to the 1996 loan. First, we agree with the district court's finding of no material misrepresentation under the CPPA. By her own testimony, Duren was not deceived by Central's assertion that a payment of \$1,665 would be less than her combined payments under the two loans refinanced by the 1996 loan. Second, with respect to Duren's TILA claim, we hold that a jury could reasonably find that Duren failed to prove that Central did not deliver the required disclosures to her. In a case involving two borrowers, and the delivery by the lender of a single set of documents, TILA does not establish an irrebuttable presumption that the documents necessarily were given to the non-suing borrower, whether or not the two borrowers were in the same room at the time of delivery. Third, we uphold the district court's decision that Duren failed to prove the elements of common law unconscionability. Finally, because equitable rescission is available under the CPPA only to the extent that "the court deems proper," D.C. Code § 28-3905(k)(1)(D), we find no error in the district court's exercise of its discretion to deny Duren's request for that remedy against IMC.

Conclusion

In summary, despite the myriad of challenges from both Duren and First Government, we uphold the district court's disposition, with one exception: We reverse the judgment and award against First Government and remand to the district court for determination by the court of the question of whether First Government's disclosures to Duren satisfied the requirements of TILA.