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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MITCHELL and RANDI SCHWARTZ,

Plaintiffs,

vs.

NOVASTAR MORTGAGE INC.,
SAXON MORTGAGE SERVICES, INC.
MORTGAGE ELECTRONIC
REGISTRATION
SYSTEMS, INC., JPMORGAN
CHASE BANK, N.A., in its own
capacity and as trustee for
NOVASTAR MORTGAGE FUNDING
TRUST, SERIES 2005-4, AND
NOVASTAR MORTGAGE FUNDING
TRUST, SERIES 2005-4,

Defendants.

CASE NO.

03 4843

JURY TRIAL DEMAND

COMPLAINT

INTRODUCTION

1. Plaintiffs Mitchell and Randi Schwartz seek rescission of their home mortgage transaction with NovaStar Mortgage, Inc. pursuant to the Truth in Lending Act, 15 U.S.C. § 1635. Plaintiffs also charge defendant Saxon Mortgage Services, Inc. with failure to provide information that it is required to provide pursuant to 15 U.S.C. § 1641(f)(2).

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to Title 28 of the United States Code, Sections 1331 and 1337 because plaintiffs' claims under the Truth in Lending Act arise under federal law.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because plaintiffs'

claims arose here and because the defendants do business in this district.

PARTIES

4. Defendant NovaStar Mortgage Inc. is a mortgage lender that has done business in this district. Defendant Saxon Mortgage Services, Inc. services mortgages originated by NovaStar and does business in this district. Upon information and belief, defendants Mortgage Electronic Registration Systems, Inc. and JPMorgan Chase Bank, N.A., either in its own capacity of NovaStar Mortgage Funding Trust, Series 2005-4 and/or NovaStar Mortgage Funding Trust, Series 2005-4, were assignees of plaintiffs' mortgage, within the meaning of 15 U.S.C. § 1641 and also do business in this district.

5. Plaintiffs Mitchell and Randi Schwartz, husband and wife, are residents of Holland, Pennsylvania.

BACKGROUND

6. Plaintiffs own a home in Holland, Pennsylvania. In August 2005, they decide to refinance the mortgage on their home to raise money to pay for their daughter's medical care.

7. Plaintiffs applied to a NovaStar affiliate for a \$208,000 mortgage loan with a fixed interest rate over thirty years of 8.550%. On or about August 8, 2005, plaintiffs received a preliminary TILA disclosure and a good faith estimate, both of which indicated they would be getting a fixed rate mortgage. According to the good faith estimate, the interest rate on the mortgage would be 8.550%. According to the preliminary TILA disclosure, the total finance charge plaintiffs would be paying would be \$380,440.46.

8. There ensued a long delay, during which time plaintiffs' financial situation worsened and their needs became more acute.

9. In October 2005, plaintiffs received new documents concerning their mortgage.

Key deal terms had changed. The interest rate was now adjustable and could go as high as 15.550%, rather than remaining fixed at 8.550%. The total finance charge became \$481,682.29, rather than \$380,440.46, an increase of more than \$100,000.00.

10. The loan closed on October 19, 2005. Plaintiffs were given Notice of Right to Cancel forms which misstated the name of the lender and did not disclose the address to which rescission notices should be sent, both violations of 12 C.F.R. § 226.23(b)(1)(iii).

11. Plaintiffs were also given a document dated October 19, 2005, which said that they would owe fees of \$395, \$300 and \$2,731 (a total of \$3,426) if they tried to back out of the deal, a misrepresentation of their rescission rights in violation of 12 C.F.R. § 226.23(b)(1)(iv).

12. Plaintiffs' original lender was NovaStar Mortgage, Inc. Plaintiffs' mortgage was transferred to Mortgage Electronic Registration Systems, Inc. Upon information and belief, the mortgage loan was assigned to JPMorgan Chase Bank, N.A., as trustee for NovaStar Mortgage Funding Trust, Series 2005-4 and/or NovaStar Mortgage Funding Trust, Series 2005-4. Plaintiffs paid off their mortgage loan earlier this year.

COUNT ONE -- TRUTH IN LENDING ACT -- RESCISSION

13. Plaintiffs incorporate herein by reference paragraphs one through twelve above.

14. NovaStar's disclosures to plaintiffs did not comply with the requirements of the Truth in Lending Act. To understand how the disclosures were defective, some background is helpful.

REGULATORY FRAMEWORK

15. The Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et. seq. requires the clear, fair, conspicuous and accurate disclosure of the costs and terms of credit. The statute's purpose is to protect consumers from inaccurate and unfair credit practices, and to assure a meaningful

disclosure of credit terms so that the consumers will be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit.

16. Accordingly, the Board of Governors of the Federal Reserve System promulgated Regulation Z to implement TILA. 12 C.F.R. § 226.1(a). A creditor is required by Regulation Z to make certain disclosures to the consumer, “clearly and conspicuously in writing, in a form that the consumer may keep.” 12 C.F.R. § 226.17(a)(1). Regulation Z sets out certain guidelines for creditors to follow when disclosing the amount financed, the finance charge, and the annual percentage rate to the consumer and demands that these disclosures be accurate. 12 C.F.R. §§ 226.18, 226.22, 226.5.

17. Regulation Z also requires that “disclosures shall reflect the terms of the legal obligation between the parties” 12 C.F.R. § 226.17(c)(1) and that the creditor accurately disclose “[t]he number, amounts, and timing of payments scheduled to repay the obligation.” 12 C.F.R. § 226.18(g)(1).

18. The Truth in Lending Act confers additional rights on home owners who refinance their mortgages with a new lender. In order to give these borrowers an opportunity to reflect on their other TILA disclosures and to rethink transactions that would put the titles to their homes at risk, the Truth in Lending Act gives home owners who refinance their mortgages with a new lender the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or three business days after receiving their final TILA disclosures or three business days of receiving notice of their right to rescind, whichever is later.

More specifically, the statute, provides that:

Except as otherwise provided in this section, in the case of any consumer credit transaction ... in which a security interest ... is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, 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 section together with a statement containing the material disclosures required under this title, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so.

15 U.S.C. § 1635(a).

19. To ensure that rescission is a viable option, the statute also provides that if the customer elects to rescind, the customer is entitled to the return of all money or property that the customer has given as part of the credit transaction. More specifically, the statute provides:

When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.

15 U.S.C. § 1635(b).

20. To ensure that home owner borrowers are aware of these rights, the statute requires lenders to disclose rescission rights to customers clearly, conspicuously and accurately.

More specifically, the statute provides:

The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

15 U.S.C. § 1635(a).

21. Regulation Z, promulgated by the Federal Reserve Board pursuant to the Truth in Lending Act, amplifies the statutory requirements. Subject to exceptions not here pertinent, the regulation provides:

In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction

12 C.F.R. § 226.23(a)(1).

22. The regulation goes on to require that the creditor "deliver" to "each consumer entitled to rescind" two copies of a document that "clearly and conspicuously disclose[]" the consumer's rescission rights. See 12 C.F.R. § 226.23(b)(1).

23. More specifically, the regulation provides:

In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in § 226.36(b)). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

- (i) The retention or acquisition of a security interest in the consumer's principal dwelling.
- (ii) The consumer's right to rescind the transaction.
- (iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.
- (iv) The effects of rescission, as described in paragraph (d) of this section.
- (v) The date the rescission period expires.

12 C.F.R. § 226.23(b)(1).

24. Paragraph (d) goes on to explain the effects of rescission. Subparagraph (d)(1) provides:

When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

12 C.F.R. § 226.23(d)(1).

25. Subparagraph (d)(2) states:

Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

12 C.F.R. § 226.23(d)(2).

26. The Federal Reserve Board's commentary of paragraph 23(d)(2) explains that the words "any money or property" would include an appraisal fee. The commentary provides:

The consumer cannot be required to pay any amount in the form of money or property either to the creditor or to a third party as part of the credit transaction. Any amounts of this nature already paid by the consumer must be refunded. "Any amount" includes finance charges already accrued, as well as other charges, such as broker fees, application and commitment fees, or fees for a title search or appraisal, whether paid to the creditor, paid directly to a third party, or passed on from the creditor to the third party. It is irrelevant that these amounts may not represent profit to the creditor.

12 C.F.R. part 226 Supp.I para. 23(d)(2)-1.

DEFECTIVE DISCLOSURES

27. NovaStar's rescission disclosures to plaintiffs were defective in a number of respects. First, the Notice of Right to Cancel forms misstated the name of the lender in violation of 12 C.F.R. § 226.23(b)(1)(iii).

28. Second, the Notice of Right to Cancel forms did not provide the address to which to send rescission notice, also a violation of 12 C.F.R. § 226.23(b)(1)(iii).

29. Third, NovaStar gave plaintiffs a document which said they would owe fees of \$395, \$300 and \$2,731 (a total of \$3,426) if they tried to back out of the deal, a misrepresentation of their rescission rights in violation of 12 C.F.R. § 226.23(b)(1)(iv).

30. Under the Truth in Lending Act, if the rescission disclosures or TILA disclosures

are deficient, then the rescission period is extended for up to three years. See 12 C.F.R. § 226.23(a)(3) (“If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever occurs first”).

31. NovaStar’s rescission disclosures were defective. Accordingly, on or about September 19, 2008, plaintiffs sent rescission notices to NovaStar Mortgage, Inc., Saxon Mortgage Services, Inc. (the last servicer of their loan) and JPMorgan Chase, N.A. (which is believed to have been an assignee of plaintiffs’ mortgage).

32. Within twenty days of receiving the rescission notices, defendants should have paid back to plaintiffs any money or property that plaintiffs have paid to them in connection with the loan. See 12 C.F.R. § 226.23(d)(2). Defendants have not done so.

33. Defendants’ failure to honor the rescission request is a violation of the Truth in Lending Act. Plaintiffs are entitled to rescission plus statutory damages and other relief. Plaintiffs are also entitled to rescission and its associated remedies against any other assignees of the mortgage, such as defendant Mortgage Electronic Systems, Inc.

COUNT TWO -- TRUTH IN LENDING ACT -- 15 U.S.C. § 1641(d).

34. Plaintiffs incorporate herein by reference paragraphs one through thirty-three above.

35. On or about September 19, 2008, plaintiffs asked defendant Saxon Mortgage Services, Inc. to identify all assignees of plaintiffs’ mortgage loan, pursuant to 15 U.S.C. § 1641(f)(2). Saxon has not done so, which is a violation of TILA.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that the Court grant judgment against defendants as

follows:

- a. ordering defendants to provide plaintiffs with the money to which plaintiffs are entitled to under 12 C.F.R. § 226.23(d)(2);
- b. awarding plaintiffs actual damages proximately caused by defendants' failure to comply with 12 C.F.R. § 226.23(d)(2);
- c. awarding appropriate actual and statutory damages;
- d. ordering defendants to pay costs, penalties, and attorneys fees;
- e. granting such other relief as the Court deems just and proper.

ANN MILLER, LLC

By:



Ann Miller
834 Chestnut Street, Suite 206
Philadelphia, PA. 19107
(215) 238-0468
Attorney for Plaintiffs

OF COUNSEL:

Daniel Harris, Esq.
Anthony Valach, Esq.
The Law Offices of Daniel Harris
150 N. Wacker Drive, Suite 3000
Chicago, IL 60606
(312) 960-1802