

LANDLORD TENANT

SUIT FOR FORCIBLE ENTRY AND DETAINER REQUIRES LANDLORD TENANT RELATIONSHIP

Aguilar v. Weber, ___ S.W.3d ___ (Tex. App.—Waco 2002).

FACTS: In April of 1998, the Webers and the Aguilars entered into a contract for the purchase of residential property. Under the contract, the Webers agreed to execute a warranty deed conveying the property to the Aguilars if the Aguilars made timely payments for a period of three to six months. The contract stated that in the event of a default on payments due, the Aguilars forfeited all monies previously paid. The contract did not provide that default created a landlord-tenant relationship or that in the event of default the Webers could institute a detainer suit to establish possession.

In the summer of 2000, the Webers initiated a detainer suit, alleging that the Aguilars had defaulted on the contract by failing to make timely payments, pay taxes, or provide insurance as provided by the contract. The justice court issued judgment in favor of the Webers.

On appeal to the county court, the Aguilars filed a counter-claim in which they: (1) disputed the amount allegedly owed under the contract, and (2) argued that the Webers failed to execute the warranty deed as required by the contract. The county court ruled in favor of the Webers, the Aguilars appealed.

HOLDING: Appeal dismissed for want of jurisdiction.

REASONING: Jurisdiction over forcible detainer actions is expressly given to the justice court of the precinct where the property is located and, on appeal, to county courts for a trial de novo. See TEX. PROP. CODE ANN. § 24.004 (Vernon 2000). However, a justice court is expressly denied jurisdiction to determine or adjudicate title to land. TEX. GOV'T CODE ANN. § 27.031(b) (Vernon Supp. 2001).

The sole issue in a forcible detainer suit is who has the immediate right of possession of the premises. See *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.). To prevail in a forcible detainer action, a plaintiff is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession. If it becomes apparent that a genuine issue of fact regarding title exists, the justice court does not have jurisdiction over the matter. See *Mitchell v. Armstrong Capital Corp.*, 911 S.W.2d at 171 (Tex. App.—Houston [1st Dist.] 1995, writ denied)

A forcible detainer action is dependant on proof of a landlord-tenant relationship. See *Haith v. Drake*, 596 S.W.2d 194, at 196 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). The lack of a landlord-tenant relationship is an indication that the justice court (and county court on appeal) is called upon to adjudicate title to real estate in a forcible detainer case. Because this is a right justice courts are expressly denied, this court agrees that a forcible detainer action must be based on a landlord-tenant relationship.

CONSUMER CREDIT

POINTS ARE INTEREST NOT FEES

Tarver v. Sebring Capital Credit, 69 S.W.3d 708 (Tex. App.—Waco 2002).

FACTS: Sharon and James Tarver (“the Tarvers”) went to Sebring Capital Credit (“Sebring”) to obtain a home equity loan. They entered into an agreement for the home equity loan for 80% of the value of their home and gave Sebring a lien on their residence to secure the loan. While negotiating the loan, Sebring offered the Tarvers a 12.375% interest rate, however, the Tarvers requested a lower rate. Thereafter, Sebring offered the Tarvers a 9.375% interest rate in exchange for the Tarvers paying 3% of the original loan amount as discount points. At the final signing of the loan agreement, the Tarvers signed a Discount Point Acknowledgment stating that they had been offered a higher interest rate, and had agreed to pay the discount points in exchange for the lower interest rate of 9.375%. Sebring absorbed most of the fees charged in order to stay within the limitations of the three-percent rule of section

50(a)(6)(E) of the Texas Constitution. The three-percent rule limits the amount of fees that can be charged to a consumer to three percent of the loan principal.

The Tarvers brought a declaratory judgment action seeking to invalidate the loan. They alleged that Sebring never offered any interest rate other than 9.375% and, therefore, the discount points paid were actually fees charged by the bank subject to the limitations of the three-percent rule. The Tarvers argued that section 50(a)(6)(E) of the Texas Constitution states that fees may not exceed three percent of the original loan principal. The trial court granted summary judgment in favor of Sebring. The Tarvers appealed.

HOLDING: Affirmed.

REASONING: The Tarvers argue that the points charged are fees disguised as interest. Section 50(a)(6)(E) of the Texas Constitution specifically excludes interest from the three-percent limitation. Points are one of two forms of consideration paid by a borrower to a lender: (1) interest as a percentage of the principal balance, charged overtime for the use of the money, and (2) points calculated as a

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percentage of the loan amount, charged up-front to obtain a lower interest rate. The Tarvers did execute a written acknowledgement that they requested a lower interest rate and agreed to pay the discount points in exchange. The points are not fees because under section 50(a)(6)(E) of the Texas Constitution, they are not charged to originate, evaluate, maintain, record, insure, or service the extension of credit. The points were paid as consideration to the bank for lowering the interest rate.

The court notes that, “interest” means compensation for the use, forbearance, or detention of money. Charges that constitute interest are not subject to the three-percent rule. Fees that are required to be paid and that are not interest are subject to the three-percent limitation. The points constitute a form of interest and the “Discount Point Acknowledgment” signed by the Tarvers at closing, stating that they were electing to pay discount points in order to obtain a smaller interest rate, is uncontroverted evidence that the Tarvers were aware that the points were charged as interest. Hence, the court hereby defines interest to include “Points” under section 50(a)(6)(E) of the Texas Constitution, which are not subject to the three-percent rule.

BANK THAT OFFERED A “NO ANNUAL FEE” CREDIT CARD, BUT CHANGED THE TERMS MID-YEAR TO REQUIRE A FEE, VIOLATED THE TRUTH IN LENDING ACT

Rossman v. Fleet Bank Nat’l Ass’n., 280 F.3d 384 (3rd Cir. 2002).

FACTS: In late 1999, Paula Rossman received a “Pre-Qualified Invitation” to obtain a credit card from Fleet Bank (“Fleet”). This solicitation was for a low annual percentage rate and “no annual fee.” In the table of basic credit card information as required under the Truth in Lending Act (“TILA”) was a column with the heading “Annual Fee.” Under this heading was the word “None” and the statement, “We reserve the right to change the benefit features associated with your Card at any time.”

Rossman responded to Fleet’s offer, and in January of 2000 received her “no-annual-fee Platinum Mastercard.” In May 2000, Fleet sent a letter to Rossman announcing its intention to change the terms of the agreement and impose a \$35 annual membership fee. In June 2000, Fleet announced by letter that this fee would be imposed immediately. Rossman then brought a putative class action suit alleging violations of the TILA. Specifically, Rossman alleged that Fleet continued to bait new customers with the no-annual-fee offer, while telling existing customers that the fee increase was necessitated by changing market conditions. According to Rossman, the no-annual-fee offers were made by Fleet with the intention of imposing a fee shortly thereafter, creating a bait-and-switch scheme in violation of the TILA. The District Court disagreed, and granted Fleet’s 12(b)(6) motion for failure to state a claim.

HOLDING: Reversed and remanded.

REASONING: The purpose of the TILA is to assure accurate, meaningful disclosures. *See* 15 U.S.C. § 1601. As such, the TILA prohibits not only literal falsities, but also misleading statements. The TILA is a consumer protection act designed to provide easily understood information to consumers, so it is appropriate to interpret the statement “no annual fee” from the consumer’s point of view. Here, Fleet advertised the absence of an annual fee as a defining feature of the card, and “no annual fee” is fairly understood by reasonable consumers to imply a term of one year. Fleet attempted to impose an annual fee after just six months. Because the statement “no annual fee” is misleading with respect to the duration of the offer, further clarification is necessary for Fleet to meet the requirements of the TILA.

The court recognizes that in one sense, the solicitation disclosures were accurate because the agreement referred to by the disclosures did not contemplate an annual fee. But in another sense, if Fleet intended to impose an annual fee shortly thereafter, the disclosures were misleading. Solicitation disclosures are intended to alert the consumer to the basic costs of the credit card he or she is considering, and this purpose was ill-served when Fleet concealed the temporary nature of its “no annual fee” offer. Thus, Fleet’s “no annual fee” statement is a misleading solicitation in violation of the TILA.

TRUTH IN LENDING REQUIRES TWO NOTICES TO RESCIND

FAILURE TO HONOR VALID RESCISSION IS A SEPARATE VIOLATION OF TRUTH IN LENDING

Staley v. Americorp Credit Corp., 164 F. Supp. 2d 578 (D. Md. 2001).

FACTS: Rebecca Staley (“Staley”) owned real property in Frederick, Maryland. She executed and delivered to Americorp Credit Corporation (“Americorp”) a note and deed of trust that constituted a second mortgage on her principal residence. Thereafter, Staley sued defendant Americorp under the Maryland Mortgage Lender Law (“MMLL”) and the federal Truth in Lending Act (“TILA”), alleging that, among other things, she did not receive notice of her right to rescind and the notice she did receive provided the incorrect date that the rescission period would expire. In addition, Staley alleged she gave Americorp written notice of her rescission and that Americorp did not honor it. Americorp moved to dismiss the case for failure to state a claim.

HOLDING: Ganted in part and denied in part.

When a borrower uses her principal dwelling to secure her loan, the TILA provides her with a right to rescission.

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REASONING: When a borrower uses her principal dwelling to secure her loan, the TILA provides a right to rescission. 15 U.S.C. § 1635(a). The creditor is required to “deliver two copies of the notice of the right to rescind” to the borrower. 12 C.F.R. § 226.23(b)(1). Because Staley alleged that she did not receive the notices that Americorp is required to provide, the court rules that this allegation is sufficient to state a claim which would entitle Staley to relief.

Furthermore, under the TILA, the notice of right to rescind must clearly and conspicuously disclose “the date the rescission period expires.” 12 C.F.R. § 226.23(b)(1)(v). The rescission period expires at “midnight of the third business day following consummation [of the loan], delivery of the notice [of the right to rescind], or delivery of all material disclosures, whichever occurs last.” 12 C.F.R. § 226.23(a)(3). Staley alleges that the notice provided a rescission date before the documents were ever executed. The court rules that if Americorp sent such notice to Staley, the notice fails to provide a clear and conspicuous disclosure of the date that the period of rescission actually expired. Thus, the court rules that Staley has stated a claim for which relief could be granted. Finally, the court rules that Staley’s allegation that Americorp failed to honor her rescission of her loan is sufficient to state a claim upon which relief could be granted because the failure to honor a consumer’s rescission of her loan is a separate violation of the TILA.

LITIGATION FUNDING VIOLATES STATE USURY LAWS

Rancman v. Interim Settlement Funding Corp., ___ N.E.2d ___ (Ohio. App.—2001).

FACTS: Rancman was injured in an automobile accident involving a drunk driver. While litigation was pending regarding the accident, Rancman executed a contract with Interim Settlement Funding Corp. (“ISF”) and received \$6,000. The collateral for the contract was the possible settlement Rancman would receive from her pending litigation regarding the accident. The lowest possible interest rate on the contract was 280%.

After Rancman received \$100,000 on her personal injury claim, she filed a complaint against ISF seeking declaratory judgment that ISF committed unfair, deceptive or unconscionable sales practices and that the contract was a loan requiring usurious interest and violated the Small Loan Act. ISF moved for summary judgment on Rancman’s claims. The trial court granted summary judgment to ISF on Rancman’s claim that ISF committed unfair sales practices and denied summary judgment on Rancman’s claim that the loans required usurious interest and violated the Small Loan Act. The trial court later found that the transaction with ISF was a loan that violated the usury interest law and Small Loan Act and therefore, the contract was illegal and ISF was not entitled to any recovery.

HOLDING: Affirmed in part and reversed in part.

REASONING: The court finds that the transaction between ISF and Rancman is a loan. For a transaction to qualify as a loan, a sum of money must be delivered to another upon the agreement to repay the sum loaned. *Springgate v. Daneman*, 32 Ohio App. 279, 283 (1929). Repayment of the sum loaned is considered repayable absolutely if non-payment of the amount is so improbable as to convince the court or jury that there was no real hazard. At trial the president of ISF testified that this was a case with a low risk of not recovering any amount from the jury. The evidence presented at trial demonstrates that the contracts were loans because no real probability existed that non-payment would occur. Because the transaction was a loan, Ohio’s usury laws apply. The transaction is in violation of Ohio’s usury laws and is, therefore, an illegal contract.

IN ORDER FOR A VIOLATION OF THE FAIR CREDIT REPORTING ACT TO BE WILLFUL, JUSTIFYING AN AWARD FOR PUNITIVE DAMAGES, A DEFENDANT’S COURSE OF CONDUCT MUST EXHIBIT A CONSCIOUS DISREGARD FOR OR ENTAIL DELIBERATE AND PURPOSEFUL ACTIONS TAKEN AGAINST A PLAINTIFF’S RIGHTS

Sapia v. Regency Motors of Metairie, Inc., 267 F.3d 747 (5th Cir. 2002).

FACTS: Robert Sapia (“Sapia”) went to Regency Motors of Metairie Louisiana (“Regency”) to shop for a new truck. He informed the salesperson he had no money to put down but would use his current vehicle as a trade-in. However, his current vehicle provided no net trade in allowance, because it was not worth more than Sapia owed. Sapia found a truck and negotiated a price with the salesperson. Sapia then signed papers authorizing Regency to check his credit to determine which financial institution would most likely extend him credit.

Sapia met with the finance manager of Regency who explained each of the documents presented to Sapia to sign. Sapia signed many documents including a Truth-in-Lending Disclosure Statement and Security Agreement and an Addendum to Purchase Agreement. The Truth-in-Lending Statement and Security Agreement stated that, “I have entered into a credit sale with you to finance the purchase of the following described motor vehicle,” and contained a promise by Sapia to pay the principle amount along with interest at the specified rate. The Addendum to Purchase Agreement stated the sales installment contract would be assigned to a financial institution and that in the event Regency was unable to assign the contract within seven days, the Retail Sales contract would be void. The addendum clearly provided that:

Should Regency be unable to obtain financing within seven days of date hereof *prospective* purchaser shall return the vehicle to Regency by the end of the seventh day or within forty-eight hours of notification by Regency that financing cannot be obtained, which ever occurs earlier.

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Thereafter *prospective* purchaser will be without authority to further use the vehicle and acknowledges and agrees that law enforcement authorities may be called.

An employee in the finance office directed Sapia to sign a Bank One-Harahan Credit Application because she felt it was the most likely place to approve Sapia. Bank One did not approve Sapia. The following day Bank One sent a fax to Regency that listed the basis for the denial as excessive inquires and insufficient equity and noted that credit might be extended for an "auto similar to trade."

Sapia was then advised to return to the dealership to restructure the transaction to include a down payment in the hope of obtaining financing. Sapia was unavailable because he had left the country on business. It appeared that Sapia might not return until well after the expiration of the seven day window, so Regency attempted to have the loan approve by AmeriCredit Financial. AmeriCredit refused to approve Sapia and sent a decision notification to him indicating such. Over the next several days, Regency attempted to secure financing with multiple lending institutions, but none financed Sapia due to his bad credit. Regency subsequently took possession of the truck pursuant to the Addendum to Purchase Agreement.

Sapia filed suit under the Truth in Lending Act and the Fair Credit Reporting Act. The court granted summary judgment to the defendant.

HOLDING: Affirmed.

REASONING: The court finds that Sapia presents no evidence of actual damages arising from Regency's conduct. Sapia received adverse action letters from Bank One, Hibernia, Chase Manhattan, and Ford Motor Credit. Regency's duty to send out an adverse action letter could only arise if a lender it contacted failed to do so. AmeriCredit was the only lender from whom Sapia denies receiving an adverse action letter. However, Sapia could not have learned any additional information from a fifth

or sixth adverse action letter. Moreover, failure to issue an adverse action letter when the letter is prompted by an accurate report precludes the possibility that there was anything Sapia could remedy in order to obtain financing. The court determines that no damages have occurred.

The court also notes that in order to collect punitive damages under the Fair Credit Reporting Act, Sapia must show that Regency willfully failed to comply with one of the Act's requirements. For the violation to be "willful," thereby justifying an award of punitive damages under the FCRA, a defendant's course of conduct must exhibit a "conscious disregard" for or entail "deliberate and purposeful" actions taken against a plaintiff's rights. *Cousin v. Trans Union Corporation*, 246 F.3d 359, 372 (5th Cir. 2001). Sapia stated that "it went without citing

Sapia's argument that "willful" envelops all acts committed in violation of the law because a party is "imputed to know the law" is unfounded.

authority that Summary Judgment is not the proper vehicle to obtain evidence on intention." Sapia cites no authority in arguing that summary judgment dismissing a claim for punitive damages is improper. Sapia's argument that "willful" envelops all acts committed in violation of the law because a party is "imputed to know the law" is unfounded, incorrect, and, if applied generally, would allow punitive damages for all claims. Furthermore, Sapia presents no evidence that Regency acted in conscious disregard of his rights.

Therefore, the district court's granting of Regency's Motion for Summary Judgment on the issue of punitive damages is proper.

MISCELLANEOUS

A DELAY DEMANDING ARBITRATION DOES NOT CONSTITUTE WAIVER UNLESS THERE IS ACTUAL PREJUDICE TO THE OPPOSING PARTY

ARBITRATION CLAUSE IS BINDING ONLY ON PARTIES AND ASSIGNEES

In re Rolland, ___ S.W.3d ___ (Tex. App.— Austin 2001).

FACTS: Plaintiff Rolland, prior to moving to Texas in 1981, contracted with Livernois Moving & Storage ("Livernois") to retain and store her furniture in Michigan. Rolland claimed her furniture was in excellent condition when initially stored. Livernois ceased business operations in 1989 but with Rolland's consent, transferred her storage account to Defendant Potter Warehouse ("Potter"). In 1997, Rolland requested her property be shipped to Texas.

Based on Potter's recommendation, Rolland contracted with Defendant Wheaton Van Lines ("Wheaton") for the move. When her property arrived, Rolland discovered the property was dank and some items were mildewed, damaged, or missing.

Rolland sued Potter and Wheaton (collectively "Defendants") for various causes, including negligence, breach of contract, and breach of the DTPA. Defendants filed motions to compel arbitration, relying on an arbitration clause in the 1981 agreement between Rolland and now defunct Livernois. Rolland argued there were no enforceable arbitration agreements between her and the Defendants, and in the alternative, Defendants had waived their right to arbitration by waiting too long in the judicial process to compel arbitration. The court subsequently granted Defendants' motions and stayed the litigation pending arbitration. Rolland sought mandamus relief from