RENDERED: NOVEMBER 18, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000549-MR

CARLA BALDWIN — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 13-CI-00557

PBK BANK;
AND UNKNOWN SPOUSE OF
CARLA BALDWIN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

KRAMER, CHIEF JUDGE: Carla Baldwin appeals from a summary judgment and order of sale rendered in Madison Circuit Court. The order directed the master commissioner to sell a parcel of real property under mortgage to PBK Bank after Baldwin failed to make mortgage payments on the note for approximately one

year. Baldwin argues summary judgment was improperly rendered because a genuine issue of material fact remained regarding whether PBK violated the Truth in Lending Act ("TILA"), 15 United States Code (U.S.C.) § 1601 *et seq*., entitling her to offset statutory and actual damages from the amount of PBK's ultimate judgment against her. We agree. We therefore reverse and remand.

For the most part, the facts are not in dispute. Baldwin executed a promissory note to borrow approximately $340,000 from PBK for the purchase of a residential property located at 506 Breezewood Circle in Richmond, Kentucky. Baldwin owned another home at 407 Doubletree Court in which she resided. Concurrent with the execution of the note, PBI obtained a first mortgage on both parcels to secure the Breezewood Circle loan. Baldwin subsequently defaulted on the note, which resulted in PBK filing the instant foreclosure action in Madison Circuit Court.

As indicated, Baldwin defended in part by alleging she was entitled to offset actual and statutory damages from the outstanding balance of her loan because she never received TILA disclosures from PBK when she executed the promissory note. She contended TILA applied to her loan because she had purchased the Breezewood property for a family purpose. In support, she filed an affidavit in which she stated she had purchased the property for her parents to live in, rent-free; she had never received income from any real estate or worked in the real estate industry; the first and only time she saw her loan application or any of its accompanying documentation was when she signed it at the closing; and that

PBK had never given her copies of any kind of paperwork, either before or after the closing.

PBK subsequently moved for summary judgment for the outstanding balance of its loan to Baldwin. While PBK acknowledged it had never given Baldwin copies of the documentation she signed at the closing, or any kind of TILA disclosures, it asserted TILA disclosures were not required under the circumstances because its loan to Baldwin fell within the "business purpose exception" to TILA. In support, PBK pointed out that the loan application and promissory note Baldwin had executed at the closing included typed notations to the effect that the purpose of the loan was for the purchase of rental property; and, to further underscore that the loan was for business purposes, PBK also noted that Baldwin had executed an "assignment of leases and rents" (another document PBK had prepared for Baldwin's signature for the closing) in favor of PBK with respect to her property at 506 Breezewood Circle.[1] Alternatively, PBK asserted that even if TILA was applicable, Baldwin was equitably estopped from relying upon TILA, and was otherwise prohibited from relying upon it by reason of the statute of limitations.

The circuit court ultimately entered a summary judgment of foreclosure in favor of PBK and against Baldwin for $328,543.55, along with

[1] The "assignment of leases and rents" also purported to encompass any and all leases and rents Baldwin received from her Doubletree property. It is unclear why PBK drafted this document to include Baldwin's Doubletree property; PBK has acknowledged at all relevant times, and through the same loan documents, that Baldwin resided in the Doubletree property and was, thus, not renting it to tenants.

interest, representing the full amount of what PBK alleged remained outstanding on the loan. The circuit court's judgment did not address TILA. This appeal followed.

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*. at 480 (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the circuit court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Likewise, we review the circuit court's interpretations of

law *de novo*. *Cumberland Valley Contrs., Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

We now turn to our analysis. Generally speaking, failing to make a disclosure required by TILA may provide grounds for subjecting a lender to statutory damages, actual damages, costs and attorney's fees; these amounts, in turn, may be offset from an underlying debt in a collection action. *See Marema v. First Fed. Savings Bank of Elizabethtown, Inc.*, 405 S.W.3d 512 (Ky. App. 2012); *see also In re Wentz*, 393 B.R. 545, 559-60 (S.D. Ohio 2008). The circuit court's decision to award PBK the full amount of its claim against Baldwin was, as the parties agree, a clear rejection of Baldwin's argument that TILA applied in this matter. Because the circuit court's judgment specifies no particular reason why it found TILA inapplicable, we presume the circuit court found TILA inapplicable for each of the reasons argued in PBK's motion for summary judgment, discussed above. *See, e.g., Sword v. Scott*, 293 Ky. 630, 169 S.W.2d 825, 827 (1943) ("In the absence of the court's specifying the ground or grounds for his dismissal of the petition, it will be assumed that it was upon any or all of the grounds which the proof sufficiently established."). We will address each of those reasons.

First, PBK argues the evidence demonstrates its loan to Baldwin was indisputably for a business purpose and therefore exempt from TILA; and further demonstrates Baldwin should be equitably estopped from denying it. We disagree.

To be sure, TILA does not apply to "(c)redit transactions involving extensions of credit for business or commercial purposes . . . ." 15 U.S.C. §

1603(1); *see also* 12 C.F.R. § 226.3(a).[2] The express purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). For that reason, the application of TILA is limited to "consumer" credit, defined as follows:

> The adjective 'consumer,' used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

15 U.S.C. § 1602(h).

The Official Commentary to Regulation Z, which is considered dispositive in TILA cases unless it is demonstrably irrational, provides further guidance in this context.[3] It explains that lenders

> [M]ust determine in each case if the transaction is primarily for an exempt purpose. If some question exists as to the primary purpose for a credit extension, the creditor is, of course, free to make the disclosures, and the fact that disclosures are made under such circumstances is not controlling on the question of whether the transaction was exempt.

[2] 12 C.F.R. § 226, TILA's array of implementing regulations, is generally known as "Regulation Z."

[3] The Official Commentary is published by the Board of Governors of the Federal Reserve System and the interpretation of Regulation Z contained therein "is dispositive in TILA cases unless the commentary is demonstrably irrational." *Clay v. Johnson*, 264 F.3d 744, 748 (7th Cir.2001); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980) ("Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA [and] [t]he Act is best construed by those who gave it substance in promulgating regulations thereunder.").

12 C.F.R. § 226.3, Supp. I, Cmt. (1). "Thus, under the Board's interpretation, creditors have an affirmative duty to determine the applicability of the exemption, and in cases of uncertainty, they are expressly invited to make the disclosures." *In re Dawson*, 411 B.R. 1, 35 (D.D.C. 2008); *see also Id.* at 37 (specifying the lender's duty is to "make an inquiry reasonably calculated to lead to an accurate determination" of whether the purpose of the loan is for business or commercial purposes).

To that end, factors that a lender should consider in making such determinations include:

> A. The relationship of the borrower's primary occupation to the acquisition. The more closely related, the more likely it is to be business purpose.
>
> B. The degree to which the borrower will personally manage the acquisition. The more personal involvement there is, the more likely it is to be business purpose.
>
> C. The ratio of income from the acquisition to the total income of the borrower. The higher the ratio, the more likely it is to be business purpose.
>
> D. The size of the transaction. The larger the transaction, the more likely it is to be business purpose.
>
> E. The borrower's statement of the purpose of the loan.

12 C.F.R. § 226.3, Supp. I, Cmt. (3)(i)(A)-(E).

With this is mind, there is at least some evidence supporting Baldwin sought a loan from PBK for a consumer or family purpose. As noted in Baldwin's affidavit, the only residents of the Breezewood Circle property were Baldwin's

mother and father; she never charged them rent or intended to do so; her intent was to purchase the property for them; and she has never derived income from real estate or rental properties. *See, e.g., Friedman v. Maspeth Federal Loan and Sav. Ass'n*, 30 F.Supp.3d 183, 190 (E.D. New York 2014) (explaining "If a member of the owner's family is to occupy the premises without payment of rent, it may be considered a loan for non-business and non-commercial purposes);[4] *see also Shames-Yeakel v. Citizens Financial Bank*, 677 F.Supp.2d 994, 1002-3 (N.D. Ill. 2009) (explaining finder of fact could reasonably conclude a loan obtained to purchase a loft for one's son to live in rent-free was a loan obtained for a family purpose).[5]

Nevertheless, PBK argues its loan to Baldwin was unequivocally for a business purpose—and that Baldwin is equitably estopped from denying it—based upon the following undisputed facts: a representative of PBK arrived at Baldwin's

[4] *Friedman* was a case dealing with the Real Estate Settlement Procedures Act (RESPA), not TILA, but it makes no difference. RESPA and TILA specifically exempt transactions involving credit "primarily for business, commercial or agricultural purposes." 12 U.S.C. § 2606(a)(1); 15 U.S.C. § 1603(1). Under the relevant regulations of both statutes, the provisions for determining when the exemption applies are identical. *See* 12 U.S.C. § 2606(b).

[5] In support of a contrary position (*i.e.*, that a loan to purchase non-owner-occupied property for members of extended family to live in, rent free, must qualify as a commercial or business purpose), PBK relies upon *Daniels v. SCME Mortgage Bankers, Inc.*, 680 F.Supp.2d 1126 (C.D. Cal. 2010); and *In re Fricker*, 113 B.R. 856 (E.D. Pa. 1990).

Daniels, however, provides no such rule of law. The plaintiff in *Daniels* made an *assertion* that a particular loan was for a family purpose within the meaning of TILA, and the court found the assertion insufficient for purposes of withstanding a motion to dismiss because this assertion was not set forth in the plaintiff's complaint and thus could not be taken as true. *Daniels*, 680 F.Supp.2d at 1130.

Moreover, while *Daniels* (albeit in *dicta*) and *Fricker* both appear to interpret TILA as inapplicable in the context of non-owner-occupied housing for members of the owner's extended family, we find the logic of those cases unpersuasive. Both cases attempt to support this interpretation by citing TILA commentary directed toward "non-owner-occupied *rental* property." *Daniels*, 680 F.Supp.2d at 1131; *Fricker*, 113 B.R. at 867.

residence; presented her with loan documents containing pre-printed notations indicating the loan was for a business purpose; that Baldwin signed the documentation.

We disagree. "Because the TILA is a remedial statute primarily intended to protect consumers, courts conducting a TILA analysis look to 'the substance rather than the form' of the relevant transactions." *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 727 (7th Cir. 2004) (FCRA case) (quoting *Clark v. Rent–It–Corp.*, 685 F.2d 245, 248 (8th Cir. 1982) (TILA case)); *see also Hickman v. Cliff Peck Chevrolet, Inc.*, 566 F.2d 44, 46 (8th Cir. 1977). In other words, a lender's representation to a borrower, to the effect that TILA applies to a particular loan, is not controlling. 12 C.F.R. § 226.3, Supp. I, Cmt. (1); *see also Antanuos v. First Nat. Bank of Arizona*, 508 F.Supp.2d 466, 472 (E.D. Virginia 2007). Conversely, a borrower's stated purpose for the loan is merely one of the several factors a lender must consider prior to issuing a loan—a factor which, depending upon the circumstances, may or may not be entitled to weight.

For example, in *In re Dawson*, 411 B.R. 1, a borrower executed loan documents that purported to put her on notice that she was entering a commercial rather than a consumer transaction. She also executed an "affidavit of business purpose." As the court explained, however,

> [A]n affidavit stating that a loan is for a business purpose is not legally conclusive as to the purpose of that loan. Indeed, "[t]he business or personal nature of [a] loan is a factual question to be answered after evaluating the circumstances surrounding the transaction." *McGovern*

> *v. Smith*, 59 Wash. App. 721, 801 P.2d 250, 256 (1991). The same principle holds true with respect to the other documents purporting to put [the borrower] on notice that she was engaging in a commercial rather than a consumer transaction. The instrument consummating the loan may have included provisions that gave it the superficial appearance of a commercial loan, yet the court finds that the inclusion of such provisions was insufficient to overcome the true character of the loan as a consumer loan.

Id. at 37.

The *Dawson* court also gave the documentation no evidentiary weight in the context of the creditor's equitable estoppel defense[6] to the borrower's TILA claim. As to why, the court held it was unreasonable for the creditor to take the position, based upon the documentation, that the loan was for business purposes when: (1) the lender performed an inadequate investigation into the true character of the loan prior to issuing it; (2) other closing documents raised "red flags" regarding the true character of the loan; and (3) the debtor was unsophisticated. *Id*. at 37-8.

As such, Baldwin's representations regarding the purpose of her loan are not dispositive of the character of the loan, and must be considered with other

[6] In Kentucky, reasonable reliance is also an essential element of equitable estoppel. Specifically, the essential elements are: (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. *Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 91 (Ky. 2000) (citation omitted). On the other hand, the party claiming estoppel must show the following essential elements: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Id*.

factors such as: (1) her level of sophistication; (2) her conduct relating to the property; and (3) the extent to which PBK, prior to issuing the loan, made an inquiry reasonably calculated to lead to an accurate determination of whether the purpose of Baldwin's loan was for business or commercial purposes. As it stands, PBK does not contest Baldwin's statements, set forth in her affidavit, indicating she has no sophistication in real estate. PBK does not contest Baldwin's statements that she has never collected or sought to collect rent on any property she has ever owned, and that only her parents have lived in the Breezewood Circle property. The record also provides no indication PBK conducted *any* investigation into the true character of the loan Baldwin requested, despite its affirmative duty to do so; or that it gave Baldwin the option of signing loan documents that did not already have a pre-printed "business purpose" notation. There remains a material issue as to whether it was reasonable for PBK to rely upon Baldwin's signature on those documents as proof positive that her loan was for a business purpose.

Lastly, PBK argues the applicable statute of limitations barred Baldwin's TILA claim. PBK is incorrect. TILA violations generally must be asserted within one year of the alleged violation. Baldwin did so outside of one year. However, 15 U.S.C. § 1640(e) expressly provides that the Act's one-year limitation on actions for recovery of damages "does not bar a person from asserting a violation . . . in an action . . . brought more than one year from the date of the . . . violation as a matter of defense by recoupment or set off[.]" Baldwin's assertion of PBK's TILA violation qualified as such, and Baldwin was accordingly entitled

to assert it as a counterclaim in PBK's foreclosure action for a recoupment, or set-off, from the debt owed. For parity of reasoning, *see Marema v. First Federal Savings Bank of Elizabethtown, Inc*., 405 S.W.3d 512, 516 (Ky. App. 2012); *Empire Finance Co. of Louisville, Inc. v. Ewing*, 558 S.W.2d 619, 622 (Ky. App. 1977).

In short, PBK offered no valid basis justifying the summary dismissal of Baldwin's TILA claim. Accordingly, we REVERSE and REMAND for further proceedings not inconsistent with this opinion.

CLAYTON, JUDGE, CONCURS.

STUMBO, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Tracey E. Burkett Richmond, Kentucky	Stuart K. Olds Richmond, Kentucky