STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of RAYMOND BURGIN, Deceased.

FLORENCE M. BLOUGH and JERRY H. PELKY,

Plaintiffs-Appellants,

v

BERNICE YOUNG, Personal Representative of the Estate of RAYMOND BURGIN, deceased,

Defendant-Appellee.

UNPUBLISHED
January 23, 1998

No. 196327
Muskegon Probate
LC No. 94-068951-CH

Before: Markey, P.J., and Michael J. Kelly and Whitbeck, JJ.

PER CURIAM.

Plaintiffs sued to foreclose a mortgage on property in the estate of Raymond Burgin. The lower court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). Plaintiffs appeal as of right. We reverse and remand.

We are called upon once again to resolve a dispute arising from the Diamond Mortgage Corporation/A.J. Obie & Associates, Inc., mortgage-backed securities fraud.[1] In this case, decedent Raymond Burgin and Ida Burgin executed and delivered to Diamond a promissory note, secured by a mortgage on their home, in the amount of $10,500, in the expectation that they would receive a loan for the same amount. Diamond, however, without ever disbursing the loan funds to the Burgins, assigned the note and mortgage to plaintiffs, Florence Blough and Jerry Pelky, for face value. The mortgage was recorded with the Muskegon County Register of Deeds, and plaintiffs received only a single payment under the loan and mortgage agreement.

Subsequently, decedent Raymond Burgin died intestate, his wife having predeceased him. An independent probate estate was filed in Muskegon Probate Court, and defendant Bernice Young was appointed the independent personal representative of the estate. Pursuant to her powers as estate

representative, defendant, on May 31, 1994, without knowledge of the recorded mortgage, contracted with Ronald and Susan Kroll to sell the decedent's property which was implicated by the mortgage. During a title search, however, conducted pursuant to the sales contract, defendant discovered the outstanding mortgage on the property in plaintiffs' favor. On March 20, 1995, defendant notified plaintiffs of her intention to rescind the underlying credit transaction pursuant to the federal Truth in Lending Act (TILA), 15 USC 1601 *et seq*. Plaintiffs brought suit to foreclose the mortgage.

We review de novo a trial court's grant or denial of summary disposition, *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995), by examining the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law, *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

Plaintiffs raise several contentions of error concerning the lower court's decision to grant summary disposition in favor of defendant, but we find that only one is meritorious. Plaintiffs argue that the trial court erred in finding that defendant's right to rescind the underlying credit transaction endured after defendant contracted to sell the implicated property to the Krolls. We agree.

As a starting point, TILA § 1635(a) provides that an obligor retains a right to rescind credit transactions like the one involved in this case; however, the right to rescind is not unlimited. Particularly, Regulation z of the Federal Reserve Board provides, inter alia, that the consumer's right to rescind expires upon sale of the property, 12 CFR 226.23(a)(3), and TILA § 1635(f) states that "[a]n obligor's right to rescind shall expire three years after the date of consummation of the transaction or upon the sale of the property, which ever occurs first." Plaintiffs cite *Hefferman v Bitton*, 882 F2d 379, 383-384 (CA 9, 1989), in support of their argument that the sales contract with the Krolls terminated any right to rescind that defendant might have had under the TILA.

In *Hefferman*, the federal court held that in order to properly rescinded a credit transaction, the consumer must send notice of her intention to rescind before contracting to sell her property. *Hefferman*, *supra* at 384. The court stated that it believed the "sale" that TILA § 1635(f) establishes as a cutoff to rescission occurs when the consumer irrevocably agrees to sell the property, not upon the ultimate conveyance of the property. *Id*.

Defendant argues that the language in *Hefferman* on which plaintiffs rely is nonbinding dicta because the federal court had already concluded, on a different ground, that the consumer had no right to rescission. We disagree. The federal court posited the portion of the *Hefferman* decision discussing the timing of the rescission as an alternative basis for ruling against the consumer and, in so doing, stated, "*we hold* that [the consumer] should have sent notice [of her intention to rescind] before contracting to sell the property." *Hefferman*, *supra* at 384 (emphasis added). This is not the language of dicta. Further, *Hefferman* is a federal case construing federal law, and we are bound by authoritative holdings of federal courts on federal questions when there is no conflict. *Kocsis v Pierce*, 192 Mich App 92, 98; 480 NW2d 598 (1991). Because we have found that no other federal court has addressed this aspect of the TILA, we must follow the *Hefferman* decision.

The lower court attempted to distinguish *Hefferman* from the case at bar in several respects. In *Hefferman*, the lender had disbursed the funds of the credit transaction to the consumer. *Hefferman*, *supra* at 380. In the case at bar, it is undisputed that Diamond never disbursed the funds of the loan to the decedent. In *Hefferman*, the consumer had knowledge of the previous credit transaction and security interest involving her property when she contracted to sell the property. *Id*. at 380. In the instant case, defendant claims to have had no knowledge of the mortgage and lien that had attached to the property until a title search, conducted pursuant to the contract to sell the property, revealed the existence of the encumbrance. However, these differences are insufficient to render *Hefferman* inapplicable to the instant case because the policy considerations supporting the *Hefferman* decision do not hinge on such distinctions. The federal court in *Hefferman* stated the following respecting its holding:

> Congress probably enacted § 1635(f) because it worried that allowing a consumer to rescind after selling his residence would cloud property titles and inhibit transactions. Terminating the right to rescind when the consumer irrevocably agrees to sell the property fulfills this policy better than terminating the right upon the actual conveyance. Allowing consumers to rescind or attempt to rescind after entering such a contract implicates the rights of the purchaser and his financing agency and could produce needless litigation and other difficulties. Although [the consumer] may have concealed the attempted rescission from [the buyers], or informed them of her intentions but assuaged their doubts by paying the lenders in full at the conveyance, some sellers might attempt to extract an advantage from their buyers. By threatening to rescind, for example, they might attempt to impede, delay, or abort a sale or to exact tribute from a buyer who worries that the original creditor, if not paid, may demand payment at a later date, a possibility that might cause the buyer's banker to withdraw his loan commitment. If the cutoff for rescission occurs upon the contract to sell, however, these possibilities will be eliminated and all buyers will know exactly what they are facing. [*Id*. at 384 (citation omitted).]

As is readily seen, the federal court in *Hefferman* interpreted the term "sale" in TILA § 1635(f) as it did, not to protect the creditor or the consumer, but rather to protect the buyer of property implicated by a security interest which results from a credit transaction. The danger of a contrary interpretation is highlighted by examining the affidavit of the prospective buyer of the subject property in the case at bar, Ronald Kroll. Kroll avers that he and his wife contracted to buy the subject property from defendant on or about May 31, 1994. Kroll claims that after they contracted, defendant informed him that a mortgage had been discovered on the property that defendant wanted to avoid paying. After several extensions of the purchase contract, Kroll alleges, defendant informed Kroll that the contract had terminated and refunded Kroll's earnest money deposit. As of the date of the affidavit, however, Kroll maintained that defendant did not properly terminate the contract and that he and his wife "have at all times been ready, willing and able" to purchase the subject property. It is this type of buyer discord, and resulting potential for litigation that the federal court in *Hefferman* sought to prevent.

Accordingly, we find that the trial court erred in finding that defendant's right of rescission endured after she contracted to sell the subject property to the Krolls. We agree with the remaining portions of the lower court's decision.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[1] See *Franck v Bedenfield*, 197 Mich App 316; 494 NW2d 840 (1992); *Meretta v Peach*, 195 Mich App 695; 491 NW2d 278 (1992); *Kocsis v Pierce*, 192 Mich App 92; 480 NW2d 598 (1991); *Thoms v Leja*, 187 Mich App 418; 468 NW2d 58 (1991); *Mox v Jordan*, 186 Mich App 42; 463 NW2d 114 (1990); *Elsner v Albrecht*, 185 Mich App 72; 460 NW2d 232 (1990); *People v Greenberg*, 176 Mich App 296; 439 NW2d 336 (1989); *Thomas v State Mortgage, Inc*, 176 Mich App 157; 439 NW2d 299 (1989); *People v Mitchell*, 175 Mich App 83; 437 NW2d 304 (1989).