**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| EMMA L. MEEKINS AND JOANN E. MEEKINS,<br><br>Appellants<br><br>v.<br><br>HSBC BANK NEVADA, NATIONAL ASSOCIATION, SHERMAN ACQUISTION LLC, SHERMAN ORIGINATOR LLC,<br><br>Appellees | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 1835 EDA 2011 |

Appeal from the Judgment Entered June 2, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): July Term, 2008 No. 001801

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., and ALLEN, J.

MEMORANDUM BY STEVENS, P.J. Filed: February 27, 2013

This is an appeal from the orders entered by the Court of Common Pleas of Philadelphia County opening default judgment against Defendants/Appellees, granting partial summary judgment in favor of Defendant/Appellees, and reaching a defense verdict after non-jury trial on Plaintiff/Appellant's consumer protection claim filed under the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa.C.S.§ 201-1 *et seq*, the Pennsylvania Home Improvement Finance Act ("HIFA"), 73 P.S. § 500-100 *et seq*., and the Pennsylvania Loan Interest and Protection Law ("LIPL"), 41 P.S. 101 *et seq*. Specifically, Appellants contend the lower court erred in opening default judgments against Appellees who each provided

inadequate excuses for their delayed petitions to open, erred in granting partial summary judgment on the HIFA claim against HSBC Bank that failed to establish authority for interest rates charged, and erred at the conclusion of the non-jury trial by reaching a defense verdict on grounds that Appellants' claim was barred by the statute of limitations. While we find no basis upon which to reverse either the order granting partial summary judgment in favor of Appellee HSBC Bank or the ultimate verdict that Appellants' claim was time-barred, we must remand this matter for preparation of a Pa.R.A.P. 1925(a) opinion that provides the court's reasons for granting each Appellee's petition to open default judgment.

The trial court has provided an apt recitation of fact and procedural history, as follows:

> On July 10, 2008, Plaintiffs filed this action to rescind a contract for the sale and installation of windows, formed twelve years earlier in May 1996. Defendant HSBC Bank financed the sale and later assigned Plaintiffs' account to co-defendant Sherman Acquisition LLC. On May 5, 2010, Defendants raised the statute of limitations as a defense. On November 22, 2010, this action was tried non-jury. At the beginning of trial Defendants declared that they would not attempt to collect on Plaintiff's account in the future and were foregoing all future payments otherwise due. They therefore forfeited all claims to any uncollected debts arising from this contract.
>
> On January 19, 2011, the court entered findings in favor of Defendants. Judgment was entered on the court's findings on June 1, 2011. It is from this judgment that plaintiffs now appeal.[1]

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[1] According to Plaintiffs' Pa.R.A.P 1925(b) Statement of Matters Complained of on Appeal, Plaintiffs also challenge Judge Gary

DiVito's orders opening default judgments as to Defendants and Judge Paul Panepinto's order granting summary judgment in favor of Defendant HSBC Bank Nevada, N.A. as to Plaintiff's HIFA claim and all claims regarding interes. Th[is] court [Judge Mark I. Bernstein] expresses no opinion as to the merits of these claims, which were never raised before this Court. In accordance with Pennsylvania Rule of Appellate Procedure 1925(a)(1), th[is] court has requested that Judge DiVito and Judge Panepinto provide opinions explaining the reasons for their rulings.

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Plaintiffs filed a two-count complaint. Count one sought to rescind the windows contract. Count two claims violation of the Pennsylvania Home Improvement Finance Act ("HIFA"), in that defendant allegedly overcharged interest and late fees and prematurely charged late fees. On September 15, 2010, Judge Paul Panepinto granted summary judgment in favor of defendants as to plaintiffs' HIFA claim and dismissed all claims regarding interest. [Specifically, proceedings leading up to that order include the following:]

* * *

On May 5, 2010, defendant HSBC Bank had filed an Answer with New Matter, averring *inter alia* that the statute of limitations had expired, that the UTPCPL claim is preempted by federal law, and that the Home Improvement Finance Act is inapplicable in this case. Defendant HSBC bank then filed a motion for summary judgment, based on the aforementioned arguments.

On September 15, 2010, Judge Panepinto granted that motion for summary judgment with respect to plaintiffs' HIFA claim and any claims regarding defendant HSBC Bank's imposition of interest charges. The motion was denied in all other respects.

* * *

Therefore, the only claim at trial was plaintiff's recission claim.

On May, 1996, Plaintiff Emma Meekins received a sales call from Brian Brown, an American Remodeling, Inc. ("AMRE") salesman. As a result of the sales call, Emma Meekins signed a document in which she offered to pay AMRE $3,116.00 for the sale and installation of three replacement windows. . . . According to the document, the sale was "[s]ubject to the approval of the Credit

Sales Department." On the second page, the document specifically provided: "Purchaser(s) understands that this document does not constitute a valid and binding Contract for any purpose until and unless it is signed and accepted by [AMRE]."

The document also stated that "the Purchaser(s) may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See accompanying notice of cancellation form for an explanation of this right." The contract contained an attachment which purported to explain Emma Meekins' right to cancel the sales agreement ("Cancellation Notice") not later than May 24, 1996.

Six days later, after the purported right to cancel had expired, AMRE required additional financing applications for their "Credit Sales Department" to approve the sale and installation of the windows. On May 27,1996, AMRE required Emma Meekins to sign an Express Credit Application for AMRE credit to be furnished by defendant HSBC Bank. Apparently, AMRE would not extend credit to Emma Meekins alone. The next day, on May 18, 1996, AMRE required that Emma Meekins' daughter, Joann Meekins, also sign the credit application. According to that application, repayment would be in the amount of $57 per month. The credit application did not contain any Cancellation Notice as required by Section 201-7 of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). No independent notice was provided on May 28, 1996 and no notice was ever given to Joann Meekins.

On May 28, 1996, Emma Meekins received, for the first time, a receipt for the windows. That receipt had a sales date of "May 28, 1996." The sale receipt had no Cancellation Notice as required by the UTPCPL.

Emma Meekins had the windows properly installed and paid ninety-six monthly installments of $57.00, a total of $5,472. Emma Meekins stopped making payments in May 2004. By letter dated January 27, 2005, Defendant HSBC Bank told Emma Meekins that it had assigned her account to co-defendant Sherman Acquisition LLC.

Defendants demanded payment on the account each month through February 2005. By letter dated February 28, 2005,

> Sherman Acquisition LLC attempted to collect $3,835.41 it claimed was still owed. On July 14, 2006, Emma Meekins' attorney mailed Sherman Acquisition LLC a notice rescinding the windows contract.
>
> Plaintiffs claim that the failure to attach Cancellation Notices to the credit agreement and sales slip violated Section 201-7 of the UTPCPL. In reaching its verdict, the [Commerce Court] court agreed. However, because the underlying action was not commenced within the applicable six-year statute of limitations, a verdict was nevertheless entered in favor of defendants. This appeal followed.

Trial Court Opinion dated 8/31/11, pp. 1-4.

Appellants raise the following issues for our consideration:

**I. DID JUDGE DIVITO ERR IN OPENING DEFAULT JUDGMENT ENTERED AGAINST SHERMAN?**

**II. DID JUDGE DIVITO ERR IN OPENING DEFAULT JUDGMENT AGAINST HSBC?**

**III. DID JUDGE PANEPINTO ERR IN GRANTING PARTIAL SUMMARY JUDGMENT TO HSBC?**

**IV. DID COMMERCE COURT ERR LIMITING TIME TO CANCEL CONSUMER FINANCING, AND FINDING PLAINTIFFS' CANCELLATION WAS BARRED BY A STATUTE OF LIMITATIONS?**

Brief of Appellants at 14.

Taking the issues out of order, we begin by considering the third issue challenging the lower court's partial grant of summary judgment in favor of Defendants/Appellees. Our standard of review on an appeal from the grant of a motion for summary judgment is well-settled.

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law

> or abused its discretion. As with all questions of law, our review is plenary.
>
> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

***Longwell v. Giordano***, 57 A.3d 163, 166 (Pa. Super. 2012).

Here, Appellants contend that the court erred in granting partial summary judgment to HSBC on grounds that: (1) HIFA provides no private right of action; and (2) the National Bank Act permitted HSBC, a national bank, to charge interest on any loan at a rate allowed by the state in which it is located, in this case, Nevada. After careful review of the record, party briefs, applicable authority, and the cogent opinion authored by the Honorable Paul Panepinto and filed on August 31, 2011, we find no merit to Appellant's claim. To this end, we adopt the rationale and holding of Judge Panepinto's opinion, finding ample evidence that HSBC was a national bank located in Nevada and, accordingly, within its rights to apply to the present commercial loan an interest rate lawful in the State of Nevada. So, too, do we agree with and adopt the decision for the reasons set forth in his opinion

that Appellants may not invoke HIFA as an actionable claim because the statute provides not a private right of action but, instead, that its provisions shall be enforced by the Attorney General or by a district attorney. 73 P.S. § 500-102.

We likewise rely on the opinion of trial judge, The Honorable Mark I. Bernstein, for our disposition of Appellants' fourth and final claim charging error with the trial court's decision that their UTPCPL claim ran afoul of that statute's six-year limitations period. Our review of the record discloses that Appellants' claim became actionable on May 28, 1996, the date on which the window contract was perfected but without the proper cancellation notice as required by law. Because Appellant waited twelve years before filing the present action seeking rescission of the contract for want of a proper cancellation notice, the six-year statute of limitations barred their claim. We find no error in the trial court's decision to this effect and, accordingly, incorporate that opinion in our decision.

Nevertheless, we decline further review and, consequently, ultimate disposition of this matter, as the lack of a Pa.R.A.P. 1925(a) opinion on the issue regarding the lower court's decision to open two default judgments impairs our ability to review the issue. Specifically, while we acknowledge Appellees' respective contentions that they were denied proper service of Appellants' Complaints for Appellants' failure to deliver them to a proper address, we equally acknowledge Appellants' response that Appellees

provided confusing and/or conflicting contact information in their communications with Appellants. Moreover, there appears nowhere in the record an explanation as to why either Appellee's seemingly considerable delay in filing a petition to open default judgment was deemed excusable. We therefore remand this matter to the lower court with the request that The Honorable Gary DiVito author a Pa.R.A.P. 1925(a) opinion responding to Appellants' claims that the court erred in granting the Appellees' respective petitions to open default judgment. The lower court shall have 45 days from the filing date of this memorandum and order in which to transmit its opinion to this Court.

Case remanded to the Honorable Gary DiVito for preparation and transmittal of a responsive Pa.R.A.P. 1925(a) opinion consistent with this memorandum. Certified record shall accompany the 1925(a) opinion when it is filed with the Superior Court. Panel jurisdiction is retained.

**IN THE COURT OF COMMON PLEAS**
**OF PHILDELPHIA COUNTY**

**CIVIL TRIAL DIVISION**

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| EMMA L. MEEKINS and JOANN E. MEEKINS | : | JULY TERM, 2008 |
| Plaintiffs, | : | NO. 01801 |
| v. | : | |
| HSBC BANK NEVADA, N.A., et al. | : | |
| Defendants. | : | |



**OPINION**

On July 10, 2008, plaintiffs filed this action to rescind a contract for the sale and installation of windows, formed twelve years earlier in May 1996. Defendant HSBC Bank Nevada, N.A. financed the sale and later assigned plaintiffs' account to co-defendant Sherman Acquisition LLC. On May 5, 2010, defendants raised the statute of limitations as a defense. On November 22, 2010, this action was tried non jury. At the beginning of trial defendants declared that they would not attempt to collect on plaintiffs' account in the future and were foregoing all future payments otherwise due. They therefore forfeited all claims to any uncollected debts arising from this contract.

On January 19, 2011, the Court entered findings in favor of defendants. Judgment was entered on the Court's findings on June 1, 2011. It is from this judgment that plaintiffs now appeal.[1]

---

[1] According to plaintiffs' Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal, plaintiffs also challenge Judge Gary DiVito's orders opening default judgments as to defendants and Judge Paul Panepinto's order granting summary judgment in favor of defendant HSBC Bank Nevada, N.A. as to plaintiffs' HIFA claim and all claims regarding interest. The Court expresses no opinion as to the merits of these claims, which were never raised before this Court. In accordance with Pennsylvania Rule of

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Plaintiffs filed a two count complaint. Count one sought to rescind the windows contract. Count two claimed violations of the Pennsylvania Home Improvement Finance Act ("HIFA"), in that defendant allegedly overcharged interest and late fees and prematurely charged late fees. On September 15, 2010, Judge Paul Panepinto granted summary judgment in favor of defendants as to plaintiffs' HIFA claim and dismissed all claims regarding interest. Defendants have no claim. Therefore, the only claim at trial was plaintiffs' rescission claim.

On May 21, 1996, Emma Meekins received a sales call from Brian Brown, an American Remodeling, Inc. ("AMRE") salesman. As a result of the sales call, Emma Meekins signed a document in which she offered to pay AMRE $3,116.00 for the sale and installation of three replacement windows. Specifically, the document read:

> I/we the owners of the premises described below, hereinafter referred to as "Purchaser" offer to contract with AMERICAN REMODELING, INC. (A Century 21 AUTHORIZED CONTRACTOR), hereinafter referred to as "Contractor" to furnish, to deliver and arrange for installation of all materials necessary to improve the PREMISES LOCATED AT: SAME.[2]

According to the document, the sale was "[s]ubject to the approval of the Credit Sales Department." On the second page, the document specifically provided: "Purchaser(s) understands that this document does not constitute a valid and binding Contract for any purpose until and unless it is signed and accepted by AMERICAN REMODELING, INC."

The document also stated that "the Purchaser(s) may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See accompanying notice of cancellation form for an explanation of this right." The contract contained an

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Appellate Procedure 1925(a)(1), the Court has requested that Judge Divito and Judge Panepinto provide opinions explaining the reasons for their rulings.

[2] Agreement dated May 21, 1996.

attachm[illegible] which purported to explain Emma Meekins' right to cancel the sales agreeme[illegible] ("Cancellation Notice") "not later than midnight of May 24, 1996."

Six days later, after the purported right to cancel had expired, AMRE required additional financing applications for their "Credit Sales Department" to approve the sale and installation of the windows. On May 27, 1996, AMRE required Emma Meekins to sign an Express Credit Application for AMRE credit to be furnished by defendant HSBC Bank Nevada, N.A. Apparently AMRE would not extend credit to Emma Meekins alone. The next day, on May 28, 1996, AMRE required that Emma Meekins' daughter, Joann Meekins, also sign the credit application. According to that application, repayment would be in the amount of $57 per month. The credit application did not contain any Cancellation Notice as required by Section 201-7 of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL").[3] No independent Notice was provided on May 28, 1996 and no notice was ever given to Joann Meekins.

On May 28, 1996, Emma Meekins received, for the first time, a receipt for the windows. That receipt had a sales date of "May 28, 1996." The sales receipt had no Cancellation Notice as required by Section 201-7 of the UTPCPL.

Emma Meekins had the windows properly installed and paid ninety-six monthly installments of $57.00, a total of $5,472. Emma Meekins stopped making payments in May 2004. By letter dated January 27, 2005, HSBC Bank Nevada, N.A. told Emma Meekins that it had assigned her account to co-defendant Sherman Acquisition LLC.

Defendants demanded payment on the account each month through February of 2005. By letter dated February 28, 2005, Sherman Acquisition LLC attempted to collect $3,835.41 it

[3] 73 P.S. § 201-7.

claimed as still owed. On July 14, 2006, Emma Meekins' attorney mailed Sherman Acquisition LLC a notice rescinding the windows contract.

Plaintiffs claim that the failure to attach Cancellation Notices to the credit agreement and sales slip violated Section 201-7 of the UTPCPL. Plaintiffs are correct. Section 201-7 of the UTPCPL provides:

> (a) Where goods or services having a sale price of twenty-five dollars ($ 25) or more are sold or contracted to be sold to a buyer, as a result of, or in connection with, a contact with or call on the buyer or resident at his residence either in person or by telephone, that consumer may avoid the contract or sale by notifying, in writing, the seller within three full business days following the day on which the contract or sale was made and by returning or holding available for return to the seller, in its original condition, any merchandise received under the contract or sale. . . .
>
> (b) At the time of the sale or contract the buyer shall be provided with:
>
> (1) A fully completed receipt or copy of any contract pertaining to such sale, which is in the same language (Spanish, English, etc.) as that principally used in the oral sales presentation, and also in English, and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of ten points, a statement in substantially the following form:
>
> > "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction.
> >
> > See the attached notice of cancellation form for an explanation of this right."
>
> (2) A completed form in duplicate, captioned "Notice of Cancellation," which shall be attached to the contract or receipt and easily detachable . . . .

Under Section 201-7, the cancellation notice must be provided "at the time of the sale or contract." No sale occurred until May 28, 1996.

It is hornbook law that there must be an offer, acceptance, and consideration for there to be the meeting of the minds the law calls a contract.[4] Acceptance requires an intention to be bound. No contract was formed on May 21, 1996. The May 21, 1996 document explicitly stated it was not a contract: "Purchaser(s) understands that this document does not constitute a valid and binding Contract for any purpose until and unless it is signed and accepted by AMERICAN REMODELING, INC." The document also reserved seller acceptance until approval of the credit sales department had been obtained. The May 21, 1996 document's language unambiguously demonstrates that it was an offer made to AMRE by plaintiff Emma Meekins. The language clearly demonstrates that the offer had not yet been accepted.

AMRE's actions also demonstrate that they did not agree to any contract which could bind them to do anything until May 28, 1996. Before AMRE agreed to anything, it required Emma Meekins to sign a credit application on May 27, 1996. Even then, AMRE did not agree to install the windows. It also required Joann Meekins to cosign before AMRE would be bound to do anything. Indeed, until Joann Meekins signed the credit application on May 28, 1996, there was no legally enforceable agreement that could have required AMRE to install windows. The contract for the sale of the windows was first created on May 28, 1996.

AMRE provided only one Cancellation Notice. That cancellation notice was given to Emma Meekins on May 21, 1996. That notice stated that the agreement could be cancelled before May 24, 1996, four days before any mutually binding contract came into existence. Joann

[4] 2 John E. Murray, Jr., Murray on Contracts § 28.

Meekin who was a party to the contract with AMRE for the sale of the windows, was n r given a Cancellation Notice. AMRE violated Section 201-7 of the UTPCPL.

An action under the UTPCPL must be brought within the statute of limitations. Private actions under the UTPCPL must be brought within six years.[5] The statute of limitations begins to run as soon as the right to institute the suit arises.[6] Section 201-7 requires that the right to rescission be disclosed "at the time of the sale or contract."[7] Plaintiffs' claim became actionable on May 28, 1996, the date the contract was finally formed and AMRE failed to provide the required three day Cancellation Notices.[8] Since this action was not commenced until July 16 2008, more than twelve years later, it is barred as a matter of law.[9]

Accordingly, a verdict was entered in favor of defendants. Since defendants waived any claim for additional payment, defendants were instructed to provide plaintiffs with acknowledgement that the loan has been paid in full.

For the reasons set forth above, the judgment entered on June 1, 2011 should be affirmed.

**BY THE COURT**

7/2/11
**DATE**

**MARK I. BERNSTEIN, J.**

[5] See Gabriel v. O'Hara, 534 A.2d 488 (Pa. Super. Ct. 1987).

[6] Sevast v. Kakouras, 915 A.2d 1147, 1153 (Pa. 2007).

[7] 73 P.S. § 201-7(b).

[8] See, e.g, In re Faust, 353 B.R. 94 (E.D. Pa. Bankr. 2006).

[9] Even if this action was not barred plaintiffs would not be entitled to the remedy they seek. In their Complaint, plaintiffs sought to keep the windows and demanded a refund of all payments made. Plaintiffs were not entitled to the free use of defendant's windows. The windows were properly installed and worked without problem for over fourteen years. Plaintiffs had no complaint about the windows and continue to enjoy them. If plaintiffs could rescind the windows contract, they would have to return the windows. In the unlikely event that the windows could be returned, plaintiffs would have to pay the fair rental value for fourteen years of use plus the installation cost.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CIVIL TRIAL DIVISION**

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| **EMMA and JOANN MEEKINS**<br>**Appellants**<br>**v.**<br>**HSBC BANK, N.A. et al**<br>**Appellees** | : | **APPEAL TO SUPERIOR COURT**<br>**SUPERIOR COURT DOCKET**<br>**_____ EDA 2011**<br>**PHILADELPHIA CCP NO.**<br>**JULY TERM 2008, No. 1801** |






## OPINION

**PAUL P. PANEPINTO, JUDGE, AUGUST 31st, 2011:**

This is an appeal from a judgment entered by this court on June 1, 2011, based upon a verdict in favor of defendants. On September 15, 2010, the court granted partial summary judgment in favor of defendant HSBC Bank Nevada, N.A. ("HSBC Bank"). In furtherance of that appeal, plaintiffs have presented argument that the court's September 15, 2010 order was in error.

## FACTUAL AND PROCEDURAL HISTORY:

This opinion incorporates portions of the opinion filed by Judge Mark Bernstein on July 7, 2011.

On July 10, 2008, plaintiffs filed this action to rescind a contract for the sale and

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installation of windows, formed twelve years earlier in May 1996. Defendant HSBC Bank financed the sale and later assigned plaintiffs' account to co-defendant Sherman Acquisition LLC. On May 5, 2010, defendants raised the statute of limitations as a defense. On November 22, 2010, this action was tried non-jury. At the beginning of trial defendants declared that they would not attempt to collect on plaintiffs' account in the future and were foregoing all future payments otherwise due. They therefore forfeited all claims to any uncollected debts arising from this contract.

On January 19, 2011, the court entered findings in favor of defendants. Judgment was entered on the court's findings on June 1, 2011. It is from this judgment that plaintiffs now appeal.

Plaintiffs filed a two-count complaint. Count one sought to rescind the windows contract. Count two claims violation of the Pennsylvania Home Improvement Finance Act ("HIFA"), in that defendant allegedly overcharged interest and late fees and prematurely charged late fees. On September 15, 2010, Judge Paul Panepinto granted summary judgment in favor of defendants as to plaintiffs' HIFA claim and dismissed all claims regarding interest. Therefore, the only claim at trial was plaintiffs' rescission claim.

On May 21, 1996, plaintiff Emma Meekins received a sales call from Brian Brown, an American Remodeling, Inc. ("AMRE") salesman. As a result of the sales call, Emma Meekins signed a document in which she offered to pay AMRE $3,116.00 for the sale and installation of three replacement windows. Specifically, the document read:

> I/we the owners of the premises described below, hereinafter referred to as "Purchaser" offer to contract with [AMRE] (A 21st Century AUTHORIZED CONTRACTOR), hereinafter referred to as "Contractor" to furnish, deliver and arrange for installation of all materials necessary to improve [premises].

According to the document, the sale was "[s]ubject to the approval of the Credit Sales Department." On the second page, the document specifically provided: "Purchaser(s) understands that this document does not constitute a valid and binding Contract for any purpose until and unless it is signed and accepted by [AMRE]."

The document also stated that "the Purchaser(s) may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See accompanying notice of cancellation form for an explanation of this right." The contract contained an attachment which purported to explain Emma Meekins' right to cancel the sales agreement ("Cancellation Notice") not later than May 24, 1996.

Six days later, after the purported right to cancel had expired, AMRE required additional financing applications for their "Credit Sales Department" to approve the sale and installation of the windows. On May 27, 1996, AMRE required Emma Meekins to sign an Express Credit Application for AMRE credit to be furnished by defendant HSBC Bank. Apparently, AMRE would not extend credit to Emma Meekins alone. The next day, on May 18, 1996, AMRE required that Emma Meekins' daughter, Joann Meekins, also sign the credit application. According to that application, repayment would be in the amount of $57 per month. The credit application did not contain any Cancellation Notice as required by Section 201-7 of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). No independent notice was provided on May 28, 1996 and no notice was ever given to Joann Meekins.

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Emma Meekins had the windows properly installed and paid ninety-six monthly installments of $57.00, a total of $5,472. Emma Meekins stopped making payments in May 2004. By letter dated January 27, 2005, defendant HSBC Bank told Emma Meekins that it had assigned her account to co-defendant Sherman Acquisition LLC.

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Plaintiffs claim that the failure to attach Cancellation Notices to the credit agreement and sales slip violated Section 201-7 of the UTPCPL. In reaching its verdict, the trial court agreed. However, because the underlying action was not commenced within the applicable six-year statute of limitations, a verdict was nevertheless entered in favor of defendants. This appeal followed.

**JUDGE PAUL PANEPINTO'S ORDER GRANTING PARTIAL SUMMARY IN FAVOR OF DEFENDANTS:**

On May 5, 2010, defendant HSBC Bank had filed an Answer with New Matter, averring *inter alia* that the statute of limitations had expired, that the UTPCPL claim is preempted by federal law, and that the Home Improvement Finance Act is inapplicable in this case. Defendant HSBC bank then filed a motion for summary judgment, based on the aforementioned arguments.

On September 15, 2010, Judge Panepinto granted that motion for summary judgment with respect to plaintiffs' HIFA claim and any claims regarding defendant HSBC Bank's imposition of interest charges. The motion was denied in all other respects. In furtherance of

their appeal, plaintiffs argue that this order was entered in error.

**ALLEGATIONS OF ERROR:**

Pursuant to Pa.R.A.P. 1925(b), the Appellant has filed a Statement of Matters Complained of on Appeal. This Statement of Matters argues in relevant part:

1. The trial court erred in granting defendant HSBC Bank's motion for summary judgment in part, where the issue of federal preemption was waived by the filing of a pleading in the nature of an Answer.
2. The trial court erred in granting defendant HSBC Bank's motion for summary judgment in part, where genuine issues of material fact remained regarding plaintiffs' Home Improvement Finance Act claim.
3. The trial court erred in granting defendant HSBC Bank's motion for summary judgment in part, where genuine issues of fact remained regarding whether the original lender was national bank.

**DISCUSSION:**

*Pa.R.C.P.* 1035.2 provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) Whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) If, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

The court shall grant summary judgment when the facts are so clear that reasonable minds cannot differ as to whether the moving party is entitled to judgment as a matter of law. *Mt. Village v. The Bd. of Super. of Longswamp Twp.*, 874 A.2d 1, 6 (Pa. 2005). The reviewing court must view the record in the light most favorable to the non-moving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. *Id.*

However, the Superior Court has previously held that the non-moving party also may not rest upon the averments contained in the pleadings. In order to properly raise a genuine issue of fact, the nonmoving party had the burden to present "facts" by counter-affidavits, depositions, admission, or answers to interrogatories. *Washington Federal Savings and Loan Association v. Stein*, 515 A.2d 980 (Pa. Super. 1986).

**Preemption**

The National Bank Act, *12 U.S.C. §85*, and its predecessors have been interpreted for over a century to give advantages to national banks over their state competitors. *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 309 (1978). This is because national banks are an instrumentality of the federal government, created for a public purpose, and as such are necessarily subject to the paramount authority of the federal government. *Id.* At 302. The interest rates that a national bank may charge in its credit card program are governed by federal law. In this regard, §85 of the National Bank Act plainly provides that a national bank may charge interest on "any loan" at the rate allowed by the laws of the state in which the bank is "located". §94 further states that a national bank is "located" either in the place designated in its organization certificate or in the places in which it has established authorized branches. The mere fact that a national bank has enrolled another state's residents, merchants, and banks in its credit card program does not suffice to "locate" that bank in that states for purposes of the

National Bank Act. *Id.* at 305. Finally, to the extent that the enumerated federal rates of interest are greater than permissible state rates, state usury laws must give way to the federal statute. *Id.* at 309.

In this case, defendant HSBC Bank (the national bank defendant) is located in Nevada. The complaint itself alleges that the national association is located in Las Vegas, Nevada. *See* Complaint at 1. The Cardholder Agreement and Disclosure Statement also explicitly states:

> This Agreement and your Account will be governed by the Nevada law and applicable federal law, whether or not you live in Nevada and whether or not your Account is used outside of Nevada. This Agreement is entered into in Nevada and all credit under this Agreement will be extended from Nevada. All terms and conditions of this Agreement (including the change of terms provision, the applicable law provision, and the finance charge, late charge, returned check charge and over-limit fee provision) are deemed to be interest[1] under this Agreement and material to the determination of the finance charge. *Id.* at Ex. "C", para. 28.

The District Court of the Eastern District of Pennsylvania has previously held that the National Banking Act preempts state claims alleging usury regarding interest rates:

> It is well settled that, since Congress has provided a penalty for usury, that action preempts the field and leaves no room for varying state penalties. The interest rate a national bank may charge is governed by *12 U.S.C. §85*, which looks to the interest rates allowed by the state where the bank is located. That state's law controls the rate the national bank can charge in all states. *Basile v. H&R Block*, 897 F. Supp. 194 (E.D. Pa 1995).

It should be noted that, in this case, plaintiffs seek damages arising from two distinct types of charges: (1) the charging of certain fees, costs, or other charges (*73 P.S. §500-407*); and

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[1] This definition of "interest" appears to be consistent with the definition provided by the PA Supreme Court, as "any payment compensating a creditor or prospective creditor for an extension of credit, making available a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. *Bank One, Columbus N.A. v. Mazaika*, 680 A.2d 845, 846 (Pa. 1996).

(2) the charging of excessive interest rates (*73 P.S. §500-301*). Therefore, to the extent that federal preemption applies, it should only apply with respect to alleged excessive interest rates and not to plaintiffs' other claims.

**Applicability of HIFA**

Defendant HSBC Bank next argued that the PA Home Improvement Finance Act, *73 P.S. §500-101* et seq. ("HIFA"), is inapplicable, because that statute makes no reference to the issuing of credit cards.

Here, plaintiffs allege that HIFA is applicable because

> [t]he contractor, while not directly providing the financing for the home improvements, arranged for financing of the home improvements on behalf of the consumer and the consumer made no independent effort to obtain the home improvement loan. This financing technique, referred to as "dragging the body," was recognized by the Pennsylvania courts analyzing similar consumer protection statutes. *See* Plaintiff's response at Mem. Of Law, p. 22.

According to plaintiffs, when AMRA "dragged plaintiff's body" to defendant, defendant became and was obligated to comply with HIFA, which otherwise remains applicable to home improvement installment contracts, defined as

> [a]n agreement covering a home improvement installment sale, whether contained in one or more documents, together with any accompanying promissory note or other evidence of indebtedness, to be performed in this Commonwealth pursuant to which the buyer promises to pay in installments all or any part of the time sale price or prices of goods and services, or services. The meaning of the term does not include such an agreement, if (1) it pertains to real property used for a commercial or business purpose; or (ii) it covers the sale of goods by a person who neither directly nor indirectly performs or arranges to perform any services in connection with the installation of or application of the goods; [...] or (v) the loan is contracted for or obtained directly by the retail buyer from the lending institution, person or corporation; or (vi) the loan is insured, or a written

commitment to insure it has been issued, pursuant to national housing legislation. *73 P.S. §500-102(10).*

Plaintiffs admit that, had they handed over their own credit card to finance the contract, it would have been a direct loan and would have been excepted from HIFA. However, concerning the specific facts of this case, plaintiffs contend that the financing was arranged by AMRE and by HSBC Bank. Therefore, the underlying circumstances fall within the scope of HIFA. This argument is persuasive. Nevertheless, the claim was dismissed because HIFA does not provide a private cause of action but rather states that its provisions shall be enforced by the Attorney General or by a district attorney. *73 P.S. §500-102.*

**Statute of Limitations**

Defendant HSBC Bank was correct that the UTPCPL is governed by a six-year statute of limitations, which usually begins to run when the right to institute suit arises. *Lesoon v. Metropolitan Life Insurance Co.*, 898 A.2d 600, 627 (Pa. Super. 2006).

Although the credit card agreement was made in 1996, it was plaintiffs' contention that defendant's conduct has been re-occurring on a continuous basis until the suit was commenced. Therefore, plaintiffs' claims are viable at least for the six-year period preceding the filing of the complaint here.

Additionally, part of plaintiffs' claims was that defendant never notified them of their right to cancel the agreement. To the extent that the complaint seeks cancellation of the credit card agreement, the Superior Court has previously held that the right to cancel runs indefinitely where the seller has failed to give the required notice. *Burke v. Yingling*, 666 A.2d 288 (Pa. Super. 1995).

At least for the purposes of determining a motion for summary judgment, this court

determined that defendant had not adequately met its burden to demonstrate that the statute of limitations had expired.

**CONCLUSION:**

Accordingly, for the aforementioned reasons, this appeal should be **Denied**.

**BY THE COURT:**

Paul P. Panepinto, J.

**PAUL P. PANEPINTO, J.**

8/31/2011