

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2009

CARMEN A. GANCEDO and **ANTONIO LOPEZ CAMINO**,
Appellants,

v.

RAFAEL J. DEL CARPIO and **SYLVIA DEL CARPIO**,
Appellees.

No. 4D08-1735

[June 3, 2009]

TAYLOR, J.

Carmen A. Gancedo and Antonio Lopez Camino filed a mortgage foreclosure action against Sylvia Del Carpio and her then husband, Rafael Del Carpio, Jr. The trial court granted summary judgment in favor of Sylvia Del Carpio, based on Sylvia's rescission of the mortgage for Gancedo's failure to provide her with certain disclosures required by the federal Truth in Lending Act (TILA). Gancedo and Camino appeal, arguing that they had no TILA disclosure obligations to Sylvia because she had no ownership interest in the property at the time of the mortgage execution and thus could not invoke the protection of TILA. We agree and reverse the summary judgment.

On April 12, 2005, Gancedo loaned \$60,000 to Rafael. To secure the loan, Rafael gave Gancedo a second mortgage on residential property titled solely in his name. The mortgage was executed by both Rafael and Sylvia. However, the note was signed only by Rafael. When the mortgage was executed, Gancedo did not provide either Rafael or Sylvia Del Carpio with certain disclosures required by TILA. Rafael defaulted on the note and mortgage, and Gancedo filed this mortgage foreclosure action on August 6, 2008. On December 20, 2006, Sylvia purportedly exercised her right to cancel the transaction. She asserted she was entitled to TILA's extended three-year time period for cancellation because she was not given the necessary TILA disclosures. As discussed below, she was entitled to these disclosures if she had an ownership interest in the property.

On February 7, 2007, Rafael executed a quitclaim deed to Sylvia, pursuant to a court order in the parties' marital dissolution action. In the affidavit Sylvia filed in support of summary judgment in this mortgage foreclosure action, she stated that the property encumbered by the mortgage is her principal dwelling, where she lives with her three minor children. She stated that when she executed the mortgage, she was not given the disclosures required by TILA. She specified the omitted disclosures. There is no dispute that she did not receive these disclosures. However, because her name was not on the deed to the property, the issue is whether she was entitled to the disclosures and, thus, an extended period for cancellation.

TILA is a federal statute that regulates the terms and conditions of consumer credit. *In re Williams*, 291 B.R. 636, 643 (E.D. Pa. 2003). TILA's purpose is to promote the informed use of credit by "consumers." *Id.* (quoting 15 U.S.C. § 1601). Through its enactment, Congress sought to assure a meaningful disclosure of credit terms so that the "consumer" would be able to compare more readily the various credit terms available and avoid the uninformed use of credit. *Id.* (quoting 15 U.S.C. 1601 (a)).

In 15 U.S.C. § 1604, Congress authorized the Federal Reserve Board to prescribe regulations to carry out the purposes of TILA. "Pursuant to this authority, the Federal Reserve Board promulgated 'Regulation Z' which is located in 12 C.F.R. pt. 226." *Id.* (quoting *Rossman v. Fleet Bank (R.I.) Nat'l. Ass'n.*, 280 F.3d 384, 389 (3d Cir. 2002)). Absent some "obvious repugnance" to the statute, Regulation Z "should be accepted by the courts, as should the Board's interpretation of its own regulation." *Id.* (quoting *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981)).

The issue in this case is whether Sylvia Del Carpio is a "consumer" entitled to disclosures and, failing proper disclosures, an extended cancellation period under Regulation Z. See 12 C.F.R. 226.23 (a) (granting extended right to cancel to "consumers" in the event of non-disclosures); 12 C.F.R. 226.32 (specifying disclosure requirements to consumer credit transactions secured by the "consumer's" principal dwelling). The term "consumer," as used in Regulation Z, is defined by 12 C.F.R. 226.2 (a) (11):

Consumer means a cardholder or a natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 226.15 and 226.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that

person's ownership interest in the dwelling is or will be subject to the security interest.

Section 226.23(a)(1) provides:

§ 226.23 Right of rescission.

- (a) Consumer's right to rescind. (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction.

Sylvia concedes that consumer credit was not extended to her, as she was not a signatory to the note. She makes clear that the loan was made only to her husband. Nevertheless, she asserts that she had an "ownership interest" in the home, which would bring her within the definition of the term "consumer." Sylvia first argues that she and her husband owned the home as "tenants by the entirety," even though the property was not titled in her name at the time of the mortgage execution. The February 15, 2000 warranty deed, whereby the subject property was acquired, describes the grantee as "Rafael J. Del Carpio, Jr., a married man." Sylvia, who was Rafael's wife at the time, asserts an ownership interest in the property based on her intent to hold the property as a tenant by the entirety with Rafael when it was purchased on February 15, 2000. However, her name was not on the deed, which is a fundamental prerequisite to ownership by the entirety. *See Beal Bank, SSB v. Almand & Assocs.*, 780 So. 2d 45, 52 (Fla. 2001).

Sylvia alternatively asserts an ownership interest in the property by virtue of a purported "post-nuptial agreement." This document on its face, however, is not a present conveyance of a property interest in the house, even though it contemplated such a conveyance in the event of marital dissolution. The actual conveyance by which Sylvia acquired an ownership interest in the house was the quitclaim deed of February 7, 2007, executed a few years after the mortgage was created.

Because Sylvia had no ownership interest in the home at the time the mortgage was executed, she was not a "consumer" entitled to TILA disclosures or the extended cancellation period for TILA non-disclosure. The trial court thus erred in granting her motion for summary judgment.

Reversed and Remanded for further proceedings.

MAY, J., and SHAHOOD, GEORGE A, Senior Judge, concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert L. Andrews, Judge; L.T. Case No. 06-11168 CACE09.

Dennis R. Bedard, Miami, for appellants.

Daniel T. Pascale of Berger Singerman, Miami, for appellees.

Not final until disposition of timely filed motion for rehearing.