

2013 WL 6923046 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

Margaret Ann HUNTER, Appellant,
v.
ANCHOR BANK, N.A., and Emigrant Mortgage Company, Inc., Respondents.

No. A13-0515.

June 4, 2013.

Brief and Appendix of Respondent Anchor Bank, N.A.

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*vi LEGAL ISSUES

I. Did the District Court err in granting summary judgment to Respondent Anchor Bank, N.A. (“Anchor Bank”) on the basis that Appellant's claims against Anchor Bank are being asserted affirmatively, rather than as pure defenses, and are therefore barred by the statute of limitation?

The District Court granted Anchor Bank's motion for summary judgment, in part, because Appellant's causes of action against Anchor Bank are barred by [Minn. Stat. §541.05](#), the statute of limitations. The District Court reasoned that Appellant's claims are not “pure defenses” but are affirmatively brought against Anchor Bank and Respondent Emigrant Mortgage Company, Inc. (“Emigrant”). The District Court further reasoned that the six year statute of limitations imposed by [Minn. Stat. §541.05](#) began to run at the very latest when Appellant sent a letter to Emigrant dated August 1, 2005, the content of which firmly established that Appellant knew of the facts giving rise to the causes of action in her Complaint, and that the six year statute of limitation ran on August 1, 2011.

Apposite Statute: [Minn. Stat. §541.05 \(2012\)](#)

Apposite Case: [Reynolds v. Reynolds](#), 458 N.W.2d 103 (Minn. 1990)

II. Did the District Court err in granting summary judgment to Anchor Bank because Appellant's claims against Anchor Bank are barred by the Statute of Frauds?

The District Court determined that Appellant's allegation that she was orally promised that the mortgage would not encumber the Inver Grove Heights Property fell within the scope of the Statute of Frauds located at [Minn. Stat. §§513.04](#) and [513.33](#). *vii Because the alleged promise was not in writing, the District Court granted Anchor Bank summary judgment and dismissed Appellant's claims.

Apposite Statute: [Minn. Stat. §513.04 \(2012\)](#)

[Minn. Stat. §513.33 \(2012\)](#)

Apposite Cases: [Greuling v. Wells Fargo Home Mortgage, Inc.](#), 690 N.W.2d 757, 761-62 (Minn. Ct. App. 2005)

[BankCherokee v. Insignia Dev., LLC](#), 779 N.W.2d 896, 903 (Minn. Ct. App. 2010).

III. Are Appellant's claims barred by the parol evidence rule?

On summary judgment, Anchor Bank argued that Appellant's claims flowing from her allegation that Anchor Bank assured her that the Inver Grove Heights Property would not be used as collateral for the loan are barred by the parol evidence rule. The District Court did not specifically address this argument in its decision granting Anchor Bank summary judgment.

Apposite Cases: [Material Movers, Inc. v. Hill](#), 316 N.W.2d 13, 17 (Minn. 1982).

IV. Did the District Court err in denying Appellant's motion to amend her Complaint to assert a cause of action for reformation of a mortgage and a cause of action under the Federal Truth In Lending Act ("TILA")?

The District Court denied Appellant's motion to amend. In its decision, the District Court reasoned that Appellant's causes of action for reformation and violations of TILA could not survive summary judgment. Specifically, as to the reformation claim, the District Court reasoned that Appellant had failed to show facts sufficient to plead the existence of a mutual mistake or a unilateral mistake accompanied by fraud, one or both of which are necessary to establish a reformation claim. As to the TILA claim, the *viii District Court reasoned that because the claim was offensively alleged that it is barred by the one-year statute of limitation under [15 U.S.C. §1640\(e\)](#). The court did not address in its decision Appellant's request to amend her Complaint to assert a claim for equitable estoppel.

Apposite Statutes: [15 U.S.C. §1638 \(a\)\(9\) \(2011\)](#) [15 U.S.C. §1640\(e\) \(2011\)](#)

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***1 STATEMENT OF THE CASE**

This case arises out of Appellant's 2004 mortgage loan transaction with Respondent Anchor Bank, N.A. ("Anchor Bank"), that was subsequently assigned by Anchor Bank to Respondent Emigrant Mortgage Company, Inc. ("Emigrant"). As security for the mortgage loan, Appellant signed a mortgage dated February 6, 2004, whereby she granted a mortgage against two pieces of real estate, one of which is her residence located in Inver Grove Heights, Minnesota, the other which is a residential property located in Newport, Minnesota. After defaulting on the mortgage loan, Emigrant foreclosed the mortgage against both properties.

Appellant initiated this action against Anchor Bank and Emigrant on several common causes of action, all of which arise out of the common allegation that the Inver Grove Heights property was not to be used as security for the mortgage loan and that Anchor Bank had assured her of this before the loan documents, including the mortgage, were signed. The District Court, in addition to granting other relief to Anchor Bank and Emigrant, granted Anchor Bank and Emigrant summary judgment on Appellant's claims for (i) fraud and misrepresentation; (ii) negligent misrepresentation; (iii) promissory estoppel; and (iv) mutual mistake based on the statute of limitations and statute of frauds.¹ The *2 District Court also denied Appellant's motion to amend her Complaint to allege claims for reformation of the mortgage, equitable estoppel and for violations of the federal Truth In Lending Act ("TILA"). This appeal by Appellant follows.

STATEMENT OF THE FACTS

In late 2003, Appellant agreed to assist her son in the purchase of residential real property located at 1239 Cedar Lane, Newport, Minnesota (the "Newport Property"). (A.16, ¶2.)² Because her son was unable to qualify for a loan to finance the purchase of the Newport Property, Appellant agreed to purchase the Newport Property for him and decided to finance the purchase with a loan from Anchor Bank. (A.16). Appellant agreed to purchase the Newport Property for the sum of \$265,000.00 and applied to Anchor Bank for a loan in the full amount of the purchase price. (A.42).

Anchor Bank approved Appellant's application and a closing occurred on February 6, 2004. In connection with the closing, Appellant signed, among others, the following documents:

1. Promissory Note (the "Note") in favor of Anchor Bank in the amount of \$265,000.00 (A.21);
- *3 2. Mortgage (the "Mortgage") in favor of Anchor Bank against the Newport Property and against additional property located at 6020 Asher Court, Inver Grove Heights, Minnesota (the "Inver Grove Heights Property")³ (AB.5-16);
3. Adjustable Rate Rider (AB.17-19); and
4. 1-4 Family Rider (AB.20-23).

In preparation for the closing, in December 2003, Anchor Bank obtained two separate commitments for title insurance from Fidelity National Title Insurance Company to insure the Mortgage as a first lien against the Newport Property and as a first lien against the Inver Grove Heights Property (collectively, the "Properties"). (AB.2; AB.29-36). Each title commitment carried a policy amount of half of the \$265,000.00 loan amount, or \$132,500.00. (AB.3).

Subsequent to the closing, Anchor Bank assigned its interests in the Note and Mortgage to Emigrant. (AB.2). The Mortgage was recorded with the office of the County Recorder for Washington County on February 12, 2004, and with the office of the County Recorder for Dakota County on September 2, 2004. (AB.41). Upon assignment of the Mortgage, Fidelity National

Title Insurance Company issued a policy of title insurance to Emigrant, as the assignee of Anchor Bank, with a policy amount of \$265,000.00. (AB.37-38). The title insurance policy insured the Mortgage as a first lien against both of the Properties. (AB.37-38).

On August 1, 2005, Appellant wrote to Emigrant's customer service department and requested that the Inver Grove Heights Property be released as collateral for the Note. *4 (AB.39). The reason given for Appellant's request was her belief that the value of the Newport Property provided sufficient collateral for the Note. (AB.39).

Appellant defaulted on the Note and Mortgage by failing to make the payment due on November 1, 2010, and each payment thereafter. (AB.3). As a result, Emigrant foreclosed the Mortgage by advertisement and a sale of the Properties was held on February 9, 2012, by the Washington County Sheriff, subject to a five week redemption. (AB.41-42).⁴ Emigrant was the purchaser at the sale bidding in the sum of \$287,431.26 for the Properties. (AB.42).

On August 14, 2012, Appellant filed suit in Washington County and obtained a temporary restraining order that stayed the expiration of the redemption period. In her Complaint, Appellant alleged six counts: (1) fraud and misrepresentation; (2) negligent misrepresentation; (3) promissory estoppel; (4) mutual mistake; (5) set aside foreclosure sale; and (6) **financial exploitation** of a vulnerable adult.⁵ (A.1-8). Only Counts 1, 2, 3, 4 and 6 were asserted against Anchor Bank. (Id.).

*5 The District Court held hearings on November 2, 2012, and November 28, 2012, on the following motions:

1. Emigrant's motion to dismiss, or alternatively, for summary judgment;
2. Anchor Bank's motion for judgment on the pleadings, or alternatively, for summary judgment; and
3. Appellant's motion to amend her Complaint.⁶

In an Order filed January 24, 2013, the District court (i) granted Emigrant and Anchor Bank summary judgment and dismissed the claims against them with prejudice; and (ii) denied Appellant's motion to amend. (Add.2-3). This appeal follows.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file show there are no genuine issue of material fact and that either party is entitled to judgment as a matter of law. [Minn. R. Civ. P. 56.03](#). On appeal from summary judgment, the court reviews de novo “whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 664 N.W.2d 72, 76 (Minn. 2002). Summary judgment will be affirmed “if no genuine issues of material fact exist and if the court below properly applied the law”. *Kratzer v. Welsch Companies, LLC*, 771 N.W.2d 14, 18 (Minn. 2009).

*6 B. Motion to Amend Pleadings

[Minnesota Rule of Civil Procedure 15.01](#) provides that a “party may amend a pleading once as a matter of course at any time before a responsive pleading is served... [or] a party may a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so required.” While “the amendment of pleadings should be liberally allowed unless the adverse party would be prejudiced,” the supreme court has “cautioned that the court should deny a motion to amend a complaint where the proposed claim could not withstand summary judgment.” [Rosenberg v. Heritage Renovations, LLC](#), 685 N.W.2d 320, 332 (Minn. 2004). “Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion.” [Johns v. Harborage I, Ltd.](#), 664 N.W.2d 291, 295 (Minn.2003).

II. THE DISTRICT COURT DID NOT ERR IN GRANTING ANCHOR BANK SUMMARY JUDGMENT

A. The District Court Properly Determined That Appellant's Claims Against Anchor Bank Are Not Pure Defenses And Are Therefore Barred By The Statute of Limitations

Statutes of limitation are “based to a great extent on the proposition that if one person has a claim against another... it would be inequitable for him to assert such claim after an unreasonable lapse of time, during which such other person has been permitted to rest in the belief that no such claim existed.” [Bachertz v. Hayes-Luca Lumber Co.](#), 275 N.W. 694, 697 (Minn. 1937). As a general rule, “the statute of *7 limitations may be used as a shield, not as a sword” and the statute does not bar a party from raising a pure defense. [Reynolds v. Reynolds](#), 458 N.W.2d 103, 105 (Minn. 1990).

The District Court properly granted Anchor Bank summary judgment because Appellant's claims sought affirmative relief, rather than pure defenses. (Add. 12). The District Court determined that Appellant's claims are barred by the six year statute of limitations contained in [Minn. Stat. §541.05](#) “because [Appellant] was on notice that the Inver Grove Heights Property was encumbered by the mortgage, at the very latest, by August 1, 2005, when she sent a letter to Emigrant requesting that the Inver Grove Heights Property be removed as cross-collateral for the Newport Property, and therefore, the statute of limitations ran by August 1, 2011, or approximately one year prior to the filing of the Complaint.” (Add.12).

Appellant argues that the District Court erred in its statute of limitations analysis because Appellant's claims are asserted as pure defenses to which the statute of limitations does not apply. *Appellant's Brief* at 12.⁷ This argument as to Anchor Bank fails because, as discussed below, Appellant is seeking affirmative relief against Anchor Bank on Counts 1-4 of her Complaint for (i) fraud and misrepresentation; (ii) negligent misrepresentation; (iii) promissory estoppel; and (iv) mutual mistake.

*8 Appellant argues that Counts 1-4 are pure defenses outside the purview of the statute of limitations because she is asserting them in defense to the foreclosure proceeding commenced by Emigrant. *Appellant's Brief* at 12-13. However, nowhere does Appellant argue that Counts 1-4 are being asserted to defend herself from a foreclosure of the Mortgage commenced by Anchor Bank. Where, as here, a promissory note and accompanying mortgage are assigned from one entity to another, the assignee holds the sole legal and equitable right to enforce the Note and foreclose the Mortgage. [Jackson v. Mortgage Electronic Registration Systems, Inc.](#), 770 N.W.2d 487, 500 (Minn. 2009); [JPMorgan Chase Bank, N.A. v. Erlandson](#), 821 N.W.2d 600, 604 (Minn. Ct. App. 2012). Upon assignment, Emigrant acquired all rights to foreclose the Mortgage and it is Emigrant's foreclosure, not Anchor Bank's foreclosure, that Appellant is trying to avoid. Thus, even if Appellant were asserting Counts 1-4 as pure defenses such that the statute of limitations does not apply, Counts 1-4 are only being asserted defensively against Emigrant, the party foreclosing the Mortgage and are not being asserted defensively against Anchor Bank.

If this court determines that Anchor Bank is the party conducting the foreclosure, or that Anchor Bank is acting in concert with Emigrant in the foreclosure of the Mortgage, then, in that case, Appellant's claims against Anchor Bank are still barred by the six year statute of limitations because Counts 1-4 are not being asserted as pure defenses. As to the fraud and misrepresentation claim, this court has already refused to apply the pure defense exception to the statute of limitations. In *9 [Kelley v. Rudd](#), 1992 WL 3651, *3 (Jan. 14, 1992, Minn. Ct. App.)⁸, like here, Plaintiff argued that his fraud claim was a pure defense and

therefore that it was not barred by the statute of frauds. In rejecting Plaintiff's argument in *Kelley*, this court stated that "we decline to extend the pure defense exception to the statute of limitations to claims of fraud." *Id.*

Moreover, as to the fraud and misrepresentation, negligent misrepresentation, promissory estoppel and mutual mistake claims, Appellant seeks affirmative relief from the court in her Complaint. Specifically, Appellant alleges that she harmed or was damaged and asks the court to award her damages in excess of \$50,000.00 for these claims. (App.4-7). As to Counts 1-4, to the extent Appellant seeks monetary damages against Anchor Bank, her claims are for affirmative relief as opposed to pure defenses to the foreclosure and are therefore barred by the statute of limitations.

The District Court properly determined that Counts 1-4 of Appellant's Complaint are affirmative claims and are therefore barred by the six-year statute of limitations.

B. The District Court Properly Determined That Appellant's Claims Against Anchor Bank Are Barred by Minn. Stat. §513.33

Pursuant to [Minn. Stat. §513.33](#), the alleged oral promise by Anchor Bank that the Mortgage would not encumber the Inver Grove Heights Property must be in writing. "A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions and is signed by the creditor and debtor." [Minn. Stat. §513.33, subd. 2 \(2012\)](#). A "credit agreement" includes "an agreement to lend or forbear repayment of money, goods, or things in action, to *10 otherwise extend credit, or to make any other **financial** accommodation. [Minn. Stat. §513.33, subd. 1\(1\) \(1012\)](#). Claims on agreements falling under [Minn. Stat. §513.33](#) fail as a matter of law if the agreement is not in writing." [Greuling v. Wells Fargo Home Mortgage, Inc.](#), 690 N.W.2d 757, 761-62 (Minn. Ct. App. 2005). An oral promise that is a "credit agreement" under the statute is unenforceable under the theory of promissory estoppel. [BankCherokee v. Insignia Dev., LLC](#), 779 N.W.2d 896, 903 (Minn. Ct. App. 2010). [Minn. Stat. §513.33](#) is intended to serve a broad purpose:

The Minnesota credit agreement statute was enacted in 1985 to protect lenders from having to litigate claims of oral promises to renew agricultural loans. The farm crises of the 1980's produced cash-strapped and **financially** unsophisticated farmers who claimed reliance upon their bank officers' oral promises to renew their loans. Numerous lawsuits arose over the bankers' alleged oral promises. The credit agreement statute was passed to prevent the litigation of such difficult claims.

[Rural American Bank of Greenwald v. Herickhoff](#), 485 N.W.2d 702, 705 (Minn. 1992) (internal citations omitted).

The District Court determined that the alleged agreement between the parties that the Mortgage would not encumber the Inver Grove Heights Property met the definition of a credit agreement under [Minn. Stat. §513.33](#). (Add.14). The District Court granted Anchor Bank summary judgment and dismissed Counts 1-4 because there exists no writing signed by Anchor Bank containing the alleged promise by Anchor Bank that the Mortgage would only encumber the Newport Property. In her brief, Appellant does not address whether the District Court properly applied [Minn. Stat. §513.33](#) to Counts 1-4 and whether the District Court properly determined that Counts 1-4 are barred by [Minn. Stat. §513.33](#).

*11 This case lands squarely within the language and intent of [Minn. Stat. §513.33](#). The mortgage loan, including the terms and conditions of the loan, such as the collateral, is a credit agreement that must be contained in a writing signed by Anchor Bank for Appellant to maintain an action against Anchor Bank. Here, it is undisputed that there exists no writing that contains the alleged agreement by Anchor Bank that the Mortgage would only encumber the Newport Property. Absent such a writing, Counts 1-4 are barred by [Minn. Stat. §513.33](#) and the District Court properly granted Anchor Bank summary judgment.

C. Appellant's Claims Against Anchor Bank are Barred by the Parol Evidence Rule

Pursuant to the parol evidence rule, evidence outside of a written agreement signed by the parties, including oral statements made prior to or contemporaneously with the execution of the agreement, is not admissible to modify, vary, or alter the terms of the written agreement. See *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn. 1982).

Anchor Bank argued at summary judgment that Appellant's claims were barred by the parol evidence rule, but the District Court failed to analyze the application of the parol evidence rule even after the District Court recited the parol evidence rule in its decision. (AB.69; Add.13). On appeal, Appellant's brief is silent on Anchor Bank's argument that her claims are barred by the parol evidence rule.

This case falls squarely within in the parol evidence rule. Counts 1-4 of Appellant's Complaint all rely on the common allegation that the Inver Grove Heights Property would not be used as collateral. However, the oral promise alleged by Appellant is in direct conflict *12 with the terms of three loan documents signed by Appellant at closing for the sole purpose of conveying to Anchor Bank an interest in the Properties as collateral for the loan. The Mortgage, Adjustable Rate Rider and 1-4 Family Rider, clearly identify both the Inver Grove Heights Property and the Newport Property by legal description and street address as the collateral being pledged by Appellant as security for the loan. (AB. 6, 17, 20). Counts 1-4 of Appellant's suit against Anchor Bank are based on an alleged oral promise that conflicts with the clear and unambiguous terms of these documents and are therefore barred by the parol evidence rule.

III. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTION TO AMEND HER COMPLAINT TO ASSERT CAUSES OF ACTION THAT WOULD NOT SURVIVE SUMMARY JUDGMENT

Under [Rule 15.01](#) leave to amend shall be freely given when justice so requires. [Minn. R. Civ. P. 15.01](#). But leave to amend should not be granted when doing so “would result in prejudice to the other party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761-62 (Minn. 1993) (holding that the district court did not abuse its discretion by denying a party's motion to amend when the substance of the amendment was barred by the statute of limitations). Additionally, it is not an abuse of discretion to deny an motion to amend when the proposed amended claim would fail as a matter of law. *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 817 N.W.2d 693, 714 (Minn.2012).

In her motion to amend, Appellant sought to amend her Complaint to add causes of action for reformation of the Mortgage, equitable estoppel and violations of TILA. (App.9-15). On appeal, Appellant only assigns error to the District Court's denial of her motion to amend the Complaint to allege causes of action for reformation of Mortgage and for *13 violations of TILA. *Appellant's Brief* at 14-17.

A. The District Court Properly Denied Appellant's Motion to Amend the Complaint to Assert a Claim for Reformation of the Mortgage

Reformation is the amendment of a written agreement to reflect the parties' true intent at the time of its creation. *Jablonski v. Mutual Serv. Cas. Ins. Co.*, 408 N.W.2d 854, 857 (Minn. 1987). The following elements must be shown by clear and convincing evidence in order for the court to reform a written agreement: (i) a valid agreement between the parties expressing their real intentions; (ii) a written agreement that fails to express the parties' real intentions; and (iii) the failure is the result of a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by either party. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.W.2d 303, 314 (Minn. 2003). Mutual mistake requires that both the parties to the contract agree that the written agreement does not accurately reflect the agreement struck by the parties through a scrivener's error. *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980). The evidence supporting reformation of a written instrument, including a deed, must be consistent, clear, unequivocal, and convincing. *Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn. 1977).

The District Court properly denied Appellant's motion to amend her Complaint to allege a cause of action for reformation because a claim for reformation would not survive summary judgment. (Add.15). The District Court reasoned that (i) Appellant's claim for reformation of the Mortgage based on mutual mistake would not survive summary judgment because the title commitments evidenced Anchor Bank's intent to encumber both *14 Properties and that there was no mistake on the part of Anchor Bank in including the Inver Grove Heights Property in the Mortgage; and (ii) there had not been a sufficient showing of a unilateral mistake accompanied by fraud. (Add.16). The District Court's denial of Appellant's motion to amend was proper under the facts of this case.

The evidence in the record clearly establishes that Anchor Bank intended to use the Inver Grove Heights Property as collateral for the Note.⁹ In December 2003, two months before closing, Anchor Bank obtained a title commitment on the Inver Grove Heights property with a policy amount of \$132,500.00, half of the Note amount. Given the facts of this case, the District Court properly determined that the inclusion of the Inver Grove Heights Property in the Mortgage was not a simple scrivener's error and that Anchor Bank intended all along to take a Mortgage against the Inver Grove Heights Property. Because a claim for reformation based on mutual mistake will not survive summary judgment absent evidence of a mistake on the part of Anchor Bank, the District Court properly denied Appellant's motion to amend.¹⁰

Appellant's claim for reformation based on unilateral mistake accompanied by fraud also will not survive summary judgment. Presumably, the fraud upon which this *15 claim is premised is the allegation that Anchor Bank orally promised Appellant that the Mortgage would not encumber the Inver Grove Heights Property. As argued previously, Appellant's fraud claim based on alleged oral representations is barred by [Minn. Stat. §513.33](#) and the parol evidence rule. Accordingly, Appellant's claim for reformation based on unilateral mistake accompanied by fraud will not survive summary judgment and the District Court properly denied Appellant's motion to amend her Complaint to allege such a claim.

B. The District Court Properly Denied Appellant's Motion to Amend the Complaint to Assert a Claim Under TILA

In her motion to amend, Appellant sought leave from the District Court to assert a claim against Anchor Bank for violation of TILA. Specifically, Appellant sought to assert a claim alleging that the TILA disclosure provided by Anchor Bank failed to meet the requirements of [15 U.S.C. §1638\(a\)\(9\)](#).¹¹ (App.14-15). The District Court denied Appellant's motion on the basis that the TILA claim was being asserted affirmatively and was therefore barred by the one-year statute of limitation set forth in TILA and could not withstand a motion for summary judgment. (Add.15-16). On appeal, Appellant argues *16 that the court erred in its denial of her motion to add a claim under TILA because her claim under TILA is one for recoupment and is therefore excepted from the one year statute of limitations. *Appellant's Brief* at 15-17.

A claim for violation of TILA must be brought within one year from the date of the violation or the claim is time-barred. [15 U.S.C. §1640\(e\) \(2011\)](#). TILA provides an exception to the one-year statute of limitations when the statutory violation is asserted as a defense by recoupment in an action to recover the debt. [15 U.S.C. §1640\(e\) \(2011\)](#) (emphasis added).¹² To qualify as recoupment the alleged TILA violation must be asserted defensively. *In re Smith*, 737 F.2d 1549, 1554 (11th Cir. 1984); *Basham v. Fin. Am. Corp.*, 583 F.2d 918, 928 (7th Cir. 1978); *DeVary v. Countrywide Home Loans, Inc.*, 701 F.Supp.2d 1096, 1106 (D.Minn. 2010). Moreover, a non-judicial foreclosure is not an "action" as contemplated by TILA. *Ortiz v. Accredited Home Lenders, Inc.*, F.Supp.2d 1159, 1164-65 (S.D. Cal. 2009) (holding that an "action" as contemplated by [15 U.S.C. 1640\(e\)](#) commenced by the creditor that would allow the debtor to seek recoupment even after the expiration of the one year limitation does not include a non-judicial foreclosure because [15 U.S.C. 1640\(e\)](#) defines "action" as a court proceeding).

*17 In this case, Appellant is not seeking to assert a recoupment¹³ claim under TILA as a defense to an action to recover the debt on the Note. Here, because Emigrant foreclosed by advertisement, Emigrant lost its right to seek a deficiency against Appellant for any amount outstanding on the Note after the sale of the Properties. [Minn. Stat. §582.30, subd. 2 \(2012\)](#). Because Emigrant and Anchor Bank are not seeking to recover any deficiency on the Note, there is nothing for Appellant to "recoup" by bringing the TILA claim and Appellant's purported claim under TILA is therefore barred by the one-year statute of limitations.

The only exception that arguably allows the debtor to bring a recoupment claim affirmatively after the expiration of the one year limit is in the context of a non-judicial foreclosure is where the debtor's recoupment claim is based on violations of 15 U.S.C. §§1639b(c)(1)-(2) or 15 U.S.C. §639c(a). 15 U.S.C. §1640(k) (2011).¹⁴ In this case, Appellant is not asserting a TILA violation under 15 U.S.C. §§1639b(c)(1)-(2) or *18 15 U.S.C. §1639c(a) and she is therefore prohibited under 15 U.S.C. §1640(e) to bring her TILA claim affirmatively in response to the non-judicial foreclosure after the expiration of the one-year time limit. The District Court did not err in its denial of Appellant's motion to add a claim for recoupment under TILA where such a claim could not survive summary judgment. The District Court properly determined that the TILA claim was being asserted affirmatively and was therefore time barred because Appellant failed to bring the claim within the one year period imposed by 15 U.S.C. §1640(e).

CONCLUSION

Respondent Anchor Bank respectfully requests that this Court affirm the District Court's grant of summary judgment in its favor.

Appendix not available.

Footnotes

- 1 The District Court also dismissed Count 5 to set aside the foreclosure sale for other reasons on summary judgment. (Add.13-14). Appellant's claim to set aside the sale, is based solely on whether Emigrant complied with applicable foreclosure laws in foreclosing the mortgage and is therefore not applicable to Anchor Bank. *Appellant's Brief* at 5-12. Thus, Anchor Bank took no position at the District Court level on this claim and takes no position on appeal. The District Court also dismissed Count 6 of the Complaint on summary judgment which alleged that Anchor Bank **financially exploited** a vulnerable adult in violation of *Minn. Stat. §626.557* because Appellant orally represented at the summary judgment hearing that she was not pursuing this claim. (Add.8 at n.1).
- 2 Citation to Appellants' Appendix will be in the following format: "A ____". Citations to Appellants' Addendum will be in the following format: "Add ____". Citations to Anchor Bank's Appendix will be in the following format: "AB____".
- 3 The Inver Grove Heights Property was, at the time of the Loan, and is still is today, Appellant's homestead.
- 4 The redemption was set a five weeks because Appellant recorded a Notice of Postponement under *Minn. Stat. §580.07, subd. 2*, which postponed the sale for a period of five months. (AB.44-45). The sale was originally scheduled to take place on September 9, 2011. (AB.46-48).
- 5 In her proposed Amended Complaint, Appellant did not plead a claim for **financial exploitation** of a vulnerable adult under *Minn. Stat. §626.557*, which was contained in her original Complaint as Count 6. (App.6-7). Because Appellant did not assert the claim in her proposed Amended Complaint and based on comments made by Appellant's counsel at the hearing on the motions to the effect that Appellant was no longer pursuing this claim, the District Court dismissed Count 6 of the Complaint. (Add.8). Appellant does not challenge the dismissal of her claim under *Minn. Stat. §626.557* on appeal.
- 6 Appellant's motion to amend the Complaint sought to add claims for reformation of the Mortgage, equitable estoppel and violations under TILA.
- 7 In her brief, it is unclear whether Appellant is arguing that the District Court erred in dismissing Counts 1-4 against both Anchor Bank and Emigrant or whether she is arguing that the District Court erred in dismissing Counts 1-4 against Emigrant only. Out of caution, Anchor Bank is proceeding here on appeal as though Appellant is arguing that the District Court erred in dismissing Counts 1-4 against both Anchor Bank and Emigrant.
- 8 Pursuant to *Minn. Stat. §408A.08, subd. 3*, a copy of *Kelley v. Rudd* can be found at AB.71-74.
- 9 The need for using the Inver Grove Heights Property as additional collateral is explained by the fact that Appellant was seeking 100% **financing** for the purchase of the Newport Property.
- 10 Appellant argues that her claim for mutual mistake in her original Complaint is actually a claim for reformation that was not properly labeled as such. *Appellant's Brief* at 14-15. Whether the claim for reformation was properly plead in the original Complaint or not is irrelevant. If the reformation claim based on mutual mistake is asserted in the original Complaint it still fails for the same reasons stated here and the District Court properly granted Anchor Bank summary judgment on the mutual mistake claim.
- 11 15 U.S.C. 1638(a)(9) states:

For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type.

12 The relevant portion of [15 U.S.C. §1640\(e\)](#) states:

This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

13 TILA does not define recoupment. Black's Law Dictionary defines recoupment as "the recovery or regaining of something"... the "[r]eduction of a Plaintiff's damages because of a demand by the defendant arising out of the same transaction"... Black's Law Dictionary (7th Ed. 1999).

14 [15 U.S.C. §1640\(k\)](#) states:

Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of [paragraph \(1\)](#) or [\(2\) of section 1639b\(c\)](#) of this title, or of [section 1639c\(a\)](#) of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

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