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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,

Eighth District, Cuyahoga County.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., Plaintiff–Appellee

v.

Martha R. LAMBERT, et al., Defendants–Appellants.

No. 94681.

Decided Feb. 3, 2011.

Background: Mortgagee brought foreclosure action against mortgagor, and mortgagor counterclaimed alleging violations of the Truth in Lending Act (TILA). The Court of Common Pleas, Cuyahoga County, No. CV–482270, entered judgment in favor of mortgagor, and she appealed.

Holdings: The Court of Appeals, James J. Sweeney, J., held that:

- (1) attorney's fees awarded mortgagor belonged to attorney and could not be used to offset any debts or obligations of the mortgagor to the mortgagee;
- (2) mortgagor who prevailed on TILA claim was statutorily entitled to costs;
- (3) evidence was sufficient to support trial court's finding that TILA violations by mortgagee were not the cause of mortgagor's emotional and psychic damages; and
- (4) finding that punitive damages were not warranted in mortgagor's case against mortgagee for TILA violations did not constitute an abuse of discretion.

Affirmed in part and reversed in part.

West Headnotes

[1] KeyCite Citing References for this Headnote

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk67 k. Judgment and relief; injunction; attorney fees. Most Cited Cases

266 Mortgages KeyCite Citing References for this Headnote

266X Foreclosure by Action

266X(K) Judgment or Decree

266k485 Scope and Extent of Relief

266k489 k. Amount of indebtedness. Most Cited Cases

Attorney's fees awarded mortgagor as prevailing party in her Truth in Lending Act claim against mortgagee belonged to attorney, absent a contractual fee agreement between attorney and mortgagor that provided otherwise, and thus, fees that were awarded could not be used to offset any debts or obligations of the mortgagor to the mortgagee in mortgagee's foreclosure action. Truth in Lending Act, §§ 130(a)(3), 122(a), 129(b)(1), 15 U.S.C.A. §§ 1640(a)(3), 1632(a), 1639(b)(1).

[2] KeyCite Citing References for this Headnote

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk67 k. Judgment and relief; injunction; attorney fees. Most Cited Cases

Mortgagor who prevailed on her Truth in Lending Act claim against mortgagee was statutorily entitled to costs of the action, and thus, trial court erred when it awarded mortgagor attorney's fees, but no costs.

[3] KeyCite Citing References for this Headnote

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.40 k. Debt collection practices. Most Cited Cases

Evidence was sufficient to support trial court's finding that Truth in Lending Act (TILA) violations by mortgagee were not the cause of mortgagor's emotional and psychic damages; mortgagor was unaware of TILA violations until trial, and even though foreclosure had been threatened for three years prior to trial, mortgagor had experienced other stressors over the same time period, including the death of a friend, and the loss of her job. 15 U.S.C.A. 1632(a), 15 U.S.C. 1639(b)(1).

[4] KeyCite Citing References for this Headnote

92B Consumer Credit

92BII Federal Regulation

92BII(C) Effect of Violation of Regulations

92Bk64 Actions for Violations

92Bk67 k. Judgment and relief; injunction; attorney fees. Most Cited Cases

Trial court's conclusion that punitive damages were not warranted in mortgagor's case against mortgagee for Truth in Lending Act violations did not constitute an abuse of discretion, absent a showing that mortgagee's violations were committed with malice. Truth in Lending Act, §§ 122(a), 129(b)(1), 15 U.S.C.A. §§ 1632(a), 1639(b)(1).

Civil Appeal from the Cuyahoga County, Court of Common Pleas, Case No. CV-482270.  
Susan M. Gray, Esq., Ohio Savings Bank Building, River, OH, for appellant.

James R. Havens, Esq., Maura E. Binder, Esq., Adam M. Schwartz, Esq., Matthew T. Wolf, Esq., Havens Limited, Columbus, OH, Rick D. Deblasis, Esq., Lerner, Sampson & Rothfuss, Cincinnati, OH, Steven V. Sorg, Esq., Hebron, KY, for appellee.  
Before: SWEENEY, J., KILBANE, A.J., and COONEY, J.

JAMES J. SWEENEY, J.

\*1 Defendant-appellant, Martha Lambert (“Lambert”) appeals the trial court's order concerning its allocation of damages, attorney fees, and costs after she prevailed against Mortgage Electronic Systems, Inc. (“MERS”) on her claims arising under the Truth in Lending Act (“TILA”). For the reasons that follow, we affirm in part and reverse in part.

Appellee initiated this lawsuit against Lambert in 2002, seeking to foreclose on her home in Cleveland. Lambert filed counterclaims upon which a magistrate found MERS liable for violating the TILA. The magistrate further concluded that Lambert had validly exercised her rescission rights under the TILA but was required to make a rescission tender to MERS. The magistrate ordered that Lambert's rescission tender would be offset by the statutory damages and attorney fees that it had ordered MERS to pay.

In February of 2010, the trial court adopted the magistrate's decision. The trial court's order entered judgment in favor of Lambert and against MERS as follows: nothing for compensatory or punitive damages, Six Thousand Dollars (\$6,000) in statutory damages “this amount to be offset against Ms. Lambert's tender and reduced to zero”; attorney fees “in the amount of \$108,055.29, less \$58,617.19 to be applied to Martha Lambert's tender for a total amount of attorney fees of \$49,438.10.” Finally, the order directed that Lambert was not required to tender any funds to MERS since the tender amount of \$64,617.19 “is offset by the amount of awarded statutory damages and attorney fees.”

Lambert also obtained a default judgment against third party defendant Country Home Mortgage (“Country Home”) and was awarded damages of \$112,055.29, plus interest at the statutory rate and costs. Country Home has not appealed.

Lambert has appealed, raising three assignments of error for our review. Additional facts will be set forth where relevant to the resolution of the assigned errors.

[1] “First Assignment of Error: The trial court erred as a matter of law and to the prejudice of Appellant by including attorney's fees in the rescission tender calculation contrary to well-settled law.”

The trial court determined that MERS committed three TILA violations pursuant to 15 U.S.C. 1632(a), 15 U.S.C. 1639(b)(1), and for failing to release its security interest within 30 days of Lambert's notice of Right to Rescind in violation of the TILA. Once a TILA violation has been established, 15 U.S.C. 1640(a)(3) provides for an award of attorney fees and costs as follows:

“Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, \* \* \* is liable to such person in an amount equal to the sum of—

“ \* \* \*

“(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action, together with reasonable attorney's fee as determined by the court \* \* \*.”

\*2 The record reflects that Lambert's attorneys accrued \$216,111.58 in fees. The magistrate, in his decision, reduced the amount to \$108,055.27 reasoning, in part, that the combined hourly rate of Lambert's attorneys “appear[ed] excessive” and the amount of attorney fees sought in comparison to the statutory damages obtained were “excessive.” Then, the magistrate directed that \$58,617.19 of the attorney fees awarded would be further reduced by applying it to offset the amount Lambert owed to MERS for her rescission tender.

Lambert does not dispute the finding that she owes MERS \$64,617.19 in order to effectuate the rescission process under the TILA. Instead, she challenges the court's order to the extent it offsets this amount against the proceeds of attorney fees awarded.

We note that the Southern District of Ohio has contemplated the potential for an equitable offset of attorney fees awarded for a TILA violation with amounts owed to the lender. See *F.D.I.C. v. Martinez* (June 12, 1997), S.D. Ohio No. C–3–93–429, unreported. However, in *Martinez*, the court did not order such an offset and specifically observed that it had not awarded attorney fees against the F.D.I.C. Further, the district court advised, “[a]ny [attorney fee] award granted may be deducted from the Defendants' equitable obligation.” *Id.*, fn. 11. The court reserved the determination for a later date and, therefore, the *Martinez* decision is neither helpful nor persuasive.

In *Plant v. Blazer Fin. Svcs., Inc.* (C.A.5, 1979), 598 F.2d 1357, 1365, the Fifth Circuit held that an award of attorney fees for a TILA violation “is not subject to setoff against the debtor's outstanding debt to the creditor. \* \* \* the attorney is entitled to the fee that is awarded to him regardless of any controversy regarding the underlying debt.” This rationale serves to facilitate the congressional purpose behind the TILA. To provide otherwise would only serve to frustrate the enforcement of the TILA provisions because even attorneys who successfully prove violations of the law may not be compensated for their work.

The litigant's attorney has a legally protected interest to attorney fees awarded under fee-shifting provisions. E.g., *Bourke v. Carnahan* (1995), 163 Ohio App.3d 818, 2005–Ohio–5422, 840 N.E.2d 1101, 16, citing *Flannery v. Prentice* (2001), 26 Cal.4th 572, 110 Cal.Rptr.2d 809, 28 P.3d 860, (“attorney-fee award under the Fair Employment and Housing Act belonged to the attorneys for whose work they were awarded”). Just because the client benefits from such an offset does not make it “equitable.” Equity is not served by requiring the successful litigant's attorney to essentially pay the debts their clients owe to creditors out of the fees attributed to the

attorney's hourly rates for legal services rendered. In the absence of a contractual fee agreement between the lawyer and client that provides otherwise, if an attorney has earned the attorney fees that are awarded, the fees belong to the attorney, not the client, and may not be used to offset debts or obligations of the client.

\*3 This assignment of error has merit and is sustained.

[2] "Second Assignment of Error: The Court erred as a matter of law in its award of attorney's fees and costs."

Because Lambert prevailed on her TILA claim, she was entitled to "costs of the action." 15 U.S.C. § 1640(a)(3); see, also, *SunAmerica Fin. Corp. v. Williams* (1981), 2 Ohio App.3d 272, 275, 442 N.E.2d 83 ("Where a creditor violation is proven, liability, as provided for in Section 1640, must follow"). Lambert asserts that the trial court erred by failing to award her any costs. MERS counters that Lambert was awarded a lump sum of attorney fees and costs and, therefore, the error in failing to separately designate an award for costs is harmless.FN1

FN1. MERS contends that the court awarded Lambert 50% of her attorney fees, which included costs of \$39,343.

Lambert's objections to the magistrate's decision included the failure to apportion an award for costs of the action. Although the trial court overruled Lambert's objections, the order at issue does not address or include an award of costs.

A review of the record reveals that the trial court specifically awarded attorney fees in the amount of \$44,240.32 for "the initial trial of the case," which was a reduction of the fees sought for the reason that the fee bill did not "parse out the non-TILA related work." This portion of the award was clearly for attorney fees and did not include an award of costs.FN2 Next, the court awarded attorney fees for the damages portion of the trial. The court reduced the amount of fees sought based upon the logic that "the attorney fees greatly exceed the amount of damages [with] no strong support to justify the fees." Additionally, the court reasoned that it was not necessary for two attorneys to accrue billable time for the damages portion of the trial, for "a combined rate of \$450.00 per hour." For these reasons, the attorney fees sought for this portion of the trial were reduced by half, which amounted to \$63,813.97. Again, the trial court did not include any costs of the action in this part of the award.

FN2. The court indicated "it will be impossible for the Court to make an exact calculation as to what amount [ ] of the Attorneys' time was spent on proving the TILA violations. However, the Court has reviewed the counterclaim, all of the Pleadings and Motions filed in the case on the August 29, 2005 Magistrate's Decision and can estimate roughly 50% of the attorneys' time was spent on the TILA violations." The Court accordingly reduced the attorney fees by half. There was no mention of costs being considered as a component of this award.

Because the trial court's order did not address or include an award for any costs of the action, MERS' contention that Lambert received an award of costs for items that do not qualify as "costs" is not supported.

From this record, we can only conclude that trial court's order that specifically provided “the total amount of attorney fees awarded to defendant Lambert is \$108,055.27” was just that—an award of attorney fees. Accordingly, the trial court erred by not awarding Lambert costs of the action.

MERS does not dispute that Lambert is entitled to post-judgment interest on her award for attorney fees on the grounds that it is automatically provided by law pursuant to R.C. 1343.03(A). Because Lambert is entitled to an award for costs of the action and there was no allocation for costs in the trial court's judgment, this assignment of error is sustained.

[3] “Assignment of Error III: The trial court abused its discretion by failing to award actual and punitive damages.”

\*4 We review the determination of damages under the abuse of discretion standard. *Roberts v. U.S. Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 1996–Ohio–101, 665 N.E.2d 664.

Lambert sought compensatory damages for emotional distress and psychic trauma she alleged to have suffered as a consequence of MERS' TILA violations. Courts have recognized that such injuries can qualify as actual damage under the TILA. See *Kurz v. Chase Manhattan Bank*, (S.D.N.Y.2003), 273 F.Supp.2d 474, 480; see, also, *Butler v. Sterling, Inc.*, (C.A.6, 2000), 210 F.3d 371. “The key, of course, is linking any claimed damage to the defendant's TILA violation and not to some other cause.” *Kurz*, 273 F.Supp.2d at 480.

Both parties offered expert witness testimony concerning the cause of Lambert's claimed damages. Lambert offered the testimony of John Matthew Fabian, PSY.D., J.D. (“Fabian”). MERS presented the testimony of Phillip Resnick, M.D. (“Resnick”).

MERS contends that Lambert did not suffer emotional damage as a result of the foreclosure or any TILA violation. Lambert, however, contends that the record contains no dispute that Lambert suffered emotional distress as a result of the foreclosure.FN3

FN3. It is her position that MERS continued its pursuit of the foreclosure action after the TILA violations became evident and ignored her rescission, which it should have honored. Therefore, she contends any emotional distress caused by the continued foreclosure proceedings became part and parcel of the damages she suffered as a result of the TILA violations.

The record establishes that Lambert was hospitalized in 2003 and received a mental health diagnosis. At issue is what caused the onset of her illness. Both experts essentially testified that stressors that cause someone to develop symptoms of mental illness occur within a few weeks to a month of the event.

Fabian is a forensic and clinical psychologist. There is no dispute that Fabian opined that Ms. Lambert suffered emotional and psychological harm due to the fear of losing her home. He cited Lambert's hospital medical records and psychiatric records as supporting his conclusion. It was

his opinion that the on-going nature of the foreclosure proceedings, rather than other stressors, caused her damages.

Resnick holds a medical license and is a professor of psychiatry at a local medical school. He is board certified in psychiatry and neurology, with a subspecialty certification in forensic psychiatry. Resnick interviewed Lambert and had her identify the stressors in her life that led up to her 2003 hospitalization and to rank them on a scale of one to ten. He then explained that psychiatric literature weighs various stressors, which reportedly weighs death of a friend more highly than a foreclosure. Applying this research, Resnick considered the death of one of Lambert's clients to be a higher rated stressor than the threatened foreclosure.

Resnick testified that it was his opinion that the TILA violation was not a substantial factor in causing Lambert's injury. In support, Resnick indicated, among other things, that Lambert was unaware of the TILA violation until the 2005 trial. Likewise, Resnick opined that the foreclosure action was not a substantial factor in causing her injury. He relied on, among other things, the nine month interval between the threatened foreclosure in September of 2002 and the onset of Lambert's symptoms in June of 2003. It was Resnick's opinion that the death of Lambert's client and the loss of her job caused her injuries; both of which occurred within four or five weeks prior to the onset of symptoms. Resnick acknowledged under cross-examination that there were various medical records where Lambert had identified the foreclosure of her home as a psychological stressor. Resnick also testified that, "I am prepared to say that I believe [the foreclosure action] did cause her emotional distress." Nonetheless, Resnick maintained his opinion that the foreclosure was not a substantial factor in causing Lambert's injuries. He testified that the medical records noted other stressors and the foreclosure action was not the only one mentioned. Resnick indicated that Lambert had identified "many, many stressors that were going on in her life \* \* \* She volunteered those things as things that she saw as stressors in her life." Based on Lambert's disclosures to him and interviews with others, he concluded that the death of her client and the loss of her employment was the precipitating factor to the onset of her symptoms rather than the foreclosure action that had been pending for nine months.

\*5 The trial court found that Lambert's emotional and psychic damages were not caused by the foreclosure action or any TILA violation. The court based this conclusion on the time that elapsed between the filing of the foreclosure complaint and the onset of symptoms as well as Resnick's opinion that neither was a substantial factor in causing Lambert's severe emotional distress or psychological problems.

While we very well may have reached a contrary conclusion based upon the evidence, the trial court's findings were supported by evidence in the record and did not amount to an abuse of its discretion. The applicable standard of review does not allow us to substitute a valid exercise of the trial court's discretion with our own. The trial court's judgment on Lambert's claim for actual damages is affirmed.

[4] Finally, Lambert asserts that the trial court erred by denying her claim for punitive damages. We review the trial court's decision concerning a punitive damages award for an abuse of discretion. To substantiate an award of punitive damages, there must be a finding of actual malice. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 316, 736

N.E.2d 517. “[A]ctual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

Whether the TILA even allows for the recovery of punitive damages, the trial court concluded that such an award was not warranted. The trial court found that Lambert had not presented any evidence that the TILA violations were committed with malice. In particular, the trial court cited the magistrate's decision as follows:

“[T]here is no evidence in this case that plaintiff tried to deceive or cheat Lambert. Its failure to immediately recognize Lambert's rescission as valid was not the result of bad faith on plaintiff's part. Rather, plaintiff failed to recognize said rescission as valid because it was unsure that the rescission was valid. Since it has taken several days of trial and this lengthy opinion to determine that the rescission was valid, this approach by plaintiff was reasonable under the circumstances. Accordingly, the fact that plaintiff did not release its security interest within 30 days of receipt of Lambert's notice of right to rescind does not eliminate Lambert's tender obligation.” Based on the foregoing, the trial court did not abuse its discretion by concluding that punitive damages were not warranted in this case. The third assignment of error is overruled.

Judgment affirmed in part and reversed in part.

It is ordered that appellee and appellant split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

\*6 It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, A.J., concurs.

COLLEEN CONWAY COONEY, J., concurs in judgment only.

Ohio App. 8 Dist., 2011.

*Mortg. Electronic Registrations Systems, Inc. v. Lambert*  
Slip Copy, 2011 WL 345970 (Ohio App. 8 Dist.), 2011 -Ohio- 461

Not Reported in N.E.2d, 2007 WL 4532679 (Ohio App. 10 Dist.), 2007 -Ohio- 7008

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