

MASS.

**United States District Court
District of Massachusetts**

2006 OCT 11 P 5:03

Pierre Richard Augustin, PRO SE)
Plaintiff,)
)
v.)
)
DANVERSBANK, ET AL.,)
Defendants.)

C.A. No. 06-10368 (NMG)

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
WITH SUPPORTING AUTHORITY (Ameriquest Mortgage)**

CERTIFICATION OF PERSONAL CONSULTATION

Plaintiff hereby certifies that on October 11, 2006 he hand delivered to the United States District Court of Massachusetts and has followed Rule 7.1(a)(2) prior filing his Memorandum of Point and Authorities in opposition to defendant's motion to dismiss.

1. Emancipation Redress

In America, no one is considered to be above the law. The United States Constitution is considered the supreme law of the land both because of its content and because its authority is derived from the people. However, first and foremost, plaintiff meditates and relies on the divine guidance of the almighty to provide him with wisdom to dissect and to comprehend the meaning of the law of the land.

Plaintiff strongly believes in the transparency of the judicial system in the United States of America to uphold the law in the search of Justice. For, it is the only forum whereby an average 'Joe' citizen like myself who never had any infraction with the law, was left with the only viable option of bankruptcy and TILA to protect his property rights without money, status and political connection in seeking the emancipation and the redress

from the violation of the law by defendants's powerful corporations with unlimited budget represented by the most savvy lawyers on just about equal term.

Intuitively, plaintiff recognizes that he is facing lawyers that are well schooled with an in-depth knowledge of the law and various courtroom strategies that he lacks. Although not a lawyer or pretending to be one, plaintiff action is symmetrical to many pro se individual from the early settlers in the state of Massachusetts who could not afford expensive legal representation in the search of fairness, equal protection and justice under the law.

Unequivocally, the paramount reason for plaintiff complaint against the defendants rest on the principle of Emancipation and Redress which are intertwined with his property rights as "the guardian of every other right". Thus, plaintiff arguments are based on the following Rule of Law and others as deemed appropriate:

- 1) **1st Amendment**, "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances."
- 2) **5th Amendment**, "No person shall be ... deprived of life, liberty, or property, without due process of law"
- 3) **7th Amendment**, "...The right of trial by jury shall be preserved."
- 4) **14th Amendment**, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

- 5) **Natural Rights**, “Weakness allures the ruffian, but arms, like laws, discourage and keep the invader and plunderer in awe, and preserve order in the world as well as property. Horrid mischief would ensue were the law-abiding citizens deprived of the use of them, and the weak will become a prey to the strong.” — Thomas Paine

- 6) **Common Law**, In *Beard v. U.S.*(158 U.S. 550, 1895), the Court approved the common law rule that a person "may repel force by force" in self-defense, and concluded that when attacked, a person "was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force" as needed to prevent "great bodily injury or death."

- 7) **Pro Se Litigants**, “Courts are particularly cautious while inspecting pleading prepared by plaintiffs who lack counsel and are proceeding pro se. Often inartful, and rarely compose to the standards expected of practicing attorneys, pro se pleadings are viewed with considerable liberality and are held to less stringent standards than those expected of pleadings drafted by lawyers”. (*Antonelli v. Shehan*, 81 F. 3d 1422, 1427 (7th Cir. 1996)). Also, “parties appearing pro se are allowed greater latitude with respect to reasonableness of their legal theories (*Patterson V. Aiker*, 111 F.R.D. 354, 358 [N.D. GA 1986]) and according to section D of Rule 11 of the Federal Rule of Civil Procedure.

2. Defendant violated Local Rule 7.1(a)(2)

The *facts and circumstances* reveal that there were no attempt made by neither the defendant or their counsel to comply with Local Rule 7.1(a)(2) nor was there any certification accompanying their motion to dismiss.

The issue is covered by a **Rule of law** of Local Rule 7.1(a)(2)(Motion Practice) which states that “No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.”

Analysis - The fact help to prove that the defendant or their counsel did not comply with Local Rule 7.1(a)(2).

Conclusion - From the **analysis**, plaintiff comes to the **Conclusion** that the **rule of law** does apply to the fact. Hence, defendant’s motion to dismiss should be denied.

3. F.R.Civ.P. 12(b)(1) – District Court has Jurisdiction Over The Subject Matter

The **facts and circumstances** that brought the plaintiff under the Federal Court jurisdiction are that this complaint involves violations of Federal and State Law and the plaintiff and defendants are citizens of different states. As a whole, the complaint is based on actual count of facts and claims based on Federal and Massachusetts Law since plaintiff has pursued and exhausted all administrative remedies prior the filing of this action in Court.

The issue is covered by the **Rule of law, which** are 28 U.S.C § 1331, 28 U.S.C § 1332 and 28 U.S.C § 1391.

Analysis - The fact helps to prove that the rule created by Article III of the U.S. Constitution expressly creates a federal court system, and Section 2 of that Article further declares that *jurisdiction*. Also, Federal Courts may hear only those cases involving federal laws, federal or sovereign parties (including states), or disputes between citizens from different states. Defendant is foreign corporation from California doing business in Massachusetts.

Conclusion - From the *analysis*, plaintiff comes to the *Conclusion* that based on the *rule of law*, the United States District Court, District Court of Massachusetts has venue and power to hear and decide on this case whose subject matter fits within the court's scope of authority. Hence, defendant's motion to dismiss should be denied.

4. F.R.Civ.P. 12(b)(6) – Plaintiff state a claim upon which relief can be granted

The *facts* and *circumstances* that brought the plaintiff to court against “Ameriquest” are based on the facts that payoff or refinancing does not terminate the extended right of rescission so as long as the earlier loans were within the three-year period and the earlier loan independently had violations giving rise to the extended rescission right as well (*Pulphus v. Sullivan*, 2003 WL 1964333, at *17 (N.D. Ill. Apr. 28, 2003); *McIntosh v. Irwin Union Bank & Trust Co.*, 215 F.R.D. 26 (D. Mass. 2003); *Mayfield v. Vanguard Savings & Loan Ass'n*, 710 F. Supp. 143 (E.D. Pa. 1989) (both current and prior, refinanced loan rescinded); *Abele v. Mid-Penn Consumer Discount*, 77 B.R. 460, 467 (E.D. Pa. 1987), *aff'd mem.*, 845 F.2d 1009 (3d Cir. 1988) (four in series of refinancings rescinded); *In re Steinbrecher*, 110 B.R. 155 (Bankr. E.D. Pa. 1990); *In re Milbourne*, 108 B.R. 522 (Bankr. E.D. Pa. 1989); see also *Wiggins v. Avco Fin. Servs.*, 62 F. Supp. 2d 90 (D.D.C. 1999) (rescission allowed even though debtors paid off loan after sending rescission notice); *in re Tucker*, 74 B.R. 923 (Bankr. E.D. Pa. 1987) (debtor could have rescinded earlier, refinanced loans, though did not seek rescission).

By invoking F.R.Civ.P. 12(b)(6), defendant is suggesting that plaintiff's factual allegations must be taken as true for the purpose of the court ruling on the motion. Since defendant's motion does not replace the trial, real and factual issues based on circumstantial evidence and prior conclusion should be drawn favorably for the

plaintiff. Since there are matters outside the complaint allegations, then this motion could be viewed as a "Summary Judgment".

The issue is covered by a **Rule of law** of F.R.Civ.P. 12(b)(6) which states, if, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Analysis - The fact helps to prove that when considering defendant's motion, the court must construe the factual allegations in the light most favorable to plaintiff with all doubts resolved in the pleaders favor and the allegations taken as true. The purpose of the 'Notice of Rescission' and allegations cited in Plaintiff's verified complaint was to give defendant fair notice of plaintiff's claimed and the rule of law for basing the argument. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). With regard to Fed. Rule Civ. P 12(b)(6), court should dismiss a suit under FRCP 12(b)(6) only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that entitled him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957).

The rule also state that a dismissal under failure to state a claim upon which relief can be granted would have to be "treated as one for summary judgment", and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" as stipulated in Fed. Rule Civ. P, Rule 12(b). Then, in the absence of given plaintiff the opportunity to present sworn affidavits as well as the opportunity to conduct some kind of discovery against defendants and to request admissions and conduct interrogatories, plaintiff reaches the conclusion that justice will not be served based on the notion that the Fourteenth Amendment to the

Constitution requires that plaintiff be allowed his Due Process rights to prove these claims by a preponderance of the evidence. Plaintiff has the legal right, and a moral duty, according to the constitution, the 7th amendment to present his evidence to a jury and let them decide based on the finding of fact and the principle of equality and fundamental fairness.

Conclusion - From the *analysis*, plaintiff comes to the *Conclusion* that based on the *rule of law*, he has satisfied the burden of stating a claim against “Ameriquest Mortgage”. Plaintiff’s complaint need not alleged any specific wrong per se; rather it must merely notify the defendant of the nature of the claim and state the ‘Relief Sought’. Plaintiff also alleges that all defendants are liable for damages by virtue of their part in the civil conspiracy and trampling on the rights of plaintiffs by violating Federal and State Law. Hence, defendant’s motion to dismiss should be denied.

5. Plaintiff has stated a Cause of Action against Defendant

The *facts and circumstances* that brought the plaintiff to court against defendants is the civil conspiracy with Global Consultants (acted as a “finder” in the transaction), Title company, Closing Attorney, Allen Segal in violation of the Massachusetts Laws on Predatory Lending and Acts and the fact that TIL rescission does not only cancel a security interest in the property but it also cancels any liability for the plaintiff to pay finance and other charges, including accrued interest, points, broker fees, closing costs and that the lender must refund to plaintiff all finance charges and fees paid. Thus, Ameriquest Mortgage is obligated to return those charges to the plaintiff (Pulphus v. Sullivan, 2003 WL 1964333, at *17 (N.D. Apr. 28, 2003) (citing lender’s duty to return consumer’s money as reason for allowing rescission of refinanced loan); McIntosh v. Irving Union Bank & Trust Co., 215 F.R.D. 26 (D. Mass. 2003) (citing borrower’s right to be reimbursed for prepayment penalty as reason for allowing rescission of paid-off loan).

The issue is covered by a **Rule of law** under Federal and Massachusetts Law on Predatory Lending, TILA, HOEPA and others law.

Analysis - The fact helps to prove that the plaintiff alleged unequivocally that the defendant(s) has violated of Federal and Massachusetts Law on Predatory Lending, TILA, HOEPA and others law.

Conclusion - From the **analysis**, plaintiff comes to the **Conclusion** that the **rule of law** does apply to the fact. Plaintiff has sufficiently alleged facts necessary to prove each element of his causes of action. Hence, defendant motion to dismiss should be denied.

6. Plaintiff's did notify lien holders within the Federal & Mass. TILA limitation period

The **facts and circumstances** that plaintiff filed a copy of the notice of rescission in the bankruptcy court notifying the attorneys representing DanversBank, Commonwealth, New Century Mortgage and Chase Home Finance as well as having certified receipt return of proof of delivery to the Defendants/Lawyers including Ameriquest Mortgage are proof of notification according to the Official Staff Commentary, 226.2(a)(22)-2 as authorizing service on attorney.

The issue is covered by a **Rule of law** of the Truth-in-Lending which empower plaintiff to exercise his right in writing by notifying creditors of his cancellation by mail to rescind the mortgage loan transactions per (Reg. Z §§ 226.15(a)(2), 226.23(a)(2), Official Staff Commentary § 226.23(a)(2)-1) and 15 U.S.C. § 1635(b). This action is also based on Massachusetts TILA law, which has a statute of limitations of 4 years.

The filing of Bankruptcy tolls or extends the rescission time as plaintiff had filed for bankruptcy on September 26, 2005 and obtained a discharge on September 26, 2006. Also, the principle of equitable tolling does apply to TILA 3 years period of rescission since despite due diligence, Plaintiff could not have reasonably discovered the concealed fact of TILA violations in-depth and explicitly until September 17, 2006 at about 5 a.m. in reading the Truth-in-Lending book by the National Consumer Law Center.

The equitable tolling principles are to be read into every federal statute of limitations unless Congress expressly provides to the contrary in clear and ambiguous language, (See *Rotella v. Wood*, 528 U.S. 549, 560-61, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)). Since TILA does not evidence a contrary Congressional intent, its statute of limitations must be read to be subject to equitable tolling, particularly since the act is to be construed liberally in favor of consumers. In an analogous case, the District Court reversed the Bankruptcy court holding that section 108(b) guards against the expiration of the underlying right by extending the period to exercise the right of rescission, as long as the right had not expired when the bankruptcy case.

Analysis – The fact helps to prove the statute and regulation specify that the security interest, promissory note or lien arising by operation of law on the property becomes automatically void. (15 U.S.C. § 1635(b); Reg. Z §§ 226.15(d)(1), 226.23(d)(1). As noted by the Official Staff Commentary, the creditor’s interest in the property is “automatically negated regardless of its status and whether or not it was recorded or perfected.” (Official Staff Commentary §§ 226.15(d)(1)-1, 226.23(d)(1)-1.). Also, the security interest is void and of no legal effect irrespective of whether the creditor makes any affirmative response to the notice. Also, strict construction of Regulation Z would dictate that the voiding be considered absolute and not subject to judicial modification. This requires canceling documents creating the security interest and filing release or termination statements in the public record. (Official Staff Commentary §§ 226.15(d)(2)-3, 226.23(d)(2)-3.) Thus, allowing rescission of

refinanced loan or loan paid off is also consistent with TIL's protective attitude toward borrowers' rescission rights generally and the general requirement that TIL be interpreted liberally for the consumer.

Conclusion - From the *analysis*, plaintiff comes to the *Conclusion* that both the statute and Regulation Z make it clear that, if the plaintiff has the extended right and chooses to exercise it, the security interest and obligation to pay charges are automatically voided. (Cf. *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704-05 (9th Cir. 1986) (courts do not have equitable discretion to alter substantive provisions of TILA, so cases on equitable modification are irrelevant). The statute, section 1635(b) states: "When an obligor exercises his right to cancel..., any security interest given by the obligor... becomes void upon such rescission". Also, it is clear from the statutory language that the court's modification authority extends only to the procedures specified by section 1625(b).

The voiding of the security interest is not a procedure, in the sense of a step to be followed or an action to be taken. The statute makes no distinction between the right to rescind in three day or extended in three years for federal and four years under Mass. TILA, as neither cases nor statute give courts equitable discretion to alter TILA's substantive provisions. Since the rescission process was intended to be self-enforcing, failure to comply with the rescission obligations subjects Ameriquest Mortgage and other defendants to potential liability. Non-compliance is a violation of the act which gives rise to a claim for actual and statutory damages under 15 USC 1640. TIL rescission does not only cancel a security interest in the property but it also cancels any liability for the plaintiff to pay finance and other charges, including accrued interest, points, broker fees, closing costs and that the lender must refund to plaintiff all finance charges and fees paid. Thus, it is premature to determine jurisdiction since plaintiff has the option of enforcing the rescission right in federal district, state or bankruptcy court (See S. Rep. No. 368, 96th Cong. 2 Sess. 28 at 32 reprinted in 1980 U.S.C.A.N. 236, 268

("The bill also makes explicit that a consumer may institute suit under section 130 [15 U.S.C., 1640] to enforce the right of rescission and recover costs and attorney fees in a successful action"). Hence, defendant motion to dismiss should be denied.

7. Plaintiff timely submitted Summons to U.S. Marshal

Timeline analysis of service of Summons & Complaint by US Marshall										
				Step 1	Step 2	How?	A	Step 3	B	Step 4
	Docket entry #	Defendant	Date Summons was Issued by Court	Date Plaintiff submitted Summons to US Marshall	Date US Marshall served on Defendants	Served by US Marshall or by mail	# of Days Elapsed between Step 1 & Step 2	Date US Marshall filed Proof of Service in Court	# of Days Elapsed Between Step 2 & Step 3	Date Plaintiff received proof of service
1	7	Allen H. Segal	4/3/2006	4/7/2006	4/13/2006	Officer	7	4/18/2006	5	*
2	8	Commonwealth	4/3/2006	4/7/2006	4/13/2006	Mail	7			*
3	9	Chase	4/3/2006	4/7/2006	4/14/2006	Mail	8			*
4	10	Allied Home Mort.	4/3/2006	4/7/2006	4/21/2006	Officer	15	5/3/2006	13	*
5	11	New Century	4/3/2006	4/7/2006	4/21/2006	Officer	15	5/3/2006	13	*
6	15	Old Republic	4/7/2006	4/7/2006	4/20/2006	Officer	14	5/4/2006	15	*
7	19	DanversBank	4/3/2006	4/7/2006	5/8/2006	Officer	32	5/12/2006	5	*
8	27	Ameriquest	4/3/2006	4/7/2006	5/12/2006	Officer	36	6/1/2006	21	*
9	40	Global Consultant	4/3/2006	4/7/2006	5/31/2006	Officer	55	6/14/2006	15	*
10	50	Samuel Reef	4/3/2006	4/6/2006	6/29/2006	Officer	85	7/5/2006	7	*
11	59	Allen H. Segal	7/14/2006	7/14/2006	8/28/2006	Officer	46	8/29/2006	1	*
12	65	Ameriquest	4/3/2006	6/30/2006	9/8/2006	Officer	71	10/4/2006	27	*

The facts and circumstances as outlined in the table above, prove that Plaintiff submitted the summons and complaints to the U.S. Marshall office for process timely. Plaintiff received the summons issued on April 3, 2006 by the Court that he submitted timely on April 6 & 7, 2006 to the U.S. Marshall's

office. Once Plaintiff turned over the summons and complaint to U.S. Marshal, he does not have any authority to demand that his summons be delivered right away. Based on the fact mentioned above, Plaintiff believes that the summons were issued timely since the 120 days period, as confirmed by the Massachusetts District Court Clerk's office, run from April 3, 2006 to July 31, 2006. Also, on July 26, 2006, Plaintiff timely submitted a Motion for Enlargement of Time so that the US Marshal would have appropriate time to serve the remaining summons in their possession among which was Ameriquest's summons in route to California.

The issue is covered by a *Rule of law* that in an action in which the Plaintiff petitions to proceed in forma pauperis, the Fed. R. Civ. P. 4(m) 120-day period for service on the defendant does not begin to run on the date that the plaintiff files the complaint with the clerk of court without the required filing fee. Courts must allow considerable leeway when assessing whether a pro se litigant's failure to comply strictly with the time limits should be excused for good cause which is to be determined by the court itself. Good causes are determined by the following factors: 1) whether the plaintiff exhibited reasonable diligence or made reasonable effort to effect service, 2) whether the party to be served received actual notice of the lawsuit (which Ameriquest in their motion to dismiss claimed to receive from a co-defendant a courtesy copy of the complaint) (in *Re Sheehan*, 253 F.3d 507 (9th Cir. 2001)), 3) the degree of prejudice suffered by the party to be served, 4) the degree of prejudice to the serving party if his complaint is dismissed and 5) whether the serving party has moved for an extension of the time to serve.

Analysis – The time limit rule for service states that if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, could either dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time. Fed.R. Civ. P. 4(m) grants discretion to the district court to extend

the time period for service of process, even in the absence of a showing good cause for failure to effect timely service (*Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 30 Fed.R. Serv. 3d 823 (3r Cir. 1995) and (*Horenkamp v. Van Winkle And Col., Inc.*, 402 F.3d 1129, 60 Fed. R. Serv. 3d 1260 (11th Cir. 2005)).

In Plaintiff's case, he filed a timely motion to enlarge time for serving the summons prior to the running of the 120 days. In deciding whether to grant permissive relief, the district court should also take care to protect pro se plaintiffs from the consequences of confusion or delay as illustrated above by U.S. Marshall or attending the resolving of an in forma pauperis petition.

Conclusion - From the *analysis*, plaintiff comes to the *Conclusion* that when a pro se litigant is proceeding in forma pauperis, he is relying on service by the U.S. Marshals, and as long as he provided the information as illustrated in the table above, to identify the defendant, courts have uniformly held that the Marshals' failure to effect service automatically constitutes good cause under Fed. R. Civ. P. 4(m). A plaintiff proceeding in forma pauperis is entitled to rely upon court officers and United States Marshals to effect proper service, and should not be penalized for failure to effect service of process, where such failure is through no fault of the litigant. Hence, defendant's motion to dismiss should be denied.