

seq; and (3) conspiracy to commit fraud under UTPCPL, HIFA, and Pennsylvania common law.¹ Chase moves to dismiss Count I and the HIFA and UTPCPL violations alleged against it in Count II but does not address the conspiracy allegations in Count II at this time.

I.

For present purposes, we accept all well-pleaded allegations in the amended complaint as true. Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citation omitted).

Plaintiffs, husband and wife, are homeowners in the City of Philadelphia. They were solicited by two men, Calvin Harris and Marcus Newsome, on behalf of the Philadelphia Home Improvement Outreach Program ("PHI"), to perform improvements to plaintiffs' property. Newsome told plaintiffs that PHI would assist them in arranging financing in the amount of \$76,000 to pay for the improvements. Without plaintiffs' knowledge, Newsome or Harris contacted a mortgage broker, defendant Jonathan Ganz of Bryn Mawr Mortgage to arrange for financing. Sometime thereafter, Newsome, Harris and/or Ganz submitted a loan application to Chase.

Plaintiffs agreed to a loan from Chase in the amount of \$186,900. Approximately \$90,000 of this total was to pay off two

1. In Count III of the amended complaint, not presently at issue, both plaintiffs bring a claim of negligence against defendants Randall and Lexington.

existing mortgages on their home. Other portions of the loan were to pay other existing debt that the plaintiffs carried. The plaintiffs were also to receive \$26,530 in cash. On or about January 25, 2005, Newsome and Eric Senders, an employee of defendant Lexington, participated in the closing of the loan at plaintiffs' residence. Newsom and Senders told plaintiffs that Chase would escrow the cash intended for home improvements and would disburse the funds upon authorization of plaintiffs to PHI's subcontractors. Defendant Randall, who was not present at the mortgage closing, notarized the plaintiffs' signatures on the mortgage.

Despite the representations to plaintiffs prior to the closing of the mortgage, the non-mortgage debt was not paid off, and plaintiffs did not receive a cash disbursement. Instead, a total of \$70,000 in three checks from the loan proceeds was distributed to Harris. Although PBI hired subcontractors to complete work on plaintiffs' property, much of the work was not completed and that which was completed was shoddy and consisted of sub-standard materials. On June 26, 2006, plaintiffs notified Chase that they were rescinding the loan. Chase has refused to honor plaintiffs rescission request.

II.

Chase first argues for the dismissal of Count I, which seeks rescission of the mortgage loan and alleges that Chase violated TILA when it failed properly to complete paperwork given to Darlene Johnson regarding her right to rescind the mortgage

loan. According to plaintiffs, the line provided for the date by which the right to rescind must be exercised was left blank on Ms. Johnson's notice.²

TILA gives certain borrowers a temporary right to rescind a mortgage transaction:

[I]n the case of any consumer credit transaction ... in which a security interest ... is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later
....

15 U.S.C. § 1635(a). The creditor must provide the borrower with notice of this right by giving two copies of the notice to each borrower who has a right of rescission. 12 C.F.R. § 226.23(b).

The notice must clearly and conspicuously disclose:

- (i) The retention or acquisition of a security interest in the consumer's principal dwelling.
- (ii) The consumer's right to rescind the transaction.

2. The date was properly inserted on the corresponding line on Alexander Johnson's form. In a transaction involving multiple consumers, however, notice of right to rescind must be made separately "to each consumer who has the right to rescind." 12 C.F.R. § 226.17(d); In re Apgar, 291 B.R. 665, 670 (Bankr. E.D. Pa. 2003). Here, Chase was obliged to provide proper notice to both Darlene and Alexander Johnson. See 12 C.F.R. § 226.23(a). Because plaintiffs do not argue that Alexander Johnson's notice was defective in any way, it is only the right of Darlene Johnson to rescind which is presently at issue.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

Id. If a creditor fails to deliver notice of the right to rescind or any of the required material disclosures, the debtor may rescind at any time up to three years following the consummation of the transaction. Id. § 226.23(a)(3).

The Board of Governors of the Federal Reserve System (the "Board"), which is responsible for developing model disclosure forms, has published a model Notice of Right to Cancel form. See 12 C.F.R. Pt. 226, App. H-8. A creditor using this model form is deemed to be in compliance with the disclosure provision of TILA. 15 U.S.C. § 1604(b). In the instant matter, the form used by Chase conforms to the model form promulgated by the Board. In using the model form, Chase was required to insert on the appropriate blank line the date by which the right to rescind must be exercised. Chase does not dispute that the line on Darlene Johnson's notice was left blank. Instead, relying on Palmer v. Champion Mortgage, 465 F.3d 24 (1st Cir. 2006), it argues that its duty was only to provide an objectively reasonable notice of the deadline and that Darlene Johnson's notice was sufficient to meet that standard because it twice provided information which would make the deadline clear to the average consumer.

In particular, Chase relies on the following two portions of the notice describing the deadline for the right to rescind:

Your Right to Cancel

You are entering into a transaction that will result in a mortgage/security interest in your home. You have a legal right under federal law to cancel this transaction, without cost, within three (3) business days from whichever of the following events occur last:

- (1) The date of the transaction which is January 25, 2005; or
- (2) The date you received your Truth-in-Lending disclosures; or
- (3) The date you received this notice of your right to cancel.

* * *

If you cancel by mail or telegram, you must send the notice no later than midnight of [left blank] (or midnight of the third business day following the latest of the three events listed above).

In the Palmer case, on which Chase relies, the creditor mailed the borrower her Notice of Right to Cancel after the closing had taken place. The notice identified the deadline for rescission as April 1, 2003, but the borrower did not receive the letter until sometime after that date had passed. As with the notice in the instant case, the notice in Palmer contained language explaining that the rescission deadline would not pass until three days after the latest of the three triggering events, one of which was the date the borrower received the notice of her

right to cancel. The notice also included a parenthetical note after listing the rescission deadline, identical to the one in this case, setting out an alternative manner for determining the deadline if the three triggering events did not occur at the same time. The borrower attempted to rescind the transaction seventeen months later. She argued that because the April 1 deadline had passed before she received the notice, the notice was "confusing" and such defective notice extended her right to rescind to the statutory three year period. Id. at 27. The Palmer court used the standard of an "average consumer, looking at the Notice objectively" to determine that the notice was not confusing and that the extended rescission right under TILA was not triggered. Id. at 28-29. The court stated that the "twice-repeated alternative deadlines" would have made it "crystal clear" to the average consumer that the April 1 deadline would not necessarily be the applicable one. Id. at 29.

Chase urges this court to apply Palmer's reasoning to the present situation. As noted above, it argues that the notice to Darlene Johnson provided all the necessary material information for a reasonably alert person to determine when her right of rescission would expire, even with the blank in her notice. We disagree.

A notice of the right of rescission must contain "[t]he date the rescission period expires." 12 C.F.R. § 226.23(b)(v). The amended complaint alleges, and Chase does not deny, that Chase's notice to Darlene Johnson's did not contain this vital

piece of information. Darlene Johnson has properly set forth a TILA violation, and the question presently before this court is whether that alleged violation can be excused, as Chase argues it should be. By contrast, the notice in Palmer did contain the date of the rescission deadline and otherwise complied with each of the governing regulations. Palmer did not address whether an alleged TILA violation could be excused. Instead, the issue there was whether the notice was defective because it was confusing even though there was compliance with the TILA. The Palmer court itself expressly distinguished the situation it confronted from one in which the notice at issue stated no rescission date at all. 465 F.3d at 29.

The correct standard for TILA violations is one of strict liability:

TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. Once the court finds a violation, no matter how technical, it has no discretion with respect to liability.

In re Porter, 961 F.2d 1066, 1078 (3d Cir. 1992), citing Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 898 (3d Cir. 1990) (internal quotations omitted). Indeed, we were unable to find, nor did Chase cite, a single case excusing a creditor's failure to fill in the blank designated for the rescission deadline. See, e.g. Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d

699, 704 (9th Cir. 1986); Williamson v. Lafferty, 698 F.2d 767 (5th Cir. 1983); Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143 (E.D. Pa. 1989); In re Armstrong, 288 B.R. 404 (Bankr. E.D. Pa. 2003).

In sum, Darlene Johnson has stated a claim under the TILA because of Chase's failure to include the rescission deadline on her notice. As a result, the time period in which she may exercise her right of rescission is three years, pursuant to 12 C.F.R. § 226.23(a)(3). If Ms. Johnson proves her allegations of a TILA violation, she has until three years after January 25, 2005, the day the transaction was consummated, to rescind. If, as she alleges, she notified Chase of her desire to rescind on June 26, 2006, she acted well within the permissible time period to do so. Chase would then be required to honor Ms. Johnson's right to rescind the mortgage loan transaction.

Chase additionally asserts that Count I of the amended complaint should be dismissed against it because plaintiffs did not tender the principal of the mortgage loan to Chase prior to pursuing rescission. "When a borrower rescinds a loan, he or she must return the money borrowed." Porter, 961 F.2d at 1077. The question Chase raises is whether the borrower must always repay, or offer to repay, the proceeds of the loan before seeking to terminate the creditor's security interest.

Section 1635(b) of TILA sets forth the sequence of rescission and tender that must be followed unless a court orders otherwise. Within twenty days of the borrower's notification

that she is exercising her right of rescission, the creditor must return any money or property given as earnest money, downpayment, or otherwise and reflect the termination of its security interest that was created by the transaction. After the creditor has met these obligations, the borrower must tender the property or its reasonable monetary value.³ The Notice of Right to Cancel that

3. The full text of the statutory provision reads as follows:

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor ... becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(continued...)

Chase provided to both plaintiffs describes the rescission procedure in much the same way. The Notice made clear that, after receiving plaintiffs' notice of rescission, Chase "must take the steps necessary to reflect the fact that the mortgage on [plaintiffs'] home has been cancelled" and that only after Chase has undertaken that obligation does the borrower have the responsibility to tender the money or property.

It is apparent from the plain language of the statute that the borrower does not have to tender the proceeds of the loan before invoking her right to rescind unless and until a court decides otherwise and modifies the statutory scheme. Contrary to Chase's assertion, this modification is a matter of the court's equitable discretion and does not operate automatically. Indeed, in each of the cases Chase cites, the court recognizes that it is using its authorized discretion to depart from the ordinary order as described in the statute. See, e.g. Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003); Williams v. Homestake Mortgage Co., 968 F.2d 1137 (11th Cir. 1992); FDIC v. Hughes Dev. Co., 938 F.2d 889 (8th Cir. 1991); Brown v. Nat'l Permanent Fed. Sav & Loan Ass'n, 683 F.2d 444 (D.C. Cir. 1982) (per curiam).

Chase has not made a request for conditional rescission in this court. Even if we were to interpret Chase's motion for

3.(...continued)

15 U.S.C. § 1635(b).

dismissal as such a request, it would be premature at this stage of the litigation. There is not yet any record, as there was in each of the cases cited by Chase, of the plaintiffs' inability to return the proceeds of the loan or any of the other circumstances this court would be obliged to consider if making a decision on equitable grounds. Because the plaintiffs were under no initial obligation to tender the proceeds of their mortgage loan prior to seeking rescission of that loan, Chase's argument to the contrary fails, and its motion to dismiss Count I of the amended complaint will be denied.

III.

Chase also argues for the dismissal of Count II, which alleges state law claims for fraud and conspiracy to commit fraud under HIFA, UTPCPL, and Pennsylvania common law.

HIFA is a Pennsylvania consumer protection statute which governs "home improvement installment contracts" that are to be performed in the Commonwealth. Plaintiffs assert that Chase violated the HIFA provisions which prohibit the collection of certain non-interest charges and of combining cash loans with financing of home improvement installation contracts. 73 Pa. Stat. Ann. §§ 500-407 and 500-408. Chase counters that those provisions of HIFA do not apply to it because it is a national banking association governed by the National Bank Act, 12 U.S.C. § 1, *et seq* ("NBA") and the regulations of the Office of the Comptroller of Currency ("OCC"). Chase maintains that those federal regulations preempt the HIFA provisions at issue.

A national banking institution may make mortgage loans subject to the terms, conditions and limitations set forth in the NBA and the OCC's regulations. 12 U.S.C. § 371; 12 C.F.R.

§ 34.3(a). Those regulations specifically address the question of the applicability of state law and provide that:

Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans ... without regard to state law limitations concerning:

* * *

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

* * *

(11) Disbursements and repayments[.]

12 C.F.R. § 34.4(a). Chase argues that these regulations preempt HIFA's prohibition on cash loans. We agree. The regulation's broad preemption of state laws which constrict the ability of national banks to make real estate loans plainly encompasses HIFA's restriction against making cash loans in connection with a home improvement installment contract.

Additionally, an OCC regulation explicitly provides that: "A national bank may charge its customers non-interest charges and fees, including deposit account service charges." 12

C.F.R. § 7.4002(a). Plaintiffs acknowledge this and admit that HIFA's prohibitions of such fees are preempted by the federal regulation. Thus, plaintiffs' amended complaint will be dismissed against Chase to the extent that it alleges a HIFA violation.⁴

Plaintiffs also allege that Chase violated three provisions of Pennsylvania's UTPCPL. Chase counters with a number of arguments, including that fraud was not pleaded with particularity, as it must be under Rule 9(b) of the Federal Rules of Civil Procedure. We will assume without deciding that plaintiffs pleaded fraud with sufficient particularity and address plaintiffs' allegations on other grounds.

First, plaintiffs claim that the defendants engaged in the unfair trade practice of "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have." 73 Pa. Con. Stat. Ann. § 201-2(4)(v). Plaintiffs assert that this provision was violated when the benefits of the loan were misrepresented to plaintiffs. Specifically, the plaintiffs allege that the loan made by Chase failed to pay the plaintiffs' debts, as Harris

4. Plaintiffs also allege that Chase's HIFA violations are per se violations of the UTPCPL. Because we find that plaintiffs have not stated a claim under HIFA, their UTPCPL claim will also be dismissed to the extent it is based on alleged HIFA violations.

and/or defendant Ganz had represented and that the proceeds of the loan were paid to Harris instead of to plaintiffs. In order to prove a UTPCPL violation based on § 201-2(4)(v), a plaintiff must show: (1) the defendant made a false representation; (2) which actually deceived or has the tendency to deceive plaintiff; and (3) the plaintiff relied on the false representation. See DiLucido v. Terminix Int'l, Inc., 676 A.2d 1237, 1240-41 (Pa. Super. 1996). Nowhere do the plaintiffs allege that any Chase employee made a representation of any sort to them. Instead, the plaintiffs contend that Harris and Ganz were Chase's agents, such that Chase should be held responsible for their actions, including their alleged misrepresentations.

Both parties agree that agency is comprised of three elements under Pennsylvania law: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking. Basile v. H & R Block, Inc., 761 A.2d 1115, 1120 (Pa. 2000). An agency relationship does not arise out of every action taken on another's behalf. Id. at 1121. "Rather, the action must be a matter of consequence or trust, such as the ability to actually **bind** the principal or alter the principal's legal relations." Id. (emphasis in original).

Plaintiffs allege that Harris and Ganz were agents of Chase because "defendant Chase remained in control of the undertaking with Ganz, [Bryn Mawr Mortgage Group ("BMMG")], and

Harris in that it directed how the financing of the loans was to be accomplished by barring any mention of improvements in the loan application process to comply with Chase underwriting standards." Plaintiffs, however, acknowledge that their loan application had to be submitted to Chase's underwriting department for consideration and acceptance. Pl.'s Am. Compl. at ¶ 29, 49(e)(1). Even accepting as true plaintiffs' allegations that a Chase account executive engaged in misconduct by directing Ganz and/or Harris how to fill out the plaintiffs' loan application, plaintiffs do not allege that Ganz or Harris had the authority to bind Chase to a nearly \$186,900 loan. Instead, Chase's underwriting department was the entity that determined whether or not to authorize the loan to plaintiffs. Thus, plaintiffs have not sufficiently pleaded an agency relationship between Chase and Ganz, BMMG and Harris. The alleged representations of these other parties cannot be attributed to Chase. Since there are no other allegations of Chase making a false representation to the plaintiffs, plaintiffs have failed to plead a violation by Chase of the UTPCPL based on § 201-2(4)(v), and this claim will be dismissed.

Next, plaintiffs aver that the defendants violated § 201-2(4)(xvi) of the UTPCPL, which defines as an unfair trade practice: "Making repairs, improvements or replacements on tangible, real or personal property, of a nature or quality inferior to or below the standard of that agreed to in writing." 73 Pa. Stat. Ann. § 201-2(xvi). "Under section 201-2(4)(xvi), a

plaintiff must show that a defendant agreed in writing to perform a contract with a certain quality and that the work was substandard and inferior." DiLucido, 676 A.2d at 1241 (footnote and citation omitted). Plaintiffs do not allege that Chase made any repairs, improvements or replacements on their property or that Chase contracted to perform any such services. Again, plaintiffs rely entirely on an agency theory, seeking to hold Chase responsible for the alleged actions of Ganz and Harris. As described above, plaintiffs' agency theory is untenable. Plaintiff's claim under § 201-2(xvi) will therefore be dismissed against Chase.

Finally, plaintiffs allege that § 201-2(4)(xxi), the "catchall provision" of the UTPCPL, was violated when defendant Randall notarized the plaintiffs' signatures on the mortgage although he was not personally present at the closing. As with plaintiffs' other assertions of liability under the UTPCPL, plaintiffs seek to hold Chase responsible as a principal for the conduct of another. Here, plaintiffs rely on the same theory as above to link Harris and Ganz to Chase, but add that Randall and Lexington were agents of Harris and Ganz and that Chase should thus be responsible for their actions as well. Without deciding whether Randall and Lexington were agents of Harris and Ganz, we have already determined that Harris and Ganz were not agents of Chase. Since the chain of agency has not been properly alleged, it follows that Randall and Lexington cannot be deemed Chase's subagents. As plaintiffs put forth no other basis for Chase's

liability for the actions of Randall and Lexington, we will dismiss plaintiffs' claim under § 201-2(4)(xxi) of the UTPCPL against Chase.

In sum, we will dismiss Count II of plaintiffs' amended complaint against Chase as to the alleged violations under HIFA and the UTPCPL.

