

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TERRENCE PAYNE, as personal	:	CIVIL ACTION
representative of the estate of	:	
BARBARA PAYNE, deceased,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EQUICREDIT CORP. OF AMERICA,	:	
FRANK T. JAMES d/b/a MONEY LINE	:	
MORTGAGE, DENISE MITCHELL,	:	
and FRANKLIN MALLOY,	:	
Defendants	:	No. 00-6442

MEMORANDUM AND ORDER

SCHILLER, J.

May , 2002

After a full trial before this Court in the above-captioned matter on March 11, 2002, judgment was entered on April 12, 2002 in the amount of \$10,192.06 plus reasonable counsel fees in favor of Plaintiff¹ and against Defendant EquiCredit Corp. of America (“EquiCredit”) as to Plaintiff’s claims under 15 U.S.C. §§ 1635 and 1639(b) in Count I of the Complaint.² Plaintiff’s remaining claims were dismissed, as were all the Defendants’ Cross-claims against each other. Defendant Denise Mitchell (“Mitchell”) was dismissed as a Defendant. Frank T. James d/b/a MoneyLine Mortgage (“James d/b/a MoneyLine”) had reached a settlement with Plaintiff before trial. In the same April 12, 2002 Order, I denied the parties’ motions for summary judgment as moot and directed Plaintiff to submit a petition for counsel fees.

¹ Plaintiff Terrence Payne is the personal representative of his mother, Barbara Payne (“Ms. Payne”), deceased, who originally brought this action in December 2000.

² See *Payne v. EquiCredit*, No. 00-6442, slip op. (E.D. Pa. Apr. 12, 2002) (“slip op.”). The Memorandum and Order was dated April 11, 2002 and filed April 12.

Now before the Court are the following post-trial motions: EquiCredit's Motion to Reconsider EquiCredit's Motion For Summary Judgment, Motions for Judgment on Partial Findings, and Judgment and to Amend Findings of Fact and Conclusions of Law,³ Plaintiff's Motion for Counsel Fees and Costs, and Mitchell's Motion for Payment of Costs and Counsel Fees.⁴ For the reasons that follow, I will deny EquiCredit's Motion to Reconsider and Amend, grant Plaintiff's motion for counsel fees in part, and deny Mitchell's and James d/b/a MoneyLine's motions for counsel fees.

I. EQUICREDIT'S MOTION TO RECONSIDER AND AMEND

On April 25, 2002, EquiCredit moved to challenge three rulings: (1) the denial of its motion for summary judgment on April 12, 2002, (2) the denial of its oral motions for Judgment on Partial Findings at trial on March 11, 2002, and (3) the April 12, 2002 judgment in favor of Plaintiff and against EquiCredit.

A. Denial of EquiCredit's Summary Judgment Motion

EquiCredit has moved for reconsideration of my denial of its motion for summary judgment in the April 12, 2002 Order. The parties submitted their motions for summary judgment on February 27, 2002. Their responses were due March 4. Because of the large number of disputed factual issues and in order to benefit from trial testimony and argument by counsel, I deferred ruling on the motions until after a full day-long trial on all the pending issues

³ EquiCredit's "Motion to Reconsider EquiCredit's Motion For Summary Judgment, Motions for Judgment on Partial Findings, and Judgment and to Amend Findings of Fact and Conclusions of Law" will henceforth be abbreviated "Motion to Reconsider and Amend."

⁴ Counsel for James d/b/a MoneyLine voluntarily withdrew his Motion for Payment of Counsel Fees. (Letter from Kassen to Court of 5/14/02.)

on March 11. After trial, I denied the summary judgment motions as moot. Slip op. at 16.

Rule 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

Despite this seemingly compulsory language, the Supreme Court has recognized a district court’s discretion to deny a summary judgment motion whenever there is “reason to believe that the better course would be to proceed to a full trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This discretion remains “even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial.” *Veillon v. Exploration Servs.*, 876 F.2d 1197, 1200 (5th Cir. 1989); *accord Metropolitan Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 356 (8th Cir. 1997).

Moreover, although the Third Circuit has not ruled on this question, most other Courts of Appeals have refused to review denials of summary judgment, finding that a district court judgment after a full trial on the merits supersedes earlier summary judgment proceedings. *See, e.g., Lama v. Borrás*, 16 F.3d 473, 476 n.5 (1st Cir. 1994); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 130 (2d Cir. 1999); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1236-37 (4th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 570-71 (5th Cir. 1994); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Watson v. Amedco Steel*, 29 F.3d 274, 277-78 (7th Cir. 1994); *Metropolitan Life*, 121 F.3d at 356; *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1358-59 (9th Cir. 1987); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992), *aff’d on reh’g*, 974 F.2d 1248, 1254; *Lind v. UPS*, 254 F.3d 1281, 1284-86 (11th Cir.

2001); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573-74 (Fed. Cir. 1986). Although most of these decisions reviewed appeals of jury verdicts, the same reasoning would apply to cases tried before a district court without a jury.

The reasons for the rule of non-appealability of summary judgment denials are manifold. First, as explained above, appeals of such interlocutory decisions interferes with a district court's discretion. *Black*, 22 F.3d at 572. Moreover, a proliferation of piecemeal appeals and multiple determinations on appeal of the same issue would frustrate judicial economy. *Pahuta*, 170 F.3d at 131; *Glaros*, 797 F.2d at 1573-74. Concerns of prudence and justice also argue against revisiting denials of such motions: a full trial on the merits is often based on a fuller record and in any case is the best test of the rights of the movant. *See Black*, 22 F.3d at 572; *Chesapeake Paper*, 51 F.3d at 1236; *Locricchio*, 833 F.2d at 1359 (although "the party moving for summary judgment suffers an injustice if his motion is improperly denied,... it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented"). Courts have refused to review such denials even when the evidence before the court at trial was exactly the same as that at the summary judgment stage. *See Lind*, 254 F.3d at 1285-86.

Finally, this rule is confirmed by the Federal Rules of Civil Procedure. Rules 50 and 52 and related jurisprudence instruct that judgment may not be rendered in a party's favor on appeal after an adverse verdict or judgment unless that party has made a motion for a directed verdict or judgment on partial findings in the district court. If a party was barred from appealing the verdict or judgment because it had failed to make such a motion, it would make little sense to permit nonetheless an appeal of a denial of summary judgment. *See Pahuta*, 170 F.3d at 131.

A few Courts of Appeals have fashioned exceptions to the rule of non-appealability in

cases of district court interlocutory determinations subject to immediate appeal, such as (1) determinations of a party's immunity from suit as a public official, (2) when the district court has granted the opposing party's summary judgment motion, (3) when the specific claim underlying the denial of summary judgment was not tried and thus was not a part of the final judgment terminating the action, or (4) the issue appealed concerned, not which facts the parties might be able to prove, but whether certain facts showed a violation of clearly established law. *See, e.g., Pahuta*, 170 F.3d at 132; *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 354 (7th Cir. 1988). None of these exceptions, however, applies in the present case.

For the same reasons that a full trial supersedes summary judgment proceedings for appeal purposes, trial in this case has superseded EquiCredit's summary judgment motion for purposes of EquiCredit's motion to reconsider. Therefore, I will not reconsider my denial of EquiCredit's summary judgment motion.

B. Denial of EquiCredit's Oral Motions for Judgment on Partial Findings

EquiCredit has also moved for reconsideration of my denials of its two oral motions for judgment on partial findings at trial on March 11, 2002. Both during and after Plaintiff's presentation of its case at trial, EquiCredit moved for judgment on partial findings pursuant to Rule 52(c). (Trial Tr. at 106, 118.) I denied both motions. At the close of trial, I took the entire case under advisement. On April 12, 2002, I issued Findings of Fact and Conclusions of Law, pursuant to Rule 52(a).

EquiCredit's motion, filed April 25, 2002, was filed 45 days after the challenged decisions. Therefore, its motion to consider those denials is untimely under Local Rule 7.1(g), which permits parties to move for reconsideration within ten days of entry of a challenged order.

LOCAL R. CIV. P. 7.1(g); FED. R. CIV. P. 6(a). I must deny EquiCredit's motion on this basis alone.

Even were its motion not untimely, however, I would deny its motion. Rule 52(c) provides:

If... a party has been fully heard on an issue and the court finds against the party on that issue, the court *may* enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, *or the court may decline to render any judgment until the close of all the evidence.*

FED. R. CIV. P. 52(c) (emphasis added). *See W.R. Grace & Co.-Conn v. InterCat, Inc.*, 7 F. Supp. 2d 425, 434 (D. Del. 1997) (choosing not to render any judgment until close of all evidence).

I acted within my discretion to decline to render judgment until the close of all evidence and to consider all evidence of record in making my findings. Once I had denied EquiCredit's motion for judgment on partial findings at the close of Plaintiff's case, EquiCredit made the strategic choice to enter more documents into evidence. It cannot now ask that these documents not be considered part of the trial record. Because EquiCredit's motion is both untimely and meritless, I will not reconsider my denials of EquiCredit's two oral motions for judgment on partial findings at trial.

C. Memorandum and Order Awarding Judgment in Favor of Plaintiff

Finally, EquiCredit has moved both for reconsideration of this Court's April 12, 2002 Memorandum and Order and to amend the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(b). Local Rule 7.1(g) permits parties to move for reconsideration within ten days of entry of judgment. LOCAL R. CIV. P. 7(g). In addition, Rule 52(b) permits parties to move for amendment of such findings within ten days after entry of judgment. Therefore, both

motions are timely filed. FED. R. CIV. P. 6(a).

Courts will reconsider an issue only “when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice.” *NL Indus. v. Commercial Union Ins. Co.*, 65 F.3d 314, 324 n.8 (1995). In this motion, EquiCredit first argues that Plaintiff has not made a prima facie case for a TILA violation, and second that the evidence in the record shows that no such violation occurred. Because I disagree with EquiCredit on both counts, I will deny its motion.

At trial as in this motion, EquiCredit argued that since no witness testified under oath that Ms. Payne had not received the required presettlement disclosures, it was impossible for Plaintiff to establish a prima facie case for a TILA violation, regardless of the documentary evidence. I disagree. While plaintiffs in TILA cases usually do testify that they did not receive required disclosures, the case law does not indicate that such testimony is a prerequisite for their prima facie case. On the contrary, the case law indicates that a plaintiff may establish a TILA violation based solely on documentary evidence. *See In re Martins*, No. 90-14686S, 1991 WL 126413, at *2 (Bankr. E.D. Pa. July 10, 1991) (“the burden of proving compliance with the TILA falls upon a lender only after a debtor has produced or provided some evidence *or* testimony that a TILA violation has occurred”) (evidence added); *accord In re Cobb*, 122 B.R. 22, 26 (Bankr. E.D. Pa. 1990). *See also Caster v. United States*, 77 B.R. 8, 14 (Bankr. E.D. Pa. 1987) (suggesting that despite plaintiff’s unreliable memory as to whether she had received any TILA disclosure statement, she could have established TILA violation if she had unsuccessfully attempted to obtain such disclosure statement from creditor in discovery).

EquiCredit has been unable to cite any judicial decision in this District establishing a

contrary rule. The difference between this case, in which the plaintiff was unable to give any testimony as to whether she received those disclosures, and a case in which a living plaintiff was unable to provide specific testimony as to whether she received the required disclosures, is purely formal. *See, e.g., In re Pinder*, 83 B.R. 905, 913-14 (Bankr. E.D. Pa. 1988) (finding that plaintiff established TILA violation, despite uncertain testimony, where plaintiff made substantial efforts through discovery to obtain copies of any TILA disclosures, which defendant was unable to produce); *In re Herbert*, 86 B.R. 433, 438-39 (Bankr. E.D. Pa. 1988), *aff'd sub nom. on other grounds, Herbert v. Fed. Nat'l Mortgage Ass'n*, 102 B.R. 407 (E.D. Pa. 1989) (finding TILA violation although plaintiff could not recognize TILA disclosure statement where defendant presented no evidence that plaintiff had received one).

Although the documentary evidence in this case was far from overwhelming in Plaintiff's favor, it was sufficient to establish Plaintiff's prima facie case. The record contained a document purporting to be correspondence containing a Section 32 Notice. It was dated, however, December 7, 1999—over ten months after the January 14, 1999 settlement. Since the date on the letter in question was apparently added to a form letter by hand using a typewriter, and since most businesses customarily date letters close to or at the same time the letter is created, the date on the letter accompanying the Section 32 Notice constitutes evidence that the Section 32 Notice was created close to or on December 7, 1999. (EquiCredit's Ex. 1.) *Cf. Newton v. United Cos. Fin. Corp.*, 24 F. Supp. 2d 444, 449 (E.D. Pa. 1998) (finding that computer-generated date on disclosure notice did not prove that notice was delivered or signed on that date).

Moreover, the purported Section 32 Notice disclosed precisely the same interest rate as that finalized at settlement, although the interest rate had fallen by at least two points during the

previous five or six weeks. *See* slip op. at 10. Based on the date plainly appearing on the letter and the inexplicable coincidence of the interest rates, I inferred that the document had been produced at or subsequent to settlement, in violation of TILA.

The burden thus shifted to EquiCredit to produce some evidence that the disclosures had been provided at least three days prior to settlement. *In re Cobb*, 122 B.R. 22, 26 (Bankr. E.D. Pa. 1990) (“the burden of proving compliance with the TILA is upon a lender once the debtor has produced or provided some evidence *or* testimony that a TILA violation has occurred”) (evidence added). A creditor is “charged with the burden of producing a disclosure statement, if asked to do so prior to trial.” *In re Herbert*, 86 B.R. at 438. “[I]f it is unable to do so, and the consumer presents some evidence supporting a contention that one was never received, we must assume that none exists.” *Id.*

EquiCredit made absolutely no effort to meet its burden. Instead, based on the same documentary evidence, EquiCredit argued that the correspondence dated December 7, 1999 containing the Section 32 Notice had in fact been sent December 7, 1998, that the date on the letter was an obvious typo, and that the precision of the predicted interest rate was a coincidence. For the reasons I have already explained, I drew a different conclusion from the same documentary evidence. Slip op. at 10-11. As discussed in Part I.B, I may consider all the evidence in the record in making findings pursuant to Rule 52.

Because Plaintiff established a prima facie case based on documentary evidence that EquiCredit failed to produce a Section 32 Notice at least three days before settlement, Ms. Payne’s testimony was not necessary. Because the plaintiff established a prima facie case for a TILA violation and EquiCredit failed to present evidence to the contrary, I concluded that

EquiCredit had violated TILA. EquiCredit is attempting to reargue issues already disposed of in the April 12, 2002 Memorandum and Order. Since my previous decision was based on all the evidence in the record, I decline to alter or amend it.

II. PLAINTIFF'S MOTION FOR COUNSEL FEES AND COSTS

15 U.S.C. § 1640(a)(3) provides that “any creditor [found liable under TILA]... with respect to any person is liable to such person in an amount equal to the sum of... the costs of the action, together with a reasonable attorney’s fee as determined by the court.” Petitioner seeks an award of \$28,200 in fees and \$559 in costs for 94 hours of work, calculated at a rate of \$300 per hour.

A reasonable attorney’s fee can be calculated by the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This figure is called the lodestar. Although the lodestar is presumed to yield a reasonable fee, the district court has considerable discretion to adjust the lodestar upward or downward for any reason put forth by the opposing party. *Bell v. United Princeton Props.*, 884 F.2d 715, 721 (3d Cir. 1989).

The party seeking attorney's fees has the burden to prove that its request is reasonable. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). “A fee applicant cannot demand a high hourly rate—which is based on his or her experience, reputation, and presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law.” *Ursic v. Bethlehem Mines*, 718 F.2d 670, 677 (3d Cir. 1983).

A. Reasonableness of Hourly Rate

EquiCredit has not disputed the reasonableness of Petitioner’s \$300 per hour rate.

Therefore, in consideration of Petitioner's over 25 years of experience as an attorney, his fourteen years as a bankruptcy judge, and his success at trial in the above-captioned case, I conclude that his \$300/hour rate is reasonable.

B. Reasonableness of Time Spent

EquiCredit objects to the amount of time billed by Petitioner on several grounds. First, EquiCredit contends that Petitioner may not collect fees for time he spent advocating losing claims. These claims include the state claims barred by *res judicata* and those federal claims barred by the statute of limitations. *Stip op.* at 15.

Plaintiff is entitled to a fee only for those services rendered in connection with the TILA claims on which he eventually prevailed. *See In re Veneziale*, 267 B.R. 695, 702 (Bankr. E.D. Pa. 2001). Although the successful and unsuccessful claims loosely share a common core of facts, *see Northeast Women's Ctr. v. McMonagle*, 889 F.2d 466, 475 (3d Cir. 1989), EquiCredit has rightly pointed out the incongruity in awarding Petitioner fees for work performed on behalf of Ms. Payne in the state court action, in which she was represented by other counsel, while Petitioner simultaneously disavows responsibility for failing to appear on Ms. Payne's behalf at the state court arbitration or appeal the dismissal that resulted from that default.

I find that a downward modification of the lodestar value is warranted. Since the fee petition does not segregate time spent on the successful TILA claims and time spent on the unsuccessful claims, I must focus on determining what amount is reasonable in relation to the results obtained, rather than excluding specific hours. *Hensley*, 461 U.S. at 440; *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 919 (3d Cir. 1985). Plaintiff prevailed against EquiCredit for his nondisclosure claim under TILA, which was his central claim. He did not

prevail, however, on his multiple state law claims based in tort, contract and fraud by Mitchell and EquiCredit. (Pl.'s Prop. Concls. of Law ¶¶ 11-19.) In fact, he did not prevail on any of his theories against Mitchell or Malloy, against the latter of whom a default judgment had been entered. Accordingly, I will reduce the lodestar value by 30%. *See Rode*, 892 F.2d at 1183 (noting that downward reduction of lodestar accounts for “time spent litigating wholly or partially unsuccessful claims that are *related* to the litigation of the successful claims”) (emphasis added).

EquiCredit also argues that I should adjust the lodestar downward because Petitioner has billed for “an extraordinary amount of time” for research on issues on which Petitioner is an expert. I find, on the contrary, that the amount of time Petitioner has billed for research is reasonable. Defendants, in particular EquiCredit, vigorously disputed Plaintiff’s claims, filing multiple motions and sending lengthy correspondence pre- and post-trial, to which Plaintiff had to respond. Moreover, the present case raised at least one novel legal issue under TILA. Therefore, a further reduction of the lodestar value is not warranted.

I will direct EquiCredit to pay Plaintiff the sum of \$19,740.00 in attorneys’ fees and \$559.00 in costs, for a total of \$20,299.00.

III. MITCHELL’S MOTION FOR PAYMENT OF COSTS AND COUNSEL FEES

Mitchell filed her Motion for Payment of Costs and Counsel Fees on April 29, 2002, seventeen days after the entry of judgment. By Order entered May 13, 2002, I granted Mitchell’s Motion for Enlargement to File a Petition for Costs/Attorneys’ Fees Under FED. R. CIV. P. 54 Nunc Pro Tunc. I therefore deem Mitchell’s motion timely filed. FED. R. CIV. P. 54(d)(2)(B).

Unless Congress provides otherwise, parties are to bear their own attorneys’ fees.

Fogerty v. Fantasy, Inc., 510 U.S. 517, 533 (1994). TILA does not provide for recovery of attorneys fees by an alleged creditor who prevails against a debtor. *See* 15 U.S.C. § 1640(a)(3). Therefore, although Mitchell prevailed against Plaintiff on all counts, she is not entitled to reimbursement from Plaintiff for her attorneys' fees and costs.

IV. CONCLUSION

In conclusion, for the reasons stated, I will deny EquiCredit's Motion to Reconsider and Amend in its entirety. I will grant in part Plaintiff's Motion for Counsel Fees and Costs and deny Mitchell's Motion for Payment of Costs and Counsel Fees. Because I find that the parties adequately amplified the issues raised by EquiCredit's Motion to Reconsider and Amend in their briefs and during argument at trial, I will deny EquiCredit's request for oral argument on its motion. *See FCC v. WJR, Goodwill Station, Inc.*, 337 U.S. 265, 275-76 (1949). EquiCredit shall pay to Petitioner the sum of \$20,299.00 in attorneys' fees and costs.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TERRENCE PAYNE, as personal	:	CIVIL ACTION
representative of the estate of	:	
BARBARA PAYNE, deceased,	:	
Plaintiff,	:	
	:	
v.	:	
	:	
EQUICREDIT CORP. OF AMERICA,	:	
FRANK T. JAMES d/b/a MONEY LINE:	:	
MORTGAGE, DENISE MITCHELL,	:	
and FRANKLIN MALLOY,	:	
Defendants	:	No. 00-6442

ORDER

AND NOW, this day of **May, 2002**, upon consideration of Defendant EquiCredit Corp. of America's Motion to Reconsider and Amend, Plaintiff's Motion for Counsel Fees and Costs, Defendant Denise Mitchell's Motion for Payment of Costs and Counsel Fees, a Motion for Payment of Counsel Fees by Defendant Frank T. James d/b/a MoneyLine Mortgage, all responses thereto, and correspondence dated May 14, 2002 from counsel for James d/b/a MoneyLine voluntarily withdrawing his Motion for Payment of Counsel Fees, and for the foregoing reasons, it is hereby **ORDERED** as follows:

1. Defendant EquiCredit Corp. of America's Motion to Reconsider and Amend (document no. 41) is **DENIED**.
2. Plaintiff's Motion for Counsel Fees and Costs (documents no. 39, 40) is **GRANTED IN PART**. Plaintiff is hereby awarded and Defendant EquiCredit

Corp. of America is hereby ordered to pay Plaintiff the sum of **TWENTY THOUSAND, TWO HUNDRED NINETY-NINE DOLLARS (\$20,299.00)** in attorneys' fees and costs.

3. Defendant Denise Mitchell's Motion for Payment of Costs and Counsel Fees (document no. 42) is **DENIED**.
4. The Motion for Payment of Counsel Fees by Defendant Frank T. James d/b/a MoneyLine Mortgage (document no. 46) is **DENIED** as moot.

BY THE COURT:

Berle M. Schiller, J.