2010

Utah First Federal Credit Union v. John Dudley : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

UTAH FIRST FEDERAL CREDIT UNION, Plaintiff and Appellee, vs. JOHN DUDLEY and JOHN DOES I-X, Defendant and Appellant,	Case No. 20100829-CA

APPEAL FROM THE ENTIRE JUDGMENT OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, UTAH,
HON. DENO HIMONAS - CASE NO. 100905635

BRIEF OF APPELLEE UTAH FIRST FEDERAL CREDIT UNION

Clayne I. Corey (5847)
CLAYNE I. COREY PLLC
9217 South 1300 East
P.O. Box 902195
Sandy, Utah 84090-2195
Telephone: (801) 255-2552
Facsimile: (801) 542-8204
Attorneys for Defendant/Appellant John S. Dudley

Darwin H. Bingham (7810)
Jonathan H. Rupp (11463)
SCALLEY READING BATES HANSEN & RASMUSSEN, P.C.
15 West South Temple, Suite 600
Salt Lake City, Utah 84101
Telephone: (801) 531-7870
Facsimile: (801) 326-4669
Attorneys for Plaintiff/Appellee Utah First Federal Credit Union

IN THE UTAH COURT OF APPEALS

UTAH FIRST FEDERAL CREDIT UNION, Plaintiff and Appellee, vs. JOHN DUDLEY and JOHN DOES I-X, Defendant and Appellant,	Case No. 20100829-CA

APPEAL FROM THE ENTIRE JUDGMENT OF THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, UTAH,
HON. DENO HIMONAS - CASE NO. 100905635

BRIEF OF APPELLEE UTAH FIRST FEDERAL CREDIT UNION

Clayne I. Corey (5847)
CLAYNE I. COREY PLLC
9217 South 1300 East
P.O. Box 902195
Sandy, Utah 84090-2195
Telephone: (801) 255-2552
Facsimile: (801) 542-8204
Attorneys for Defendant/Appellant John S. Dudley

Darwin H. Bingham (7810)
Jonathan H. Rupp (11463)
SCALLEY READING BATES HANSEN & RASMUSSEN, P.C.
15 West South Temple, Suite 600
Salt Lake City, Utah 84101
Telephone: (801) 531-7870
Facsimile: (801) 326-4669
Attorneys for Plaintiff/Appellee Utah First Federal Credit Union

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

STATEMENT OF JURISDICTION

Utah Code Ann. § 78A-4-103 confers jurisdiction over this appeal as a case transferred to the Court of Appeals from the Supreme Court.

ISSUES PRESENTED

It is difficult to determine the precise issues Appellant John S. Dudley ("Dudley") is attempting to raise in the context of this appeal. Dudley makes a variety of assertions concerning various aspects of the trial conducted in this matter, but provides little direction concerning the exact issues Dudley is addressing on appeal. While it is not the responsibility of Appellee Utah First Credit Union ("Utah First") to frame the issues for Dudley's appeal, the following points appear to be the most pivotal issues raised by Dudley.

Issue 1: Dudley's right to rescind the Note at issue expired on November 20, 2007. Therefore, Dudley's attempts to rescind the Note in February and March of 2010 had no legal effect, and Utah First was allowed to proceed with its foreclosure sale of the Property. The trial court correctly determined the invalid attempt to rescind did not require Utah First to release its security interest or seek any judicial approval before foreclosing the Property

Issue 2: The trial court was not precluded from adjudicating issues relating to Dudley's attempted rescission under the Truth In Lending Act ("TILA") because Dudley raised such issues as an affirmative defense to the unlawful detainer action.

Issue 3: The trial court properly denied Dudley's request to "exercise supplemental jurisdiction" over claims that Dudley filed in a separate federal lawsuit.

STANDARD OF REVIEW

The issues presented in this appeal are mixed questions of fact and law. "[W]hen the trial court applies the facts of the case to the law then the question is a mixed question of fact and law, and the factual basis underpinning the decision is subject to a clearly erroneous standard." *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶17, 133 P.3d 428.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. § 78B-6-802.5:

> A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:
>
> (1) defaulted in his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
>
> (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

Utah Code Ann. § 78B-6-810:

> (1) In an action under this chapter in which the tenant remains in possession of the property:
>
> (a) the court shall expedite the proceedings, including the resolution of motions and trial;
>
> (b) the court shall begin the trial within 60 days after the day on which the complaint is served, unless the parties agree otherwise; and
>
> (c) if this chapter requires a hearing to be held within a specified time, the time may be extended to the first date thereafter on which a judge is available to hear the case in a jurisdiction in which a judge is not always available.
>
> (2) (a) In an action for unlawful detainer where the claim is for nonpayment of rent or for occupancy of a property after a forced sale as described in Subsection 78B-6-802.5, the court shall hold an evidentiary hearing, upon request of either party, within ten days after the day on which the defendant files the defendant's answer.
>
> (b) At the evidentiary hearing held in accordance with Subsection (2)(a):

(i) the court shall determine who has the right of occupancy during the litigation's pendency; and

(ii) if the court determines that all issues between the parties can be adjudicated without further proceedings, the court shall adjudicate those issues and enter judgment on the merits.

15 U.S.C. § 1635(a):

...in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, 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 delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later...

15 U.S.C. § 1605:

Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

(6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed...

15 U.S.C. § 1602(aa):

(A) the annual percentage rate at consummation of the transaction will exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for extension of credit is received by the creditor; or

(B) The total points and fees payable by the consumer at or before closing will exceed the greater of –

(i) 8 percent of the total loan amount or;

(ii) $400.

STATEMENT OF THE CASE

A. Nature of the case

On November 16, 2007, Dudley executed a Note, under which he borrowed $1,560,000.00 from Utah First. (Plaintiff's Exhibit 1.) To secure the Note, Dudley executed a Deed of Trust (the "Deed of Trust") granting Utah First a first position lien on the real property located at 8028 S. Madsen Court, Sandy, Utah (the "Property"). (Plaintiff's Exhibit 7.) Dudley failed to timely make the payments required under the Note, and Utah First foreclosed its lien against the Property. (R. 1201.) Following the foreclosure sale, Utah First filed this action on March 29, 2010, to evict Dudley from the Property. (R. 1-7.)

B. Course of proceedings

A trial was held on June 21, 2010, June 29, 2010, and July 15, 2010. (R. 746-747, 777, and 843.) At trial, Dudley raised as an affirmative defense that the foreclosure was improper because, prior to the sale he rescinded the loan. (R. 1201.)

C. Disposition at trial court

On August 23, 2010, the trial court entered its Findings of Fact and Conclusions of Law which rejected Dudley's defenses to the unlawful detainer action and granted Utah First an order of restitution. Utah First was also awarded treble damages under the unlawful detainer statute for the period of time that Dudley unlawfully possessed the Property, as well as attorneys' fees and costs. (R.1196-1205.) This appeal followed.

RELEVANT FACTS

As part of his appeal, Dudley attempts to challenge the trial court's Findings of Fact and Conclusions of Law. To show that the trial court relied on properly introduced evidence in making its Findings of Fact, Utah First will set forth each finding of fact, along with the relevant evidence in support of each.

1. *On November 16, 2007, Dudley executed an Adjustable Rate Note (the "Note"), wherein he borrowed $1,560,000.00 from Plaintiff. The words, "**ADJUSTABLE RATE NOTE**" are clearly and conspicuously printed at the top of the document.* (R. 1197.)

Evidentiary Support: The Note itself clearly states up front and center, in all caps, "ADJUSTABLE RATE NOTE", and further states "THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENTS. THIS NOTE LIMITS THE AMOUNT MY INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY." (Plaintiff's Exhibit 1.) Paragraph 4(A) of the Note states in part, "[t]he interest rate I will pay

may change on the first day of January 2013, and on that day every 12th month thereafter." (*Id.*) Paragraph 4(D) of the Note states:

> The interest rate I am required to pay at the first Change Date will not be greater than 8.625% or less than 4.625%. Thereafter, my interest rate will never be increased or decreased on any single Change Date by more than two percentage points (2.0%) from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 12.65%. (*Id.*)

The Note was in the amount of $1,560,000.00, stating:

> In return for a loan that I have received, I promise to pay U.S. $1,560,000.00 (this amount is called 'Principal'), plus interest to the order of the Lender. The Lender is UTAH FIRST CREDIT UNION, I will make all payments under this Note in the form of cash, check, or money order. (*Id.*)

The Note is dated 11/16/07 and is signed by Dudley. (*Id.*) Dudley verified that he had signed the Note. (R. 1257 at p. 47.)

Several provisions of the Note provide for changes in the interest rate during the term of the Note. (Plaintiff's Exhibit 1; R. 1257 at pp. 67 - 71.)

The Note also contained an Adjustable Rate Rider, which stated in part, "[t]he interest rate I will pay may change on the first day of January 2013, and on that day every 12th month thereafter." (Plaintiff's Exhibit 1.) The Adjustable Rate Rider is also dated 11/16/07 and is signed by Dudley (*Id.*)

2. *Dudley agreed to repay the principal amount of the Note, plus interest according to the terms and conditions set forth in the Note. Dudley is an experienced and sophisticated business man. The Court finds incredible Dudley's claim that he was a hapless dupe who had no idea what he was signing and categorically rejects the same.* (R. 1197-98.)

Evidentiary Support: The Note sets forth an agreement to repay the principal amount of the Note, plus interest:

> In return for a loan that I have received, I promise to pay U.S. $1,560,000.00 (this amount is called 'Principal'), plus interest to the order of the Lender. The Lender is UTAH FIRST CREDIT UNION, I will make all payments under this Note in the form of cash, check, or money order.
> (Plaintiff's Exhibit 1.)

With respect to Dudley's business and investment activities, Dudley testified as follows:

Q. Did you go to college?
A. **I did.**
Q. Where did you go to college?
A. **I went to Richmond College in the early days, and then I took different diplomas in courses after that.**
Q. What diplomas? What would you be talking about?
A. **I took diplomas in electrical engineering. I took them in financial derivatives. I've taken many different courses through the course of my life.**
Q. How many degrees would you say you have?
A. **The only one that I've had qualified as a degree is the one in – well, two. One in construction and one in the amount of experience I've had through financial institutions.**
Q. In your coursework in financial derivatives, would that involve analysis of financial markets, financial transactions, what would that involve?
A. **That would involve transactions on the stock exchange, commodity exchange in London and in Europe.**
Q. What is your occupation now?
A. **Entrepreneur.**
Q. What would that mean in terms of your entrepreneurial ventures?
A. **I'm a consultant with RVPD, which is the company that I'm here with. I have about 10 or 12 different companies.**
Q. And what's the nature of your work with those companies?
A. **On a consulting basis. It's to establish businesses. It's to establish their offices to get the staff up and running.**
Q. Okay. How long have you been involved in this industry?
A. **Which industry?**
Q. The industry that you just talked about.

A. **Ten years.**
Q. Okay, so were you doing the same type of work when you got the loan from Utah First in 2007?
A. **Did I get the loan?**
Q. Is it fair to say that your were doing the same type of work when you got the loan in 2007?
A. I was employed by – employed by RVPD Consultants as a consultant. I was CEO. I sent the company up here in the U.S.
Q. Tell me a little bit more about what your duties would involve as a consultant and CEO?
A. It would be to take office space. It would be to hire staff. It would be to organize the equipment, to set up the basic nature of the businesses.
Q. Would you negotiate and enter into contracts?
A. Sometimes, yes. Sometimes very short-term contracts.
Q. Short-term and long-term?
A. There was (Inaudible) agreements.
Q. Okay?
A. It might have been an option on the property, just a short, one-page document.
Q. Okay. What other types of jobs have you had in the past, say since high school or the equivalent?
A. Does that have to do with the loan?
Q. Just in terms of your experience and your past dealings?
A. I've had contract companies, I've worked in the construction industry. I've worked in the sales industry, and I've worked in the financial industry.
Q. Okay. And in those various positions is it safe to say that you've been involved with a number of different types of contracts?
A. **I have, yes.**
(R. 1257 at pp. 55-58.)

Dudley further testified:

Q. Okay. And where did you get the money to purchase the home?
A. Out of my bank account.
Q. But where did the money come from, the source of it?
A. **That was my interest, my income, my personal bank account.**
Q. Was it from your employment, was it from other investments, was is from the sale of properties, what was the source of that income?

A. **Most of it was – in '07 was from seminars, training courses that I was doing.**
Q. Okay. Do you personally engage in other investments?
A. **Do I?**
Q. Do you, yourself, invest in any commodities, stocks, real property?
A. **I have a couple of 4X accounts, personal trade 4X accounts.**
Q. Okay. Explain what that would be. Is that stock exchange?
A. **Foreign currency. It's – it's basically buying and selling different currencies. And we do charting and technical analysis to see whether we think the price is going up or down, and then we take a position, either one.**
(R. 1257 at p. 63.)

3. *The Note provided for a fixed rate of interest for five (5) years, and then switched to a variable rate of interest thereafter.* (R. 1198.)

Evidentiary Support: Section 4 of the Note, which was dated November 16, 2007, stated in relevant part:

> **4. INTEREST RATE AND MONTHLY PAYMENT CHANGES**
> **(A) Change Dates**
> The interest rate I will pay may change on the first day of **JANUARY, 2013**, and on that day every 12th month thereafter. Each date on which my interest rate could change is called a "Change Date."
> ***
> **(E) Effective Date of Changes**
> My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.
> (Plaintiff's Exhibit 1.)

4. *To secure performance of his obligations under the Note, Dudley granted Utah First a security interest in the Property by executing a Deed of Trust, naming Utah First as*

beneficiary. The Deed of Trust was recorded with the Salt Lake County Recorder's Office. (R. 1198.)

Evidentiary Support: Received into evidence as Plaintiff's Exhibit 7 was a copy of the Deed of Trust bearing the recording information from the Salt Lake County Recorder's Office. In relevant part, the Deed of Trust secured repayment of the Note by stating:

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants, conveys and warrants to Trustee, in trust, with power of sale the following described property located in the COUNTY of SALT LAKE...which currently has the address of 8028 South Madsen Ct., Sandy, Utah 84093.
> (*Id.*)

5. *Prior to the closing of the loan, Utah First provided Dudley a Good Faith Estimate that set forth the charges associated with the Note. Plaintiff's Exhibit 4 is a good faith estimate that indicates it was prepared on November 15, 2007, and signed by Dudley on that same date.* (R. 1198.)

Evidentiary Support: Received into evidence as Plaintiff's Exhibit 4 was a true and correct copy of a Good Faith Estimate containing the estimated fees associated with the Note. (See Plaintiff's Exhibit 7.) The Good Faith Estimate was signed by Dudley on 11/15/2007. (*Id.*)

6. *The closing of the loan occurred on November 16, 2007. At the closing Dudley was provided three (3) copies of a Notice of Right to Cancel. Dudley was also given the Settlement Statement (Plaintiff's Exhibit 13.) and a number of other documents.* (R. 1198.)

Evidentiary Support: Received into evidence as Plaintiff's Exhibit 5 were copies of three separate documents entitled "NOTICE OF RIGHT TO CANCEL". Dudley received the Notices of Right to Cancel and discussed them at the time of closing. (R. 1287 at p. 38.) Dudley signed each of the three Notices. (Plaintiff's Exhibit 5.)

7. *The Notice of Right to Cancel clearly explained Dudley's right to cancel the Note.* (R. 1198.)

Evidentiary Support: Each Notice of Right to Cancel stated in relevant part:

YOUR RIGHT TO CANCEL

> You are entering into a transaction that will result in a mortgage/lien/security interest on your home. You have the legal right under federal law to cancel this transaction, without cost, within THREE (3) BUSINESS DAYS from whichever of the following event occurs last:
>
> (1) the date of the transaction, which is NOVEMBER 16, 2007; or
> (2) the date you receive your Truth-in-Lending disclosures; or
> (3) the date you received this notice of your right to cancel.
>
> If you cancel the transaction, the mortgage/lien/security interest is also cancelled. Within 20 CALENDAR DAYS after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage/lien/security interest on your home has been cancelled; and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.
>
> You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 CALENDAR DAYS of your offer, you may keep it without further obligation. (Plaintiff's Exhibit 5.)

8. *The Notice of Right to Cancel contained language necessary to make it an appropriate form that Dudley could have used to rescind the Note.* (R. 1198.)

Evidentiary Support: The Notices of Right to Cancel (Plaintiff's Exhibit 5.) stated:

> HOW TO CANCEL
>
> If you decide to cancel this transaction, you may do so by notifying us in writing at:
>
> UTAH FIRST CREDIT UNION
> 208 East 800 South
> Salt Lake City, Utah 84111
>
> You may use any written statement that is signed and dated by you and states your intention to cancel and/or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights. If you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of NOVEMBER 20, 2007 (or MIDNIGHT of the THIRD BUSINESS DAY following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.
>
> I WISH TO CANCEL
>
> _____ Date:_____

9. *At the closing, Dudley was given the opportunity to sign a confirmation (the "Confirmation") that the three-day rescission had passed. Dudley was not required to sign the Confirmation at closing, but was given the option of signing the Confirmation back three days later if he chose not to sign it at the closing.* (R.1199.)

Evidentiary Support: Aimee Ellett, the escrow officer that supervised the loan closing on November 16, 2007, testified as follows:

> Q. Could you turn to Plaintiff's Number 5, Notice of the Right to Cancel. Did you witness Mr. Dudley's signature on that document?
> A. **Yes, I did.**
> Q. If we could talk about that for just a minute. Let me get my copy here so I can point you to where I want you to go (Discussion off the

Record.) Okay, with respect to the certification of confirmation at the bottom?

A. **Yes.**

Q. Will you explain, please, what you explained to Mr. Dudley in connection with his execution of this document?

A. **Yes, I will. On the right to cancel, I let everybody know, or let John know that: "This document is your right to cancel. You have three full business days to go over all the documents that you signed today, make sure that you feel good about the loan. I need you to sign here that you've received this right to cancel and that you're aware that you have three full business days. If you, for some reason, wanted to cancel, you'd want to sign up above under 'I wish to cancel,' date it and get it to the Credit Union within those three days.**

"Down below, you're confirming that you've received two copies of this document to take with you today and it is your choice if you would like to sign the document, bring it back in three days or you may sign it today."

Q. And you explained all this to him at the closing?

A. **Yes.**

Q. Did you give him whatever time he wished to have to review the document and ask any questions he wished to have?

A. **Yes, I did.**

Q. And did he express to you at that time that he would rather have you take that certificate of confirmation at that time or that he preferred to deliver it later.

A. **He thought – he just signed it at the time and didn't say anything about wanting to deliver it later.**

Q. What is your normal practice with that document when that is done at the closing?

A. **My normal practice with that document is that I always give the option to whoever is signing the document that they may do what they choose. I have never had anybody take it home and want to bring it back and deal with it in three days. Everybody has always wished to sign it there. Some people have asked to post-date it, the three days. If that's their choice, I will allow it. Not a fan of that. I prefer documents dated on the day of, and then have the lender condition me for it if they'd like it dated differently, which I have had lenders condition after the fact and saying: No, I want this re-**

dated and initialed. But I'll usually let them condition me for it for me if that's what they'd like.

Q. Did Utah First ever instruct you that he had to sign that confirmation, that closing, or they would not fund the loan?

A. **No, they did not.**

(R. 1256 at pp. 109-112.)

10. *Dudley was given three business days in which he could have rescinded the*

Note. In fact, the loan did not fund until four business days after closing. (R. 1199.)

Evidentiary Support: Regarding the recission period Dudley testified as follows:

Q. And down below, it has a section that tells you how to cancel and directly below that it says, "I wish to cancel." And that section has been left blank, correct?

A. **Correct.**

Q. In fact, it's been your testimony that you did not want to cancel, is that correct?

A. **At the time, we were just in the middle of signing.**

Q. Right. You wanted the funds that they were going to give you on the loan?

A. **Yes.**

Q. Okay. And during that process, if you had any concerns about that, is it fair to say that you would have cancelled the loan?

A. **If I'd had any concerns, yes.**

Q. Okay. So, the fact that you didn't cancel it would indicate that you didn't have any concerns about the loan?
MR. COREY: Objection. Calls for a legal conclusion.
THE COURT: Overruled.
THE WITNESS: It says I have three days.
MR. BINGHAM: Right, and you indicated if you had concerns you would have canceled the loan, but you didn't. So, I'm just trying to confirm that would indicate that you did not have any concerns about the loan, correct?

A. **At the time, correct.**

Q. Okay.
And you did, in fact, receive the loan – the funds that Utah First promised you on November 21st, 2007, is that correct?

A. **We can see that from the accounts, yes.**

Q. Yes.
But they did, in fact, deliver on their promise to give you the money, correct?
A. **They put it in my bank account, yes.**
Q. And you signed this on – it says, "November 16th"?
A. **November 16th.**
Q. And that was put in your account on November 21st, correct?
A. **Correct.**
Q. At the time you got the money, you never objected to them giving you the money, did you – giving you the money, did you?
A. **No.**
(R. 1257 at pp. 77-79.)

11. *Dudley was not required to waive his right of rescission and was not required to sign the confirmation that three business days had lapsed at closing as a condition for obtaining the funds under the Note.* (R. 1199.)

Evidentiary Support: As set forth above, Aimee Ellett testified that Dudley was not required to sign the confirmation at closing as a condition for obtaining the funds under the Note. (R. 1256 at pp. 109-112.)

12. *The Court finds Dudley voluntarily chose to sign the confirmation section on the Notice of Right to Cancel as a convenience to him.* (R. 1199.)

Evidentiary Support: As set forth above, Aimee Ellett testified after explaining that Dudley could wait three days to sign the confirmation section of the Notice of Right to Cancel he simply signed the confirmation without saying anything about signing it later. (R. 1256 at p. 111.) Additionally, David Bastian, the loan officer for Utah First, who was present at the closing testified as follows:

Q. Okay. Let me refer you to Exhibit – Plaintiff's Exhibit 5. Do you remember going over that document?

A. **I remember the escrow officer going over it.**

Q. Okay. And how did that happen?

A. **Well, these are your standard right of rescission documents. Mr. Dudley signs three of them.**

Q. Can you take a look at that line in the middle there, the notice to – the receipt. It's unsigned. Do you remember anything about the day, why that wasn't signed.

A. **It looks like it's signed to me.**

Q. Right there. The date right here. Right there, being right above the signature; the right to cancel?

A. **Well, Mr. Dudley signed it and dated it. I have no idea why there is not a date on that particular line.**

Q. And is – and what about the bottom signature, did he sign that on the same day as well?

A. **He would have signed the same day as a convenience to Mr. Dudley, but he would have also been explained that he's not – that he still has his rights to rescind within the three days. The only reason that you have him sign that is basically so they don't have to come in in thee days and sign again. That's pretty standard.**

Q. Okay. So, that was standard course of business for Utah First?

A. **That's the standard course of business for the entire mortgage industry.**

Q. To – explain that standard course of business.

A. **Well, the three-day right of rescission is a federal law. If you're putting any financing on your own personal property, you have three days to cancel the transaction, and you sign that you understand that you have those three days. That was explained very clearly to Mr. Dudley; would have been.**

And then at the end of those three days, Mr. Dudley has to come in and sign that the three days have passed and that he doesn't wish to rescind the loan. It's pretty customary and standard to offer the borrower the right to sign it now, explaining that it doesn't take any away any of this rights. He still can cancel. It just saves him a trip at the end of three days to come in and say that he doesn't wish to cancel. If he wishes to cancel, he can still cancel within the three-day period. It's pretty much standard.

Q. Okay.

A. **This would have been all explained by the escrow officer.**

Q. Okay. But that's the standard explanation that you understand that he would have conveyed to Mr. Dudley, if he'd asked?

A. **Well, that's explained whether he asks or not. In the course of explaining this document, the escrow officer gets to that point and says: Unless you don't feel like you're going to rescind, and you don't want to have to come in in three days, then go ahead and sign this now and then you won't have to come in. However, it doesn't take away any of your rights to rescind this loan within the three-day period; has absolutely no effect other than save you a trip in coming in in three days and discussing or signing this document.**

Q. Okay. But do you remember that specific conversation with Mr. Dudley?

A. **I don't remember it specifically, but that's the conversation that takes place at every closing that I've ever attended.**

(R. 1256 at pp. 189-92.)

13. *Also at closing, Dudley was given a Truth in Lending Disclosure Statement.*

The Truth in Lending Disclosure Statement:

a. *Identified the lender in the upper-left-hand corner;*

b. *Contained a table that clearly stated the amount financed;*

c. *Stated that the borrower had the right to receive an itemization of the amount financed;*

d. *Clearly stated the finance charge;*

e. *Stated the annual percentage rate;*

f. *Clearly stated the amount financed and the total of payments;*

g. *Stated the number of payments and due date;*

h. *Contained descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total of payments";*

i. *Contained a statement that security is being taken in the property and provided the address;*

j. *Stated any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment;*

k. *Stated that borrower will not pay a penalty if the loan is paid off early and will not be entitled to a refund of part of the finance charge;*

l. *Contained a statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties; and*

m. *Stated, "Assumption: someone buying your home may, subject to conditions, be allowed to assume the remainder of this mortgage on the original terms."*

(R. 1199-1200.)

Evidentiary Support: Received into evidence as Plaintiff's Exhibit 2 was a copy of the Federal Truth-In-Lending Disclosure Statement (the "Disclosure Statement"). Inspection of the Disclosure Statement reveals it contains all the provisions set forth in the trial court's Finding of Fact regarding the Disclosure Statement. (*See* Plaintiff's Exhibit 2.)

14. *Dudley elected to receive an itemization of the amount financed and was thus provided with a HUD-1 Settlement Statement that accurately reflected the finance charges.* (R. 1200.)

Evidentiary Support: With respect to the Settlement Statement provided to Dudley, Aimee Ellett testified as follows:

> MR. BINGHAM: (Inaudible) what's been marked as Plaintiff's Exhibit Number 13, could you identify that document?
> **A. Yes, that's my Settlement Statement.**
> Q. And you prepared that?
> **A. Yes, I did.**
> Q. And did you give that document to Mr. Dudley at closing?
> **A. Yes, I did.**
> Q. And did you witness his signature at the end there?
> **A. Yes.**
> Q. And in particular with the last page concerning the HUD 1 Addendum?
> **A. Yes.**
> Q. Did you witness his signature to that?
> **A. Yes, I did.**
> Q. Is that a complete and accurate copy of that document?
> **A. Yes, the one that was signed at closing. This is a complete and accurate document.**
> Q. And if it did not have that last page attached to it, is it fair to say that would not be a complete copy?
> **A. Yes, that would be fair to say. Sometimes – and I'm not positive in this case. I don't think that there was, but some lenders have their own attachment that they like attached to this, which we will do. This is my attachment. Lender may have an attachment. We also may have an FHA**

attachment to the HUD if it's an FHA loan, and they like those attached. But this is my full document.

(R. 1256 at pp. 112-113.)

15. *The transaction surrounding Dudley's execution of the Note was not for the sale of any property or services.* (R. 1201.)

Evidentiary Support: The Note was not for the sale of any property or services. Dudley testified that the loan was a refinance of his home as follows:

Q. Okay. When you did this loan, you offered as collateral the home that you're currently living in. And I think you did testify that you live in that home, correct?
A. **8028 Madsen Court?**
Q. Okay.
A. **Yes.**
Q. And at the time you did the loan with Utah First, you owned that free and clear, correct?
A. **I did.**

(R. 1257 at p. 62.)

16. *The proceeds advanced under the Note were not for the purchase of the Property.* (R. 1201.)

Evidentiary Support: As set forth above, the reason for the loan was a refinance of the home previously owned outright by Dudley. (*See* R. 1257 at p.62.)

17. *At the time the Note was executed, the amount borrowed by Dudley under the Note did not exceed the fair market value of the Property.* (R. 1201.)

Evidentiary Support: Received into evidence as Defendant's Exhibit 9 was an appraisal report for the Property dated 11/10/2007, which reported that the Property had a value of $1,950,000.00. (*See* Defendant's Exhibit 9.)

18. *[Dudley] failed to make the monthly payments required by the Note.* (R. 1201.)

Evidentiary Support: Mike Bridge, Collections Manager for Utah First, testified that Dudley ceased making his mortgage payments under the Note as follows:

Q. Okay. To your knowledge, did John Dudley borrow $1,560,000 from Utah First?
A. **Yes.**
Q. And did Mr. Dudley make the payments as agreed?
A. **No, he did not.**
Q. Did Utah First undertake collection?
A. **Yes, we did.**
Q. And did these collection efforts involve foreclosure on the home that secured this payment?
A. **Yes, they did.**
Q. At any time from November 16th until February – sorry, from November 16th, 2007 until February 2009, did John Dudley or anyone on his behalf deliver any written notice of recission to Utah First?
A. **No.**
Q. Once Utah First commenced foreclosure proceedings, did Mr. Dudley –
MR. COREY: Objection, Your Honor; that's the argument.
THE COURT: There's no question pending, overruled.
MR. RUPP: Once Utah First commenced foreclosure proceedings, did Mr. Dudley ever pay the reinstatement amount?
A. **No.**
Q. At the time of the foreclosure sale was the loan current?
A. **No, it was not.**
Q. How delinquent was the loan at the time of the foreclosure sale?
A. **It was delinquent for October 5th, 2009.**
Q. Okay, do you know when the foreclosure sale took place?
A. **March 18th, 2010.**
Q. Okay. So how many months is that, five?
A. **(No audible response.)**
Q. At any time –
THE COURT: Five months from?
MR. RUPP: He was five months' delinquent.
THE COURT: Thank you.

MR. RUPP: At any time, after the purported attempted recission from Mr. Dudley, has he offered to pay back the money he received under the loan to Utah First?

A. **No.**

Q. Has he ever come in and attempted to pay back the money –

A. **No.**

Q. – he received from Utah First?

A. **No.**

Q. Did Utah First purchase the home at the foreclosure sale?

A. **Yes, we did.**

(R. 1256 pp. 79-82.)

19. *Plaintiff appropriately commenced foreclosure proceedings due to Dudley's failure to make the payments required by the Note.* (R. 1201.)

Evidentiary Support: As set forth above, Mike Bridge, Utah First's Collections Manager, testified that Utah First commenced foreclosure actions and purchased the Property at the foreclosure sale. (*See* R. 1256 pp. 79-82.)

20. *Prior to the foreclosure sale of the Property, Dudley attempted to rescind the Note. The evidence presented shows Dudley may have attempted to rescind the Note as early as February 2, 2010, or as late as March 18, 2010.* (R. 1201.)

Evidentiary Support: Defendant introduced a letter from Fresh Start Financial dated February 2, 2010, attempting to rescind the loan. (*See* Defendant's Exhibit 2.)

21. *Dudley has never attempted to tender back to Plaintiff the funds he received under the Note.* (R. 1201.)

Evidentiary Support: As set forth above, Mike Bridge, Utah First's Collections Manager, testified that Dudley never attempted to tender back the funds he received under

the Note to Utah First. (R. 1256 pp. 81-82.) Additionally, Dudley himself testified that he did not attempt to tender back the funds as follows:

> MR. BINGHAM: The question is: At the time you had Fresh Start take those actions for you in February, did you return the money to the Credit Union that you had borrowed from them?
> A. **That wasn't the next step.**
> Q. Did you return the money to the Credit Union that you had borrowed from them, is the question?
> A. **No, I hadn't.**
> Q. Okay. When you attempted to rescind the loan in March, did you return to the Credit Union the money that they had lent you?
> A. **No, not at that time.**
> Q. Okay. In fact, at no point in time to this day, have you attempted or offered to return the money to the Credit Union, isn't that true?
> A. **That's not the procedure I understand. (Inaudible).**
> Q. That's not the question. The question is: Have you ever, to this day, attempted to return the money to the Credit Union that they lent you?
> A. **No.**
> (R. 1257 at pp. 97-98.)

22. *On March 18, 2010, a foreclosure sale was conducted and Utah First purchased the Property for $900,000.00 as the highest bidder.* (R. 1201.)

Evidentiary Support: Michael Bridge testified that Utah First purchased the Property on March 18, 2010, at the foreclosure sale. (R. 1256 at p. 81.) A copy of the Trustee's Deed recorded following the sale was submitted to the trial court as an exhibit to Utah First Memorandum in Support of its Motion for Summary Judgment. (R. 316-317.) The Trustee's Deed stated that the Property was sold to Utah First for the sum of $900,000.00. (*Id.*) The price paid by Utah First at the foreclosure sale was never disputed by Dudley.

23. *On March 22, 2010, a Notice to Vacate was served on Dudley and all other occupants of the Property.* (R. 1201.)

Evidentiary Support: The Notice to Vacate was received as Plaintiff's Exhibit 12. The Service Affidavit states it was served on March 22, 2010. (Plaintiff's Exhibit 12.)

24. *The Notice to Vacate expired on March 27, 2010.* (R. 1201.)

Evidentiary Support: The Notice to Vacate stated: "Within five (5) days after service of this notice, you are hereby required to vacate and deliver possession of the Property now held and occupied by you to the undersigned..." (Plaintiff's Exhibit 12.) The affidavit of service for the Notice to Vacate indicates that it was served on March 22, 2010. (*Id.*) Five days following the date of service was March 27, 2010.

25. *[Utah First][1] filed a complaint for eviction on March 29, 2010.* (R. 1201.)

Evidentiary Support: See Complaint for Eviction. (R. 1-8.)

26. *To date, Dudley has not vacated the Property.* (R. 1201.)

Evidentiary Support: Dudley testified on June 29, 2010, that his address was 8028 Madsen Court, Sandy, Utah 84093 (the address of the Property). (R. 1257 at p. 17.) Furthermore, it was simply undisputed that Dudley continued to reside in the Property up through the trial. If Dudley had vacated the property prior to trial, there would have been no need for a trial regarding unlawful detainer.

---

[1]The Findings of Fact actually state Dudley filed a complaint for eviction. However, this is a typographical error as the complaint for unlawful detainer was clearly filed by Utah First.

SUMMARY OF THE ARGUMENTS

Dudley has failed to properly marshal the evidence, which is required to adequately challenge the trial court's findings of fact. He fails to adequately cite to the record, and recites little or no case law supporting his arguments. He also attempts to raise new issues and arguments for the first time on appeal. This alone justifies a denial of Dudley's appeal.

Utah First was allowed to complete the foreclosure of the Property and eviction in spite of Dudley's attempt to rescind the loan in February and March 2010. Dudley's attempted rescission had no effect because his right to rescind expired three business days following the closing of the loan on November 16, 2007. The trial court properly determined the disclosures provided by Utah First prior to and at the loan closing on November 16, 2010, complied with the requirements of TILA. Therefore, Dudley's right of rescission expired three business days after the closing.

The trial court properly adjudicated the unlawful detainer issues by holding a trial and issuing an order of restitution. The trial court also properly denied Dudley's request that it exercise supplemental jurisdiction over claims which Dudley had filed in a separate federal lawsuit. Dudley did not file any counterclaims in the unlawful detainer action, and he did not file a motion to consolidate this action and the federal lawsuit. Dudley's request was also untimely presented, since it was not brought until the day of trial.

ARGUMENT

I. Dudley has failed to marshal the evidence, and raises issues for the first time on appeal.

A. Dudley has failed to marshal evidence.

Dudley's appeal fails to property marshal the relevant evidence, which is required to challenge the factual findings of the trial court. The Utah Supreme Court explained the standard of review for a trial courts findings of fact when it said:

> A trial court's findings of fact will not be set aside unless clearly erroneous. In order to establish that a particular finding of fact is clearly erroneous, an appellant must marshal the evidence in support of the findings and then demonstrate that, despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence. If the evidence is inadequately marshaled, the reviewing court assumes that all findings are adequately supported by the evidence.
> *Chen v. Stewart*, 2004 UT 82, ¶19, 100 P.3d 1177 (citations omitted).

The Utah Supreme Court further explained what it means when it requires that an appellant "marshal the facts":

> To properly marshal the evidence in the record, the challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; he or she must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the district court, and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the district court's finding of fact.
> *Ostermiller v. Ostermiller*, 2010 UT 43, ¶20, 233 P.3d 489 (citations omitted).

Dudley has failed to marshal the facts as required by *Chen* and *Ostermiller*. He makes numerous allegations without reciting any evidentiary support. He claims in several instances that the trial court committed various errors, or that the evidence did not support the findings, but Dudley fails to provide any support in the record for his generic allegations.

Instead, Dudley's brief sets forth long, narrative paragraphs in which he tries to construe evidence in a light most favorable to his case, but simply provides no indication that any evidence was presented to the trial court to support his assertions.

For example, Dudley argues the only disclosure he received in advance of the loan closing was the Good Faith Estimate (Plaintiff's Exhibit 4). (*See* Appellant's Brief at pp. 9-10.) However, the very last line before Dudley's signature on the Good Faith Estimate states, "The undersigned acknowledges receipt of the booklet, 'Settlement Costs,' and if applicable the Consumer Handbook on ARM Mortgages." (Plaintiff's Exhibit 4) Introduced as Plaintiff's Exhibit 3 was a copy of the Consumer Handbook on ARM Mortgages of which Dudley acknowledged receipt by his signature on the Good Faith Estimate. When presented in the light most favorable to the trial court's decision, it is clear Dudley did receive disclosures regarding the adjustable rate feature of the Note.

Second, Dudley argues he was overcharged for a credit report fee by $55.70. (*See* Appellant's Brief at p. 10-11.) Dudley seems to point to this issue to support his argument that the trial court was mistaken in its Findings of Fact that Utah First provided proper disclosures under TILA. However, Dudley fails to provide any legal support to indicate how this issue makes the loan disclosures invalid. TILA only requires that Utah First properly disclose the finance charges being charged to Dudley. How much Utah First paid for a credit report is irrelevant under TILA. The only question is whether or not Utah First disclosed the amount it charged to Dudley. By Dudley's own admission he paid $150.00 for the credit

report. (*Id.*) Utah First disclosed the $150.00 charge to Dudley on line 804 of the Settlement Statement prepared by Amy Ellett. (*See* Plaintiff's Exhibit 13.)

Third, Dudley alleges Utah First intentionally failed to produce an appraisal report in its discovery responses. (*See* Appellant's Brief at p.11.) However, the record shows (1) the appraisal report was produced prior to trial; (2) any failure to produce the report sooner was inadvertent; and (3) the failure to produce the report sooner was not prejudicial to Dudley. (R. 1256 at pp. 5 and 19.) Moreover, Dudley recites no facts or law indicating how the appraisal report somehow invalidated the foreclosure of the Property or the eviction action filed by Utah First.

Fourth, Dudley alleges that Plaintiff's Exhibit 13, the Settlement Statement prepared by the closing office Aimee Ellett, was altered. Dudley suggests the last page of Plaintiff's Exhibit 13 was in fact the last page of Plaintiff's Exhibit 6, and that no evidence was presented that Mr. Dudley received the Settlement Statement prepared by Ms. Ellett. Thus, the $42.99 Survey to Pest Inspection to Cottonwood Improvement District Fee[2] (the "Survey Fee") was not disclosed to Dudley. (*See* Appellant's Brief at p. 13.) To the contrary, Aimee Ellett, the escrow officer who prepared the Settlement Statement in question, testified at trial that Plaintiff's Exhibit 13, including the last page, which is identified as an Addendum To HUD-1 Settlement Statement, was a complete document. (R. 1256 at p. 113.) Ms. Ellett also

---

[2] The $42.99 fee was disclosed to Dudley. However, as set forth below, even if the fee was not disclosed it makes no difference because TILA only requires disclosure of finance charges as such term is defined by TILA. The pest inspection fee was not a finance charge. Therefore, it did not need to be disclosed.

testified she personally witnessed Dudley sign the Addendum to the HUD-1 Settlement Statement (*Id.*) The Settlement Statement unambiguously identifies the $42.99 Survey Fee at line 1301-1303. (*See* Plaintiff's Exhibit 13.) Moreover, Dudley presented no evidence that this charge was a "finance charge" covered by the requirements of TILA. When viewed in light most favorably to the trial court's decision, it is evident the Settlement Statement, including Addendum 1 thereto, was delivered to Dudley on the date of closing and that the $42.99 Survey Fee was properly disclosed.

Due to Dudley's failure to marshal the evidence, this Court must assume that all of the trial court's findings are adequately supported by the evidence.

B. Dudley raises issues for the first time on appeal that were not properly raised or preserved at trial.

For the first time on appeal, Dudley argues that his wife did not receive the required loan disclosures or a Notice of Right to Cancel. (*See* Appellant's Brief at p. 16.) Dudley's wife is not a party to this action, and she is not a borrower under the Note. As such, there was no obligation to provide Mrs. Dudley with the loan disclosures or a Notice of Right to Cancel. Dudley has recited no authority demonstrating any requirement to provide the TILA disclosures to a non-borrower, and this issue was never raised by Dudley before the trial court. As such, this is not an issue properly before this Court in this appeal.

"In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *438 Main Street v. Easy Heat, Inc.*, 2004 UT 78, ¶ 51, 99 P.3d 801(citing *Brookside Mobile Park v. Peebles*,

2002 UT 48 ¶ 14, 48 P.3d 968.) There was no evidence presented at trial that Mrs. Dudley had any interest in the Property. John Dudley was the only borrower under the Note. (*See* Plaintiff's Exhibit 1.) John Dudley alone executed the Deed of Trust. (*See* Plaintiff's Exhibit 7.) Under the Deed of Trust, Dudley covenanted he "is lawfully seized of the estate hereby conveyed and has the right to grant, convey and warrant the Property and that the Property is unencumbered, except for encumbrances of record." Finally, by his own admission, Dudley alone purchased the Property. (See Appellant's Brief at p. 9.) Any reference to Mrs. Dudley's purported interest in the Property or purported right to receive the loan disclosures at issue are not properly part of this appeal, and should be disregarded.

Dudley also raises for the first time, that the unlawful detainer action was somehow barred by Utah Code Ann. § 78B-6-809(2). This issue was not presented at trial, and cannot now be raised for the first time. Moreover, Dudley's reliance on § 78B-6-809(2) is misplaced. This particular code section deals only with a trial concerning forcible entry or forcible detainer. Dudley did not make any claims for forcible entry or forcible detainer, making § 78B-6-809(2) wholly inapplicable to this matter. As such, Dudley's references to this issue should be summarily disregarded.

II. The trial court properly concluded that Utah First complied with TILA.

Dudley argues he did not receive the disclosures required under TILA, and that the disclosures presented at trial did not comply with TILA's requirements. Again, Dudley fails to marshal the evidence. In attempting to challenge the sufficiency of Utah First's

disclosures, Dudley sets forth several facts without any reference to the record. Such facts must be disregarded as being not supported by the record. Viewing the evidence in the light most favorable to the trial court's decision, it is clear Dudley received the required TILA disclosures. Since the required TILA disclosures were given to Dudley, his right to rescind the loan expired three business days after the closing.

A. Dudley received the TILA disclosures.

There is sufficient evidence to support a finding that Dudley received the TILA disclosures. Dudley argues he rebutted the presumption that the TILA disclosures were given by "testimony of Mr. Dudley, that the disclosures were not given." Appellant's Brief at p. 24. However, Dudley has failed to cite where in the record he testified that he did not receive the documents. To the contrary, Dudley testified he did receive the disclosures:

Q. Plaintiff's 2. What are you looking at there, what is that document?
A. **Federal Truth in Lending Disclosure Statement.**
Q. Okay. I'm sorry. I wanted to give you 4. I apologize. What are you looking at there?
A. **Good Faith Estimate.**
Q. Did you see that?
A. **I did. This is signed by me.**
Q. Okay. And what date is on there?
A. **11/15/07.**
Q. Okay. Alright. Take a look at that. Did you receive that document, and would you read the title of it?
A. **I did and it's the Federal Truth in Lending Disclosure Statement, November 16th, 2007.**
Q. And did you sign that?
A. **I did.**
THE COURT: What document is that, please?
MR. COREY: Two.
THE WITNESS: Plaintiff 2.

MR. COREY: So had you ever – take a look back at what's marked number 4. Do you remember getting that document on the 15th and signing it?

A. **I didn't get to keep it, but I signed it at David's office, yes.**

Q. Did he give you a 6? What is Plaintiff's 6? What is the title of the document.

A. **This is Settlement Statement.**

Q. What is the date?

A. **The date is 11/16/07.**

Q. And is there a signature on that?

A. **It's my signature.**

Q. Do you remember receiving that?

A. **Yes I do. The content of it, I don't, but my signature is my signature and that's the way I write the date.**

Q. Did they give you any other disclosures about the cost of your loan besides that statement?

A. **I don't believe so. I think that was it.**

***

Q. Okay. This is Plaintiff's Exhibit 5.
Take a look at that. Was that titled?

A. **Notice of Right to Cancel.**

Q. What did you understand this to mean?

A. **That if I wanted to cancel the loan, I could. This was like a third of the way or halfway into the documents. And I remember asking the question, "Why do I want to cancel? We haven't finished signing up for it yet." So he said – he explained some things to me, told me that I need to – that I do have a right to cancel, that I need to sign this document here and this document here. Because I wasn't cancelling, I didn't have to sign the top one.**

(R. 1257 at p. 35-38.)

In addition to Dudley's own testimony that he received the TILA disclosures, each disclosure bears his signature. (*See* Plaintiff's Exhibits 2, 4, 5, 6, and 13.) Aimee Ellett also testified that she delivered to Dudley the Notices of Right to Cancel, the Settlement Statement introduced as Plaintiff's Exhibit 13, and personally witnessed Dudley sign the same. (R. 1256 at pp. 109-113.) Finally, Dave Bastian, the loan officer for Utah First who was present at the closing testified that he remembered Aimee Ellett going over the Notice

of Right to Cancel with Dudley. (R. 1256 at pp. 189-90.) The clear weight of the evidence shows Dudley did receive the TILA disclosures.

Dudley argues the Notices of Right to Cancel were invalid because they were delivered to Dudley by Aimee Ellett, rather than Utah First. (Appellant's Brief at p. 25.) First, this argument is inconsistent with Dudley's prior argument that he didn't receive the disclosures. Second, as the escrow officer conducting the closing, Ms. Ellett would have provided the Notices of Right to Cancel at the request of Utah First. Third, Dave Bastian, Utah First's loan officer was present when the Notices of Right to Cancel were delivered to Dudley. (R. 1256 at pp. 189-92.) Fourth, Dudley provides no legal authority for the proposition that the disclosures must be handed to him directly by an employee of Utah First, rather than through its closing agent. Dudley's argument that he did not receive the Notices of Right to Cancel from Utah First is simply without merit, and is not supported by the evidence introduced at trial.

B. There was no confusion regarding Dudley's right to cancel.

Dudley next argues the instructions regarding how to rescind the Note were confusing. Aimee Ellett told Dudley that "[i]f you, for some reason, wanted to cancel, you'd want to sign up above under 'I wish to cancel,' date it and get it to the Credit Union within those three days." (R. 1256 at p. 110.) Based upon Dudley's background and experience, the Court found Dudley to be an experienced and sophisticated business man capable of understanding the loan documents and disclosures presented to him. (R. 1197-98.) The court

specifically found the Notice of Right to Cancel clearly explained his right to cancel the Note. (R. 1198.) Moreover, Dudley's claim that he was confused about the rescission process is contrary to his own actions when he attempted to rescind the Note in 2010.

C. The cost associated with the Survey Fee and the appraisal fee were disclosed to Dudley. Even if they were not, they were not required to be disclosed because they were not finance charges.

The trial court found all the finance charges that were required to be disclosed to Dudley were in fact disclosed to Dudley. Dudley argues Utah First failed to disclose a $42.99 Survey Fee and a $550.00 appraisal fee (the "Appraisal Fee"), but the record reflects these fees were disclosed to Dudley. Introduced and received as Plaintiff's Exhibit 13 was a Settlement Statement, which Amy Ellett testified was delivered to Dudley at the closing. (R. 1256 at p. 113.) That Settlement Statement disclosed both the Survey Fee, on line 1303, and the Appraisal Fee, on line 803.

Dudley argues Ms. Ellett's testimony should be given no credit pursuant to *Jackson v. U.S. Bank*, 245 B.R. 23 (E.D. Pa. 2000), but *Jackson* is inapplicable to this matter. In particular, *Jackson* is the decision of a trial court, not an appellate court concerning the credibility of the witness. Credibility of witnesses is determined by the trier of fact. *Jackson* simply held that the particular escrow officer was not very credible because she had no specific recollection of the closing. That holding was very specific and dependent on the totality of the facts presented to the court in *Jackson*. There is absolutely no legal precedent that testimony of an escrow agent is per se unreliable.

"It is the duty of the finder of fact to weigh the testimony and determine its credibility." *State v. Tanner*, 675 P.2d 539, fn 6 (Utah 1983). The assessment of Ms. Ellett's credibility must be left to Judge Himonas, the finder of fact. Judge Himonas accepted her testimony as credible, and rejected Dudley's testimony on the issue as not credible. Unlike the escrow office in *Jackson*, Ms. Ellett testified she had a specific recollection of the closing of Dudley's loan. (R. 1256 at p. 118.) It is not proper for this Court to assess the credibility of the witnesses unless the trial court clearly abused its discretion, and Dudley has made no showing that the trial court abused its discretion.

Dudley also argues the Settlement Statement introduced as Plaintiff's Exhibit 13 is inconsistent on its face, and that the addendum to Plaintiff's Exhibit 13 actually belonged on Plaintiff's Exhibit 6. This position was expressly rejected by Ms. Ellett's testimony (R. 1256 at pp. 112-113.), and the documents themselves support the position that the addendum in question belongs on Exhibit 13. Exhibit 6 has numbered pages: 1 of 3, 2 of 3, and 3 of 3. Page 3 of 3 bears Dudley's signature and a verification that he has reviewed the HUD-1. (*See* Plaintiff's Exhibit 6.) The addendum to Plaintiff's Exhibit 13 is a stand alone page, numbered "1 of 1", clearly identified as an addendum, and containing nearly the exact same verification as the last page of Plaintiff's Exhibit 6. It doesn't make sense for a settlement to have the same verification, one on the last page and one on the addendum. It makes more sense that the addendum containing Dudley's verification would be attached to a Settlement Statement that doesn't otherwise contain his signature or verification, such as the Settlement

Statement introduced as Plaintiff's Exhibit 13. The documents themselves, coupled with Ms. Ellett's testimony demonstrate Dudley received a copy of the Settlement Statement introduced as Plaintiff's Exhibit 13. Thus, the Survey Fee and Appraisal Fee were both disclosed to Dudley at the closing.

Even if the Survey Fee and the Appraisal Fee were not disclosed it would not violate TILA. Only "finance charges" need to be disclosed under TILA, and the Survey Fee and Appraisal Fee are not "finance charges" as defined by TILA.

15 U.S.C. § 1602(u) defines "material disclosures" as (1) the annual percentage rate, (2) the method of determining the finance charge, (3) the balance upon which a finance charge will be imposed, (4) the amount of the finance charge, (5) the amount to be financed, (6) the total of payments, (7) the number and amount of payments, (8) the due dates of payments, and (9) the disclosures required by 15 U.S.C. § 1639(a). 15 U.S.C. § 1635 requires disclosure of the obligor's right to rescind.

15 U.S.C. § 1638 requires disclosure of the material disclosures defined in 15 U.S.C. § 1602(u) along with, (1) the identity of the creditor, (2) a statement of the obligor's right to obtain a written itemization of the amount financed, (3) the number, amount and due dates or period of payments, (4) descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total payments", and "total sale price", (5) a statement that a security interest is being taken in the property, (6) any dollar amount that can be imposed by a late payment, (7) a statement indicating whether the borrower will be entitled

to a rebate, (8) a statement that the consumer should refer to the appropriate contract document for any information regarding nonpayment, etc. . . , and (9) if the transaction exceeds the fair market value of the principal dwelling securing the loan, a statement that portions of the interest may not be tax deductible and the consumer should consult a tax advisor.

Based on the foregoing, the only charges required to be disclosed to Dudley were "finance charges," principal payments, and potential late fees. The Survey Fee and Appraisal Fee were certainly not late fees, and were not payments to principal. Therefore, they were only required to be disclosed if they were "finance charges." 15 U.S.C. § 1605 defines "finance charge" as:

> Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction. The finance charge shall not include fees and amounts imposed by third party closing agents (including settlement agents, attorneys, and escrow and title companies) if the creditor does not require the imposition of the charges or the services provided and does not retain the charges. Examples of charges which are included in the finance charge include any of the following types of charges which are applicable:
>
> (1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.
> (2) Service or carrying charge.
> (3) Loan fee, finder's fee, or similar charge.
> (4) Fee for an investigation or credit report.
> (5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

(6) Borrower-paid mortgage broker fees, including fees paid directly to the broker or the lender (for delivery to the broker) whether such fees are paid in cash or financed.

There was no evidence the Survey Fee and the Appraisal Fee were for any purpose other than what was listed on the Settlement Statement -- e.g. a survey and appraisal. They were imposed by third parties, and were not finance charges. Consequently, they were not required to be disclosed under TILA. Dudley presented no evidence to the contrary.

D. Utah First was not required to provide any disclosures under 15 U.S.C. § 1639.

The disclosures relating to the variable rate loan obtained by Dudley were proper. Dudley erroneously argues that 15 U.S.C. § 1639 required Utah First to provide disclosures subsequent to the good faith estimate provided to Dudley. (*See* Appellant's Brief at pp. 30-31.) The provisions of 15 U.S.C. § 1639 are inapplicable to the loan in this case.

15 U.S.C. § 1639 requires certain additional disclosures for a loan referred to in 15 U.S.C. § 1602(aa). A loan referred to in Section 1602(aa) is one where:

(A) the annual percentage rate at consummation of the transaction will exceed by more than 10 percentage points the yield on Treasury securities having comparable periods of maturity on the fifteenth day of the month immediately preceding the month in which the application for extension of credit is received by the creditor; or

(B) The total points and fees payable by the consumer at or before closing will exceed the greater of –
  (i) 8 percent of the total loan amount or;
  (ii) $400.

The Note at issue in the present case is not the kind referred to in Section 1602(aa). The annual interest rate at consummation was 6.625%, (*see* Plaintiff's Exhibit 1) far below the

10% above the yield on treasury securities and the total settlement charges for the Note were $20,107.10 (*See* Plaintiff's Exhibit 13). It is also far below the threshold of 8% of the loan amount, which would be $124,800.00. Because the Note was not the type of loan note referred to in Section 1602(aa), no additional disclosures were required under 15 U.S.C. § 1639. As found by the trial court, Dudley knew he was signing a variable rate note. The words, "**ADJUSTABLE RATE NOTE**" were unambiguously stated at the top of the Note, and several provisions of the Note refer to a variable interest rate. (*See* Plaintiff's Exhibit 1.) The disclosures provided to Dudley regarding the Note were proper.

III. Utah First acted appropriately when it proceeded with the foreclosure following Dudley's invalid attempt to rescind the loan.

The evidence at trial showed that Dudley's attempt to rescind the loan was nothing more than an effort to avoid a foreclosure following his failure to repay the Note as agreed. Dudley raised no issues concerning the origination of the loan for more than two years. It was only when he defaulted on the Note and was facing a foreclosure of the Property, that he suddenly tried to rescind the Note. Since Dudley's right to rescind the Note expired on November 20, 2007, Dudley's attempts to rescind in 2010 were without any legal effect.

The foreclosure sale conducted March 18, 2010 was valid because Dudley's right to rescind the Note had long since expired. 15 U.S.C. § 1635(a) states in relevant part that:

> ...in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, 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 delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this title, whichever is later. . .

Therefore, if the rescission forms and material disclosures required by TILA were provided at the closing, as they were in this case, the right to cancel or rescind expired three business days following the closing. The trial court found the disclosures to be in compliance with TILA, meaning Dudley's right to rescind the Note expired on November 20, 2007 -- three business days after the closing of the loan.

Dudley unsuccessfully argues that 15 U.S.C. § 1635(b) requires Utah First to release the Deed of Trust and return all payments received under the Note, within twenty days after receipt of Dudley's Notice of Rescission. (*See* Appellant's Brief at p. 17.) The rescission procedures of TILA and Regulation Z relied on by Dudley apply only when there is a valid rescission. Dudley provided no support at trial that his attempt to rescind the Note was valid. 15 U.S.C. § 1635(b) states in relevant part, "[w]hen an obligor exercises his right to rescind under subsection (a), he is not liable..." The pivotal word in § 1635 is *right*. If the borrower has no right of rescission, then an attempt to rescind has no legal effect and the lender has no duty to release its security interest or return loan payments.

Many courts have recognized a lender's duties under § 1635 are only triggered when a valid rescission is exercised. *See Hopkins v. First NCL Fin. Serv.,* 372 B.R. 735, 751 (E.D. Penn. 2007)("failure to honor a <u>valid</u> rescission is itself a TILA violation")(citations omitted)(emphasis added); *Aquino v. Public Fin. Consumer District*, 606 F.Supp. 504, 511

(E.D. Penn. 1985)("After a creditor has performed its obligations pursuant to a *valid* rescission, the obligor must tender to the creditor any property the creditor has previously delivered to the obligor.")(emphasis added); *Family Fin. Serv. v. Spencer*, 41 Conn. App. 754, 770, 677 A.2d 479 (1995)("The creditor's failure to comply with such a *valid* rescission request obviates the consumer's obligation.")(citations omitted)(emphasis added); *and Fisher v. Chase Home Fin., LLC*, 2011 U.S.Dist LEXIS 60870, ¶ 9 (E.D. VA 2011)("Following *valid* rescission, the borrower 'is not liable for any finance or other charge,' including application fees, 'and any security interest given by the obligor ... becomes void.'")(citations omitted)(emphasis added). There are literally dozens of cases reciting the actions that must be taken by a lender in the face of a *valid* rescission, however, there is no legal authority requiring a lender to release its interest or take any action whatsoever following an *invalid* attempt at rescission. In the present case, Dudley's attempt to rescind the loan was invalid. Therefore, the procedures at 15 U.S.C. § 1635(b) are inapplicable.

As set forth in the facts above and more fully explained below, Dudley's right of rescission expired on November 21, 2007, three business days following the closing of the Note. Therefore, when he attempted to rescind the note his actions were in no way binding on Utah First and it was free to proceed with the foreclosure. If Dudley believed that Utah First was proceeding improperly, he could have sought an injunction. He did nothing and, as found by the trial court, the foreclosure was proper.

IV. The trial court properly adjudicated the unlawful detainer action.

The case filed by Utah First was an unlawful detainer action, and nothing more. Utah Code Ann. § 78B-6-810 states in relevant part:

> (1) In an action under this chapter in which the tenant remains in possession of the property:
> (a) the court shall expedite the proceedings, including the resolution of motions and trial;
> (b) the court shall begin the trial within 60 days after the day on which the complaint is served, unless the parties agree otherwise; and
> (c) if this chapter requires a hearing to be held within a specified time, the time may be extended to the first date thereafter on which a judge is available to hear the case in a jurisdiction in which a judge is not always available.
> (2) (a) In an action for unlawful detainer where the claim is for nonpayment of rent or for occupancy of a property after a forced sale as described in Subsection 78B-6-802.5, the court shall hold an evidentiary hearing, upon request of either party, within ten days after the day on which the defendant files the defendant's answer.
> (b) At the evidentiary hearing held in accordance with Subsection (2)(a):
> (i) the court shall determine who has the right of occupancy during the litigation's pendency; and
> (ii) if the court determines that all issues between the parties can be adjudicated without further proceedings, the court shall adjudicate those issues and enter judgment on the merits.

Consistent with Utah Code Ann.§ 78B-6-810(2)(a), a hearing regarding occupancy was held on April 30, 2010, at Utah First's request. (R. 1249.) At the hearing, Judge Kelly determined there were issues requiring further proceedings. (R. 1249 at 28-32.) The case was also not resolved by either party's motion for summary judgment. (R. 519.) Therefore, pursuant to Utah Code Ann. § 78B-6-810(1)(b) and (c), the trial court held a trial beginning on June 21, 2010, the first available date following 60 days after the complaint was served. (R. 746-747.)

A. The trial court complied with the eviction procedures found in Utah Code Ann. § 78B-6-801 *et seq.*

Dudley was guilty of unlawful detainer. Utah Code Ann. § 78B-6-802.5 governs unlawful detainer following a foreclosure, and states:

> A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:
>
> (1) defaulted in his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
>
> (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

Dudley defaulted in his obligations under the Note. (R. 1256 pp. 79-82.) A foreclosure sale of the Property was conducted, and Utah First purchased the Property as the highest bidder. (R. 1256 at p. 81; R. 316-317.) A Notice to Vacate was served on Dudley and all other occupants of the Property on March 22, 2010 (*See* Plaintiff's Exhibit 12.) Dudley failed to vacate the Property within the specified 5-day period. (R. 1257 at p. 17.), and was unlawfully detaining the Property thereafter. Pursuant to Utah Code Ann. § 78B-6-811, Utah First was entitled to an order of restitution and treble damages for the period of time that Dudley was unlawfully remaining in possession of the Property (March 27, 2010 through July 15, 2010). (R. 1203.)

Dudley argues he was not guilty of unlawful detainer because he was in quiet possession of the Property for at least one year before the commencement of the unlawful detainer action. (*See* Appellant's Brief at p 21.) Dudley relies upon Utah Code Ann. § 78B-6-809(2) for support of his position. This issue was not raised before the trial court, and

cannot now be raised for the first time on appeal. Moreover, Utah Code Ann. § 78B-6-809(2) does not apply to this matter because Dudley did not made any claims of forcible entry or forcible detainer.

B. Adjudication of Dudley's affirmative defense of rescission was necessary to the adjudication of Utah First's claim of unlawful detainer.

It was proper for the trial court to adjudicate Dudley's rescission rights under TILA. Dudley suggests that the trial court should not have adjudicated "[f]ederal law, well outside of the unlawful detainer statute, and outside of Utah First['s] claims as pled." (Appellant's Brief at p. 22.) However, it was Dudley, not Utah First, that made adjudication of Dudley's attempted rescission under TILA a necessary part of the unlawful action. Dudley's answer included the following affirmative defense:

> After being served with a Notice of Rescission, Utah First failed to take action to seek a judicial determination on the merits of John's rescission prior to exercising their power of sale from the trust deed. Upon exercise of John's federally protected right to rescission, Utah First's security interest is automatically void pursuant to 15 U.S.C. § 1635(b), and Utah First must take all the necessary steps to comply with the Truth in Lending Act within 20 days from the date of the rescission.
> (R. 11.)

Dudley's claim of rescission went right to the heart of Utah First's ownership of the Property and right to evict Dudley from the Property -- e.g. if the loan was rescinded, then there was no foreclosure sale and no basis for an eviction. This was acknowledged by the trial court at a hearing held on April 30, 2010:

> In his motion for summary judgment, [Dudley] claims to have exercised the right. He shows documentation suggesting that he's rescinding under 15 U.S.C. Section 1635, and without getting to the merits, but hypothetically, if that motion were granted the

> whole transaction were set aside, then wouldn't you be in a circumstance where Utah First would not be an owner under 78B-6-801 Subpart 5, who would be even entitled to rights under the unlawful detainer statute? Doesn't that motion go to the heart of whether you even have the right to exercise those provisions?
> (R. 1249 at p.16.)

It was impossible for the trial court to properly adjudicate possession of the Property without also adjudicating whether Dudley exercised a valid right of rescission. It is inconsistent for Dudley to raise an affirmative defense which attempts to block Utah First's right to possession of the Property, and then argue on appeal that adjudication of the affirmative defense he himself raised was improper.

Dudley relies on the holding in *Bichler v. DEI*, 2009 UT 63, 220 P.3d 1203, and Rule 54(b) of the Utah Rules of Civil Procedure to argue that the trial court should not have adjudicated the TILA issues. However, Dudley's reliance in *Bichler* and Rule 54(b) is misplaced. In *Bichler*, the question before the court is whether the defendant's counterclaims should have been dismissed because they were brought in an eviction proceeding. *Id.* at ¶ 29. *Bichler* held the trial court properly adjudicated the unlawful detainer issue, but should not have dismissed the counterclaims. *Id.* at ¶ 34. Dudley argues the present case is similar to *Bichler* stating, "[t]he district court summarily disposed of Mr. Dudley's contract claims, by making findings and conclusions, outside of the unlawful detainer statue, with blanket denial of Mr. Dudley's motion to re-frame trial structure..." (Appellant's Brief at p. 23.) Dudley also argues the trial court's actions violated Rule 54(b). (Appellant's Brief at p. 23.) *Bichler* and Rule 54(b) are both inapplicable because Dudley never asserted any contract

claims or any other counterclaims. This lawsuit consisted of a single action for unlawful detainer against Dudley, and Dudley's affirmative defenses raised in response thereto.

It is nonsensical to suggest the trial court should not have heard the defenses raised by Dudley, when Dudley chose to pursue said defenses. If Dudley did not want those issues heard, he should not have chosen to raise those issues at trial. The trial court properly heard and made findings on the defenses Dudley chose to raise at trial, and should not be faulted for doing so. Dudley's argument to the contrary is inconsistent with the strategy of defense taken by Dudley in this matter, and must be rejected.

C. The trial court properly denied Dudley's "Motion to Re-Frame Trial Structure, Stay Damages, and Supplemental Jurisdiction."

On the day of trial, Dudley filed a Motion to Re-Frame Trial Structure, Stay Damages, and Supplemental Jurisdiction (the "Motion to Take Supplemental Jurisdiction"), in which he asked the trial court to exercise jurisdiction over certain claims filed by Dudley against Utah First in a federal lawsuit filed in the United States District Court, District of Utah encaptioned *Dudley v. Utah First, et al*, Case No. 10-00562 (the "Federal Lawsuit"). (R. 541-543.) In its Findings of Fact and Conclusions of Law, the trial court properly denied Dudley's request. The trial court's decision was proper for several reasons.

First, while the state court may have some authority to hear the issues associated with the Federal Lawsuit, it was not properly characterized as supplemental jurisdiction under 28 U.S.C. § 1367(a). Dudley was effectively attempting to consolidate the actions. If he wished to consolidate, he should have attempted to remove the eviction action to federal court and

consolidate the actions. Alternatively, he could have asserted counterclaims in this matter, and he elected not to do so.

Second, by asking the Court to take jurisdiction over all the claims alleged in the Federal Lawsuit, Dudley was essentially asking the trial court to amend his Answer and allow the new claims and parties to be added on the day of trial. The Federal Lawsuit contained twenty-nine (29) separate causes of action against Utah First, as well as other parties who are not parties to this action. Dudley had ample opportunity to file counterclaims and/or third-party claims when he initially answered this action or well in advance of trial. He did not do so. He never filed any counterclaims or third-party claims, and he never filed a motion to amend his Answer to include such claims. Even if the Motion to Exercise Supplemental Jurisdiction could be considered a motion to amend, it was untimely as it was filed on the day of trial, and was prejudicial to Utah First who was ready to proceed with its presentation of evidence.

With respect to a motion to amend pleadings, the trial court considers several factors:

> Trial courts should liberally allow amendments unless the amendments include untimely, unjustified, and prejudicial factors. Trial courts are not required to find all three factors to deny a motion to amend; a court's ruling on a motion to amend can be predicated on only one or two of the particular factors. And many other factors, such as delay, bad faith, or futility of the amendment, may weigh against the trial court's allowing amendment.
> *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶58, 221 P.3d 256 (citations omitted).

The case was already at trial by the time Dudley brought his Motion to Take Supplemental Jurisdiction. To allow the additional claims to be brought at that point would

have unfairly prejudiced Utah First. Utah First would have been deprived the opportunity to have many of the claims eliminated as a matter of law prior to trial (which is what actually occurred in the Federal Lawsuit). Utah First did not have the opportunity to conduct any necessary discovery, and was not prepared to address the large number of additional claims presented at trial for the first time. Additionally, continuing the trial while such other claims were adjudicated would have violated Utah Code Ann. § 78B-6-810(1)(b), which requires a trial in the unlawful detainer action within 60 days. Furthermore, such delay would have only added to the harm suffered by Plaintiff while it bore the full carrying cost of a delinquent $1.5 million debt, without the ability to collect on the collateral.

V. Utah First is entitled to an award of attorney's fees associated with this appeal.

Pursuant to Utah Code Ann. § 78B-6-811, Utah First is entitled to an award of its reasonable attorneys' fees associated with this appeal.

CONCLUSION

For the foregoing reasons, Appellee Utah First requests that this Court affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 21 day of June, 2011.

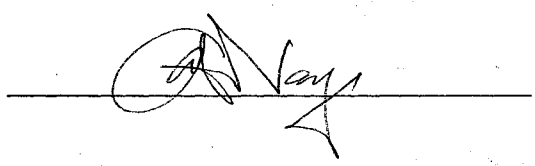
SCALLEY READING BATES
HANSEN & RASMUSSEN, P.C.

Darwin H. Bingham
Jonathan H. Rupp
Attorneys for Utah First Federal Credit Union

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing **BRIEF OF APPELLEE UTAH FIRST FEDERAL CREDIT UNION** to the following parties on the 21st day of June, 2011.

Clayne I. Corey
CLAYNE I. COREY PLLC
9217 South 1300 East
P.O. Box 902195
Sandy, Utah 84090-2195



ADDENDUM
"A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(August 23, 2010)

THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

UTAH FIRST FEDERAL CREDIT UNION, a Utah corporation, **Plaintiff,** **v.** **JOHN DUDLEY and JOHN DOES I-X,** **Defendants.**	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 100905635 Judge Deno Himonas

This matter came on for trial on June 21 and 29, 2010, and July 15, 2010. Darwin Bingham and Jonathan Rupp represented the plaintiff, Utah First Federal Credit Union ("Utah First"). Clayne Corey represented the defendant, John Dudley. The Court having heard the arguments of the parties and the testimony of the witnesses, and having reviewed the parties' briefing and the documentary evidence presented, enters the findings of fact and conclusions of law set forth below.

SUMMARY

Utah First claims to have acquired title to the home at 8028 South Madsen Court, Sandy, Utah (the "Property"), on March 18, 2010, through a foreclosure sale. Eleven days later, Utah First filed a Complaint for Eviction. The Complaint alleges that Dudley, despite having received a Notice to Vacate, has "refused to surrender the Property . . and [is] guilty of unlawful detainer." Complaint, p. 2, ¶¶ 6-8. Dudley counters that he properly exercised his rescission rights under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1501, *et seq.*, prior to the foreclosure sale and, therefore, that

the sale is void. *See, e.g.*, Defendant's Memorandum in Support of Motion for Summary Judgment, p. 7, ¶ 15.

Dudley is incorrect. While the paperwork behind the loan from Utah First to Dudley is not worthy of imitation, Utah First did make all necessary "material disclosures," as that term is defined by TILA. *See* 15 U.S.C. §§ 1602(u) & 1635(a); *see also* 12 CFR § 226.23, n. 48.[1] As a consequence, the three-year rescission period found in Section1635 of TILA, and on which Dudley necessarily relies, is inapplicable. Utah First is entitled to restitution of the Property and to damages as asserted in the Complaint.[2]

FINDINGS OF FACT

1. On November 16, 2007, Dudley executed an Adjustable Rate Note (the "Note"), wherein he borrowed $1,560,000.00 from Utah First. The words, "**ADJUSTABLE RATE NOTE**" are clearly and conspicuously printed at the top of the document. Plaintiff's Exhibit 1 (emphasis in original).[3]

2. Dudley agreed to repay the principal amount of the Note, plus interest according to the terms and conditions set forth in the Note. Dudley is an experienced and sophisticated

---

[1]The Court has endeavored to use the codes in place as of November 16, 2007, the date of the loan closing.

[2]Dudley has filed a Motion to Re-frame Trial Structure, Stay Damages and Supplemental Jurisdiction (the "Motion"). For the reasons set forth in Utah First's Memorandum in Opposition, the Court denies the Motion.

[3]The highlighting and underlining on Plaintiff's Exhibits 1 & 2 are the Courts.

businessman. The Court finds incredible Dudley's claim that he was a hapless dupe who had no idea what he was signing and categorically rejects the same.

3. The Note provided for a fixed rate of interest for five (5) years, and then switched to a variable rate of interest thereafter.[4]

4. To secure performance of his obligations under the Note, Dudley granted Utah First a security interest in the Property by executing a Deed of Trust, naming Utah First as beneficiary. The Deed of Trust was recorded with the Salt Lake County Recorder's Office.

5. Prior to the closing of the loan, Utah First provided Dudley a Good Faith Estimate that set forth the charges associated with the Note. Plaintiff's Exhibit 4 is a good faith estimate that indicates it was prepared on November 15, 2007, and signed by Dudley on that same date.

6. The closing of the loan occurred on November 16, 2007. At the closing the Dudley was provided three (3) copies of a Notice of Right to Cancel. Dudley was also given the Settlement Statement (Plaintiff's Exhibit 13), and a number of other documents.

7. The Notice of Right to Cancel clearly explained Dudley's right to cancel the Note.

8. The Notice of Right to Cancel contained language necessary to make it an appropriate form that Dudley could have used to rescind the Note.

---

[4]It does appear that Dudley initially approached Utah First about obtaining a fixed rate loan. *See, e.g.*, Defendant's Exhibit 10. It further appears, however, that the loan was a work in progress that was ultimately structured, with Dudley's consent, as a variable rate loan.

9. At the closing, Dudley was given the opportunity to sign a confirmation (the "Confirmation") that the three-day rescission had passed. Dudley was not required to sign the Confirmation at closing, but was given the option of signing the Confirmation as a convenience to him. Dudley was also given the opportunity to bring the Confirmation back three days later if he chose not to sign it at the closing.

10. Dudley was given three business days in which he could have rescinded the Note. In fact, the loan did not fund until four business days after closing.

11. Dudley was not required to waive his right of rescission and was not required to sign the confirmation that three business days had lapsed at closing as a condition for obtaining the funds under the Note.

12. The Court finds Dudley voluntarily chose to sign the confirmation section on the Notice of Right to Cancel as a convenience to him.

13. Also at closing, Defendant was given a Truth in Lending Disclosure Statement. The Truth in Lending Disclosure Statement:

a. Identified the lender in the upper-left-hand corner;

b. Contained a table that clearly stated the amount financed;

c. Stated that the borrower had the right to receive an itemization of the amount financed;

d. Clearly stated the finance charge;

e. Stated the annual percentage rate;

f. Clearly stated the amount financed and the total of payments;

g. Stated the number of payments and due date;

h. Contained descriptive explanations of the terms "amount financed", "finance charge", "annual percentage rate", "total of payments";

i. Contained a statement that security is being taken in the property and provided the address;

j. Stated any dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment;

k. Stated that borrower will not pay a penalty if the loan is paid off early and will not be entitled to a refund of part of the finance charge;

l. Contained a statement that the consumer should refer to the appropriate contract document for any information such document provides about nonpayment, default, the right to accelerate the maturity of the debt, and prepayment rebates and penalties; and

m. Stated, "Assumption: someone buying your home may, subject to conditions, be allowed to assume the remainder of this mortgage on the original terms."[5]

14. Dudley elected to receive an itemization of the amount financed and was thus provided with the Settlement Statement that accurately reflected the finance charges.[6]

---

[5]Upon reflection, it is the Court's view the lender bears the burden of establishing compliance with 15 U.S.C. § 1635(a)'s disclosure requirements. *But see McKinney v. Nationscredit Financial Services Corp.*, 2004 U.S. Dist. LEXIS 24438, *16 (N.D. IL 2004); *Wilson v. Homeowner's Loan Corp.*, 263 F. Supp. 2d 1212, 1216 (E.D. MO 2003). Utah First has carried this burden.

[6]The Court finds that the $42.99 charge for "Survey to Pest Inspection to the Cottonwood Improvement District" is not a "finance charge" as that term is used within 15 U.S.C. § 1605.

1705

15. The transaction surrounding Dudley's execution of the Note was not for the sale of any property or services.

16. The proceeds advanced under the Note were not for the purchase of the Property.

17. At the time the Note was executed, the amount borrowed by the Defendant under the Note did not exceed the fair market value of the Property.

18. Defendant failed to make the monthly payments required by the Note.

19. Plaintiff appropriately commenced foreclosure proceedings due to Dudley's failure to make timely payment as required by the Note.

20. Prior to the foreclosure sale of the Property, Dudley attempted to rescind the Note. The evidence presented shows the Dudley may have attempted to rescind the Note as early as February 2, 2010, or as late as March 18, 2010.

21. Dudley has never attempted to tender back to Utah First the funds he received under the Note.

22. On March 18, 2010, a foreclosure sale was conducted and Utah First purchased the Property for $900,000.00 as the highest bidder.

23. On March 22, 2010, a Notice to Vacate was served on Dudley and all other occupants of the Property.

24. The Notice to Vacate expired on March 27, 2010.

25. Dudley filed a complaint for eviction on March 29, 2010.

26. To date, Dudley has not vacated the Property.

From the foregoing Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

1. The disclosures, provided to Dudley prior to and at closing of the loan complied with the requirements of the Truth in Lending Act ("TILA"). *See* 15 U.S.C. §§ 1602(u) & 1635(a) and (f); *see also* 12 CFR § 226.23, n. 48.

> TILA requires consumers to file damage claims 'within one year from the date of the occurrence of the violation.' 15 U.S.C. § 1640(e). The violations plaintiffs allege, failure to received required disclosure and rescission notices, occurred on or before the transactions were consummated. . . . Plaintiff's claims for rescission, however are subject to a different standard. The regulations give consumers three days from the delivery of the notice to rescind or delivery of all material disclosures, whichever occurs last, to rescind a transaction. . . . Material disclosure means the disclosure . . . of the annual percentage rate, the method of determining the finance charge and the balance upon which the finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of the payments, the number and amount of the payments [and] the due dates or periods of payments scheduled to repay the indebtedness.

Pulphus v. Sullivan, 2003 U.S. Dist LEXIS 7080, **36-37 (emphasis added) (citations omitted).

2. The charges in the Good Faith Estimate are within the allowable tolerances required by TILA and the settlement charge for the pest inspection to the Cottonwood Improvement District do not constitute a finance charge. *See* 15 U.S.C. § 1605(e).

3. Dudley was provided three business days to rescind the transaction as required by TILA.

4. Dudley's rescission rights under TILA expired on November 20, 2007, which is three business days after the closing.

5. Dudley failed to exercise his rescission rights before they expired.

6. Dudley's attempts to rescind the Note on February 2, 2010 and March 18, 2010, were without effect because the Dudley had no rescission rights.

7. Because Dudley's attempt to rescind the Note was not based upon a valid right of rescission, Utah First was not required to stop the foreclosure sale and was not required to file a legal proceeding prior to completing the foreclosure sale.

8. Because Dudley has no legal right to rescind the Note, the foreclosure of the Property was proper.

9. Utah First became the legal owner of the Property as the highest bidder at the foreclosure sale.

11. Dudley and other individuals claiming a right of occupancy through him have been unlawfully detaining in the Property from March 27, 2010, until the date of these Findings of Fact and Conclusions of Law.

12. Utah First is entitled to an Order of Restitution giving it possession of the Property. (Utah First is to prepare, circulate, and submit an appropriate Order and Writ of Restitution.)

13. Judgment is hereby entered in favor of Utah First and against Dudley for Dudley's unlawful detainer damages in the amount of $16,275.60, which is three times the daily rent of $147.96 for a period of 110 days from March 27, 2010, through July 15, 2010. Said judgment shall be automatically augmented by $147.96 for each day after July 15, 2010, that Dudley or any other occupant remains in the Property.

14. Judgment shall be entered in favor of Utah First against Dudley for Utah First's reasonable attorneys fees. Utah First's counsel shall submit an affidavit of attorneys fees and costs and Dudley may object as appropriate.

15. Dudley's bond in the amount of $4,500.00 is hereby released to Utah First.

16. The surety bond in the amount of $4,500.00 filed by Utah First is hereby released and the surety on Utah First's bond is relieved from any further liability.

17. The Court declines to stay, re-frame, or exercise supplemental jurisdiction over any other claims, issues, or matters.

DATED this 23rd day of August, 2010.

BY THE COURT:

Deno Himonas
Third District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

1NC1

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100905635 by the method and on the date specified.

MAIL: CLAYNE I COREY 9217 SOUTH 1300 EAST SANDY, UT 84093
MAIL: JONATHAN H RUPP 15 WEST SOUTH TEMPLE STE 600 SALT LAKE CITY UT 84101

Date: August 23, 2010

Kristene Laterza

Deputy Court Clerk

1205