2016 IL App (1st) 15-2136-U

THIRD DIVISION
November 16, 2016

No. 1-15-2136

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

U.S. BANK NATIONAL ASSOCIATION, a national banking association, not in its individual capacity, but solely as Trustee of the Bank of America Funding Corporation Trust 2007-1, Plaintiff-Appellee, v. BASHEERA JAMES, Defendant-Appellant, Eric Stevenson; Mortgage Electronic Registration Systems, Inc.; American Home Mortgage Corp. d/b/a HLB Mortgage; Unknown Owners and Non Record Claimants, Defendants.	)	Appeal from the Circuit Court of Cook County, Illinois, Cook County, Illinois, County Department, Chancery Division. Nos. 07 CH 33713 The Honorable Lisa Marino and the Honorable Anna M. Loftus Judges Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in granting summary judgment in favor of the defendant bank on the plaintiff's rescission counterclaim, where there remained genuine issues of material

fact as to whether at the time of the closing on the refinancing of her mortgage, the plaintiff was given the correct number of disclosure forms, as mandated under the Truth in Lending Act (15 U. S. C. § 1601 *et seq*. (2006)).

¶ 2 This cause of action arises from a mortgage foreclosure action filed by the plaintiff U.S. Bank National Association, a national banking association, not in its individual capacity, but solely as Trustee of the Bank of America Funding Corporation Trust 2007-1 (hereinafter U.S. Bank) against, *inter alia*, the defendant Basheera James (hereinafter Basheera), to foreclose a mortgage on one of her properties. After Basheera counterclaimed seeking to rescind the mortgage by alleging violations of the Truth in Lending Act (TILA) (15 U. S. C. § 1601 *et seq*. (2006)), U.S. Bank moved for summary judgment on the counterclaim. The trial court granted U.S. Bank's motion, and subsequently entered a judgment of foreclosure and an order approving sale. Basheera now appeals, contending that the circuit court erred when it granted summary judgment because there remained genuine issues of material fact as to: (1) whether she received the proper number of mandatory TILA disclosures; (2) when those disclosures were delivered to her; and (3) whether the disclosures themselves complied with the Act. Basheera also contends that the trial court erred when it refused to permit her to proceed with her TILA damages claims. For the reasons that follow, we reverse and remand with instructions.

¶ 3 I. BACKGROUND

¶ 4 The record below reveals the following relevant undisputed facts and procedural history. On October 24, 2006, Basheera and her then husband, Eric Stevenson (hereinafter Eric), granted a mortgage on the property that they owned and that was located at 6826 South Cregier Avenue, in Chicago, Illinois (hereinafter the property) to secure a loan to Basheera for $532,000. In that transaction, HLB Mortgage (hereinafter HLB) was the original lender and Mortgage Electronic

Registration Systems, Inc. (hereinafter MERS), as the nominee for HLB, was the mortgagee. MERS subsequently assigned the mortgage to U.S. Bank.

¶ 5 On November 16, 2007, U.S. Bank filed a complaint to foreclose the mortgage on the property, asserting itself as the holder of the HLB loan to Basheera, and contending that Basheera had stopped paying her loan payments since May 1, 2007. A *pro se* appearance and form answer were filed on December 14, 2007, listing both Basheera and Eric as defendants. U.S. Bank moved for entry of judgment of foreclosure and sale. The circuit court granted U.S. Bank's motion on April 24, 2008, along with an order for summary judgment against Basheera and Eric.

¶ 6 On March 31, 2008, Basheera filed a motion to vacate the default judgment against her asserting that she had never filed an appearance and answer in the cause and that instead her estranged husband, Eric, had appeared in court, and made representations on her behalf, which were not in her interest. In support, Basheera offered an affidavit attesting to the fact that the signature on the appearance and answer were not hers, and attaching a copy of her Illinois Attorney Registration and Disciplinary Commission (ARDC) card with her actual signature. The circuit court granted Basheera's motion to vacate judgment, and permitted her to submit her answer and affirmative defenses.

¶ 7 After several amendments Basheera filed the operative second amended answer and affirmative defenses. Therein she denied that Eric held any ownership interest in the property. In addition, she alleged that because the originating lender (HLB) failed to provide her with the proper number of TILA disclosure statements in connection with the subject loan, under section 1635 of TILA (15 U.S.C. § 1635) and Federal Reserve Board Regulation Z (hereinafter Regulation Z) (12 C. F.R. §226.17(d)), her right to rescind the subject loan had been extended to

three years. Basheera stated that she now elected to rescind the loan and by way of her pleading notified U.S. Bank of this intent. Basheera further asserted that the rescission has the effect of voiding the mortgage, and therefore asked the circuit court to dismiss the foreclosure action.

¶ 8 In addition to her second amended answer and affirmative defenses, Basheera also filed a counterclaim for rescission. In that counterclaim, she alleged that the $532,000 loan from HLB secured by the subject property (namely, Basheera's home) was obtained for "personal family or household purposes, namely, refinancing of prior debt incurred for such purposes," and not for the initial purchase or construction of that property. Accordingly, she alleged that under TILA and Regulation Z, HLB was required to deliver to Eric and her a total of four copies of the right to cancel and two Truth in Lending Disclosure Statements (hereinafter TILA disclosure statements), but that instead, the bank gave her and Eric only two notices of the right to cancel and one TILA disclosure statement. As a result, she herself got only one copy of the right to cancel and no copies of the TILA disclosure statement to keep for her own records. As in her answer and affirmative defenses, Basheera again argued that as a result of this TILA violation, her right to rescind the loan was extended by three years, and that she now chose to exercise that right. In her prayer for relief, Basheera asked that the court enter judgment in her favor voiding the subject mortgage, and ordering the deletion of all adverse credit relating to the loan. In addition, she sought "such other relief as [the trial] Court deems just and appropriate."

¶ 9 In its response to Basheera's second amended affirmative defenses and counterclaim, U.S. Bank argued, *inter alia*, that Basheera's rescission claim "should be made subject to [her] tender of all sums otherwise due."

¶ 10 The cause proceeded with discovery, during which, *inter alia*, Basheera was deposed. In her

deposition, Basheera indicated that she was a licensed attorney, employed by the Cook County State's Attorney's Office in various positions since 2003. Basheera stated that she and Eric were married in 2006, and divorced in 2010. She and Eric lived together at the property from March or April 2006, until May 2008, when she moved out. The property is a four bedroom, two-story single-family home. Basheera has not been to the property since, and as far as she knows it is vacant. She has also not seen or communicated with Eric since their divorce and does not know his whereabouts. She was not aware that there was a lien for a water bill on the property for $1531.32.

¶ 11 Basheera explained that during her relationship and marriage with Eric, Eric held himself out to be a licensed mortgage broker, working freelance for several banks. Basheera understood that Eric helped people who did not have great credit records obtain mortgages, and also did economic development work for his family's property management company and his local church. According to Basheera, the reason she decided to divorce Eric was that many of the things he purported to tell her were not true, especially with respect to his management of the properties that she owned.

¶ 12 In her deposition Basheera admitted that she alone purchased the subject property in February 2006, and took out a mortgage with Long Beach Mortgage (hereinafter Long Beach) to do so. The mortgage was brokered by Eric and Preston Brown (hereinafter Brown), whom Eric held out to be his partner/boss. Soon thereafter Basheera and Eric were engaged and Eric moved into the property in March or April 2006. They were married on September 3, 2006. Basheera admitted that she refinanced the mortgage on the property twice, first in August 2006 with a loan from Wells Fargo Bank (hereinafter Wells Fargo), so as to obtain a fixed 30-year amortized mortgage rate, and then again in October 2006 with HLB (the loan at issue in this cause), to

"interest rate shop and get a lower monthly payment." The HLB loan paid off the Wells Fargo loan.

¶ 13 Basheera acknowledged that the first refinancing with Well Fargo was brokered by Eric (together with Brown), and that aside from skimming the document and signing it, she was not involved in the process at all. Accordingly, Basheera had no knowledge of any commissions that Eric may have received as a result of brokering the refinancing. She also did not remember personally receiving any cash proceeds from that refinancing even though the settlement document indicated that she should have received $30,558.64.

¶ 14 With respect to the instant (October 2006) HLB loan, Basheera stated that Eric alone brokered the refinancing. She acknowledged that under the terms of that loan the monthly installment was to be over $4,000. She testified, however, that because up until then, Eric had paid the mortgage payments on the property, as well as all of their bills, she believed he would be able to pay this amount. Basheera explained that she was never privy to Eric's bank accounts, but that based on his lifestyle and statements he made to her after certain property closings he had done, she assumed that he was making more than her (which was approximately $60,000).

¶ 15 Basheera acknowledged that she never made any mortgage payments on the property, and that Eric alone was responsible for them. She did not know when he stopped making the payments. She personally paid taxes on the property only in 2006 or 2007, but did not know if Eric did so afterwards. She also did not know whether the property was insured, because she personally never paid any insurance premiums on the property.

¶ 16 Basheera testified that she remembers going into a Hyde Park Chicago Title Office, running in quickly to sign some documents and then leaving in order to return to work. She could not recall, however, whether this took place as part of the August 2006 Wells Fargo or the October

2006 HLB refinancing. Basheera also stated that during those months, she signed some documents at home given to her by Eric. When asked if she took anything with her from the Chicago Title Office, she stated that she did not. She also stated, however, that she must have obtained the documents somehow (through Eric or by mail), because she had an accordion file for the property at home, which contained the closing documents inside it.

¶ 17 Basheera was next asked to identify certain documents relating to the instant October 2006 loan. She first identified the settlement statement for that loan, and acknowledged that her signature was on the loan document next to an October 24, 2006 date. Basheera stated, however, that the top of that document indicates that it was printed on October 25, 2006, and explained that she did not understand how it was possible that she would have obtained the document on October 24, 2006, if it was printed on the following day.

¶ 18 Basheera next identified the note and the mortgage for the subject loan, both of which have the October 24, 2006, date. According to the mortgage document both Eric and Basheera as "husband and wife," are listed as the "Borrower," and both of their signatures appear at the end of the mortgage document. The note and the settlement statement contain only Basheera's name and signature.

¶ 19 During her deposition, Basheera further identified copies of two TILA disclosure statements and four notices of the right to cancel all dated October 24, 2006, that she had produced during discovery. Both Basheera's and Eric's signatures are on all six documents. One of the TILA disclosures and one of the notices to rescind contain black dots at the top of the page, as if they had been whole-punched and then photocopied. The rest of the documents do not.

¶ 20 In her deposition, Basheera explained that she believed she personally received only one

copy of the notice to rescind, and one TILA disclosure statement from the title company on or around the closing date. In that respect, Basheera explained that she first became aware that she received an insufficient number of copies of the notice to rescind when she learned of the foreclosure (in 2008) in the instant matter, and began going through her documents. Basheera contacted Brown to see if he had any documents relevant to her property, and soon thereafter (around April or May 2008), he emailed her what he had. Basheera explained that at least two of the documents she produced in discovery came from Brown. She explained that although she was not sure which documents were from Brown and which were from her own accordion file, she assumed that anything with the dots on the edges (indicating a document was whole-punched and then photocopied) had come from Brown, because she did not keep her files "like that" inside her accordion folder. Basheera averred that other than the documents in her file and the ones she received from Brown, she did not obtain closing documents from any other source.

¶ 21 Basheera acknowledged that she also owns two other rental properties, located in the south side of Chicago, both of which are now in foreclosure. She explained that both properties were acquired in 2006. Both mortgages were in her name alone and brokered by Eric. Basheera testified that the properties were intended to be income properties, with tenants living at them and the rent being used to pay the mortgage. According to Basheera, Eric's family's mortgage property company managed both properties, and was responsible for both collecting the rent and then paying the mortgage. Basheera did not find out until around 2008, when both properties went into foreclosure that at some point the management company had stopped paying the mortgage on both loans. At that point, she filed for divorce from Eric. She stated that she was not filing any defenses in those two other foreclosure actions.

¶ 22 Basheera stated that once she got the notice of foreclosure on the property at issue in this

case, which was around 2008, she listed the property on the market briefly in an attempt to sell it, but was unsuccessful. She also stated that she attempted to negotiate a workout payment with the bank that held the note at that time but was unsuccessful.

¶ 23 Basheera admitted that even if she wanted to rescind the loan, at present she did not have the $500,000 in her checking account necessary to give the bank.

¶ 24 As to damages, Basheera stated that as a result of the foreclosure, her credit has been ruined and she has been hindered from certain employment opportunities that she sought, because she could not pass the background check.

¶ 25 Basheera also averred that since she does not recall which closing she attended, either of those closings (August or October) could have occurred without her presence. She also stated that it was possible that Eric signed her name to documents at those closings, by copying her signature. She explained that she suspected he had done that on other documents in the past, and pointed out to the *pro se* appearance and answered filed by Eric in the instant litigation, without her authority and copying her signature.

¶ 26 On April 10, 2013, U.S. Bank moved for summary judgment on Basheera's second amended affirmative defense and amended counterclaim. In her response, Basheera again acknowledged that separate from any copies of closing documents she received from Brown, her accordion file for the property contained only one copy of a TILA disclosure statement and "at most three copies" of a notice of right to cancel. After hearing arguments[1] by the parties, on October 16, 2014, the circuit court granted U.S. Bank's motion for summary judgment. On December 9,

[1] We note that the record below does not contain a copy of the transcript from this hearing.

2013, Basheera filed a motion for reconsideration, which was denied by the circuit court on October 20, 2014.[2]

¶ 27 On March 19, 2014, U.S. Bank filed a motion for summary judgment on its foreclosure complaint and for judgment for foreclosure and sale. On that same date, U.S. Bank also filed a loss mitigation affidavit stating that Basheera's loan had been denied for all available loss mitigation options.

¶ 28 On October 29, 2014, the circuit court granted U.S. Bank's motions. The property was sold at auction for $200,000 to U.S. Bank as the highest bidder. U.S. Bank then moved for an order approving the report of sale and distribution. Basheera objected to the motion, but the circuit court approved the sale on June 22, 2015, and entered a deficiency judgment against Basheera in the amount of $807,325.41. Basheera now appeals the trial court's order entering summary judgment on her rescission counterclaim and affirmative defenses, contending that summary judgment was improper because there remained genuine issues of material fact as to how many TILA disclosures were delivered to her, when those disclosures were delivered and whether the disclosures themselves complied with the Act.

¶ 29 II. ANALYSIS

¶ 30 It is well-settled that " '[s]ummary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt.' " *Buck v. Charletta*, 2013 IL App (1st) 122144, ¶ 56 (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill.2d 90, 102 (1992)). Summary judgment is proper when " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Palm v. 2800 Lake*

[2] We are also without a transcript from this hearing.

Shore Drive Condominium Association, 2013 IL 110505, ¶ 28 (quoting 735 ILCS 5/2-1005(c) (West 2008)); see also *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill.2d 391, 399 (2010). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record strictly against the moving party. *Happel v. Wal–Mart Stores, Inc.*, 199 Ill.2d 179, 186 (2002). "A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts." *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010) (citing *In re Estate of Ciesiolkiewicz*, 243 Ill.App.3d 506, 510 (1993), and *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995)). We review the circuit court's decision to grant or deny a motion for summary judgment *de novo*. *Palm*, 2013 IL 110505, ¶ 28; see also *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill.2d 102, 106 (2007).

¶ 31 For the reasons set forth below, we conclude that there remains a genuine issue of material fact as to whether at the time of the October 24, 2006, closing, Basheera was given a sufficient number of TILA disclosure forms, so as to have extended the window for rescinding that loan from three days to three years, thereby precluding summary judgment in favor of U.S. Bank on her counterclaim.

¶ 32 In that respect, we begin by noting that Congress enacted TILA to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. §1601(a) (2006); see *Financial Freedom Acquisition, LLC v. Standard Bank and Trust Co.*, 2015 IL 117950, ¶ 20 ("Congress enacted TILA [citation] to ensure credit terms are disclosed in a

meaningful way so consumers can readily and knowledgeably compare credit options available to them."); see also *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412 (1998). To fulfill this purpose, Congress delegated the Federal Reserve Board (hereinafter the Board) with the authority to prescribe regulations to carry out TILA. 15 U.S.C. § 1604 (2006). Pursuant to that authority, the Board enacted a comprehensive set of rules, known as Regulation Z (12 C.F.R. pt. 226 *et seq*.) In interpreting TILA, the Board's interpretations are given great deference. See *Financial Freedom Acquisition,* 2015 IL 117950 at ¶ 21; see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation [Z] should be dispositive."); see also *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981) (Board's interpretation of its own regulation should be accepted by the courts absent some obvious repugnance to TILA); see also *Lanier v. Associates Finance, Inc.*, 114 Ill. 2d 1, 14 (1986) ("Section 1640 [of TILA] evinces a clear congressional determination to treat the Board's administrative interpretations under [TILA] as authoritative."). What is more, in Illinois we construe TILA in favor of borrowers and favor "strict compliance" with the statutory requirements. See *Household Finance Corp. v. Buck*, 107 Ill. App. 3d 628, 630 (1982) ("Due to TILA's remedial nature, creditors must meet a standard of strict compliance with *** [the] technical disclosure requirements."); *Handy v. Anchor Mortgage Corp*., 464 F. 3d 760 (7th Cir. 2006) ("TILA does not easily forgive 'technical' errors."); see also *Cowen v. Bank United of Texas, FSB*, 70 F. 3d 937, 941 (7th Cir. 1995) (stating that "hypertechnicality reigns" in TILA cases).

¶ 33 TILA requires creditors to provide borrowers with " 'clear and accurate disclosures of terms

dealing with things like finance charges, annual percentage rates of interest and the borrower's rights.' " *U.S. Bank National Association v. Manzo*, 2011 IL App (1st) 193115, ¶ 21 (quoting *Beach*, 523 U.S. at 412 (citing 15 U.S.C. §§ 1631, 1632, 1635, 1638 (1994))).

¶ 34 Relevant to this appeal, the parties agree that pursuant to TILA and the corresponding Board regulations, the creditor must "deliver two copies of the notice of the right to rescind to *each* consumer entitled to rescind" as well as one "disclosure of the annual percentage rate, the finance charge, the amount finance, the total payments, the payment schedule, and the disclosure s and limitations." (Emphasis added.) 12 C. F. R. §§ 1026(b)(1), 1026(a)(3)(iii). Regulation Z specifies that where "both spouses are entitled to rescind a transaction, *each* must receive two copies of the rescission notice *** and one copy of the disclosures." (Emphasis added.) 12 C. F. R. Pt. 226, Supp. I, § 226.23(b)(1) (2011).

¶ 35 Failure to satisfy these disclosure requirements permits any consumer whose loan was secured by his or her principal dwelling to rescind the loan in its entirety within three days of receiving the disclosures. See 15 U.S.C. § 1635(a) (2006) ("in case of any consumer credit transaction *** in which a security interest *** is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor *** of his intention to do so."). The three day window is extended to three years where there has been a violation of the disclosure requirements. See 15 U.S.C. § 1635(f) (2006) ("An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the

property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor * * *."); see also *Manzo*, 201 ILL App (1st) 193115, ¶ 41 (holding that section 1365 is a statute of repose which permits rescission within three years of the transaction or sale).

¶ 36 In the present case, Basheera has presented evidence sufficient to withstand summary judgment with respect to her alleged non-receipt of the requisite TILA discourse forms at or immediately after the closing. In that respect, U.S. Bank principally contends that because Basheera signed acknowledgments of her receipt of the required disclosure forms, which were dated October 24, 2006, we should presume that she received the requisite number of disclosures. As proof of this fact, U.S. Bank points to the language at the bottom of the notice to rescind, signed by Basheera, which contains the following language, "The undersigned each acknowledge receipt of two copies of NOTCIE OF RIGHT TO CANCEL and one Copy of the Federal [TILA] Statement." In addition, U.S. Bank points to the language contained in the TILA disclosure statement, also signed by Basheera: "I/We hereby acknowledge reading and receiving a complete copy of this disclosure."

¶ 37 However, TILA makes clear that a plaintiff's written acknowledgement of receipt of disclosure is not by itself conclusive. See 15 U.S.C. § 1635(c). Section 1635 of TILA specifically states:

> "Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms and a statement is required to be given pursuant to this section *does no more than create a rebuttable presumption of delivery thereof*." (Emphasis added.).

¶ 38 While TILA and Regulation Z do not specify the quality or quantity of evidence needed to

overcome this presumption, and we have found no Illinois decision squarely addressing this issue, the Seventh Circuit has interpreted the aforementioned language as "strongly suggest[ing] that Congress was warning courts not to overrate the importance of the [signed] acknowledgement." *Marr v. Bank of America, N.A.*, 662 F. 3d 963, 967 (7th Cir. 2011). As the Seventh Circuit in *Marr* stated, "that is why [the statute] cautions that the statement 'does no more than' create the rebuttable presumption of delivery." *Marr*, 662 F. 3d at 967. Accordingly, the Seventh Circuit held that in overcoming the presumption created by a written acknowledgement so as to raise a genuine issue of fact that would make summary judgment inappropriate, the burden of persuasion does not fall on the borrower; rather, the borrower need only produce enough evidence to permit a reasonable jury to find that he or she did not receive the requisite number of disclosure forms. See *Marr*, 662 F. 3d at 967 ("the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion which remains on the party who had it originally.") (quoting Fed. R. Evid. 301).

¶ 39 A majority of federal courts that have considered this issue agree with the Seventh Circuit. See *e.g.*, *Cappuccino v. Prime Capital Funding L.L.C.*, 649 F. 3d 180, 189 (3rd Cir. 2011) (describing the borrower's burden as "*minimal*, given that the presumption's only effect is to require the party contesting it to produce enough evidence substantiating the presumed facts' absence to withstand a motion for summary judgment or judgment as a matter of law on the issue."); *Cooper v. First Government Mortgage & Investors Corp.*, 238 F. Supp. 2d 50, 64-65 (D.C. 2002) (holding that the plaintiff's deposition testimony regarding lack of receipt of disclosure "rebutted the presumption of delivery and presented *more than a scintilla of evidence* in support of their position" and therefore preclude summary judgment in favor of creditor

(citations omitted) (emphasis added)); *Stutzka v. McCarville*, 420 F. 3d 757 (8th Cir. 2005) (holding that affidavit of borrower that he did not receive any disclosures would at the very least have rebutted the presumption of delivery created by the signed acknowledgement); see also *Iannuzzi v. American Mortgage Network, Inc.*, 727 F. Spp. 2d 125, (E. D. New York, 2010) (holding that borrowers' statements asserting that they did not receive the requisite copies of their notice to rescind, despite the signed acknowledgement to the contrary were sufficient to preclude summary judgment); *Macheda v. Household Finance Realty Corp. of New York*, 631 F. Supp. 2d 181, 190-91 (N. D. New York, 2008) (holding that affidavits from plaintiffs stating that they had not each received two copies of the Notice of Right to Cancel was "sufficient to raise a question of fact barring summary judgment"); *Knapp v. Americredit Financial Services., Inc.*, 245 F. Supp. 2d 841, 849 (S.D.W.Va.2003) (holding that pursuant to section 1635(c) of TILA, a party's signed written "acknowledgment only creates a rebuttable presumption of delivery, ***, a presumption that cannot stand in the face of testimony that the [plaintiffs] left the office without the TILA disclosure form ***"); *Schumacher v. ContiMortgage Corp*., No. C. 99–160 (MJM), 2000 WL 34030847, at *3 (N. D. Iowa June 21, 2000) (noting that "[c]ourts have consistently held that a debtor's testimony that he/she did not receive the TILA disclosure statement is sufficient to rebut the presumption that he/she did."); *accord Glucksman v. First Franklin Financial Corp.*, 601 F. Supp. 2d 511, 514 (E.D. New York, (2009) (denying a motion to dismiss a TILA claim because "[a]lthough an executed delivery receipt is a hurdle to Plaintiffs' ultimate success on the merits, it is not an absolute bar to relief, but establishes only a presumption of delivery which may be rebutted upon a sufficient evidentiary showing."); *Haywood v. Fremont Inv. & Loan*, No. 08 Civ. 4961(BMC), 2009 WL 706090, at *1 (E.D.N.Y. Mar. 16, 2009) (denying a motion to dismiss a TILA claim because "[t]he plain language of the statute

recognizes that there will be instances where delivery has not occurred notwithstanding execution of an acknowledgment that it did."); *but see Lee v. Countrywide Home Loans, Inc.*, 692 F.3d 442 (2012).

¶ 40 The rationale has been that under Federal Rule of Evidence 301, a presumption in civil cases imposes the burden of production on the party against whom it is directed, but does not shift the burden of persuasion. See *Marr*, 662 F. 3d at 967 (citing Federal Rule of Evidence 301); *Cappuccino*, 649 F. 3d at 189-90 (same). In addition, the courts have looked to the TILA statute itself and noted that by its very terms section 1635(c) reveals the legislature's intent to create the weakest possible presumption. See *Marr*, 662 F. 3d at 967 ("This phrasing [of section 1635(c)] strongly suggest that Congress was warning courts not to overrate the importance of the acknowledgment; that is why it cautions that the statement 'does no more than' create the rebuttable presumption of delivery"); see also *Cappuccino*, 649 F.3d at 190 (holding that "[t]he language in § 1635(c) is intended to construct the weakest form of presumption possible," and noting other sections of TILA where the legislature by its phrasing placed a higher burden of proof on the borrower.)

¶ 41 We agree with the rationale of these decisions and see no reason why it should not apply here. This is particularly true, where in civil cases, with respect to rebuttable presumptions, Illinois courts have consistently recognized and applied the so-called "bursting bubble principle." See *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460-64 (1983). Under that principle, a rebuttable presumption creates a *prima facie* case of the particular issue involved. *Lipscomb v. Sisters of St. Francis Health Services, Inc*., 343 Ill. App. 3d 1036, 1041 (2003) (citing *Lehman v. Stephenes*, 148 Ill. App. 3d 538, 551 (1986)). Once evidence is introduced contrary to the presumption the bubble bursts and the presumption vanishes. *Lipscomb*, 343 Ill.

App. 3d at 1041 (2003) (citing *Lehman*, 148 Ill. App. 3d at 551). In order to rebut the presumption, the party against whom the presumption was asserted must then come forward with evidence sufficient to support a finding of the nonexistence of the presumed fact. *Lipscomb*, 343 Ill. App. 3d at 1041 (2003) (citing *Lehman*, 148 Ill. App. 3d at 551). Once this is done, the presumption ceases to operate and the issue in dispute must be determined as if no presumption ever existed, *i.e.*, what remains is a factual question for the finder of fact to resolve. See *In re Estate of Pawlinski*, 407 Ill. App. 3d 957, 965 (2011). On the other hand, if no evidence is introduced to the contrary, then the *prima facie* case created under the presumption will prevail and the party asserting the presumption will be entitled to judgment as a matter of law. *Lipscomb*, 343 Ill. App. 3d at 1041 (2003) (citing *Lehman*, 148 Ill. App. 3d at 551).

¶ 42 Applying the aforementioned principles to the cause at bar, we conclude that Basheera's deposition testimony was sufficient to overcome the rebuttable presumption created by her written acknowledgements of the receipt of the relevant disclosure documents. In that respect, Basheera testified that she did not take any documents with her from the title company on the date of the closing. She also stated that she believed that at some later date, either through Eric or from the title company, she personally received only one copy of the notice to cancel and one TILA disclosure statement. In support of that position, Basheera, *inter alia*, pointed to her accordion file wherein she kept all of the records for the property, and which failed to include a total of four notices of the right to cancel and two notices of the TILA disclosure (without whole punch marks), which indisputably she and Eric were entitled to. One of the documents in that accordion file was also a copy of the bank's loan settlement statement, which although containing Basheera's signature next to the October 24, 2006, closing date, revealed that it was, in fact, printed on the following day, October 25, 2006. Under this record, we find that Basheera's

introduction of her deposition testimony burst the bubble and eviscerated the presumption created by the written acknowledgment. See *e.g.*, *Horton v. Country Mortgage Services, Inc*., 2010 WL 55902 (N.D. Ill. Jan. 4, 2010); see also *Pernice-Dembosz v. Countrywide Bank, FSB*, 2008 WL 2062642, at *4-5 (N. D. Ill. May 13, 2008) (presumption rebutted where plaintiffs placed all documents received at closing into a folder and it was later discovered that the folder contained an insufficient number of notices during the discovery phase of the case); *Davison v. Bank One Home Loan Services*, 2003 WL 124542, at *4 (D. Kan. Jan. 13, 2003) (presumption rebutted where plaintiffs stored their copies of the loan documents in a notebook in a file cabinet, only to discover two years later, during a meeting with their attorney, that they received an insufficient number of disclosure statements); *Cooper*, 238 F. Supp. 2d at 64-65 (presumption rebutted by borrower's testimony that she placed the closing documents into a lockbox shortly after the closing without reading them and, when she later retrieved them, discovered the required number of disclosures were not present). Accordingly, viewing the facts in the light most favorable to Basheera, we find a genuine question of material fact remains as to whether Basheera received the required TILA disclosures.

¶ 43 U.S. Bank nonetheless contends that even taking the facts in the light most favorable to Basheera, the record below establishes that Basheera received the requisite number of notices. In support, U.S. Bank points out that Basheera's accordion file contained at least three non-whole-punched notices of the right to rescind and one non-whole punched TILA disclosure form, so that Basheera cannot complain that she herself was not in possession of a sufficient number of disclosures (namely two notices to rescind and one TILA disclosure statement). In making this argument, U.S. Bank asserts that Basheera is improperly representing Eric's interests even though he is not a party to this appeal and has no remaining interest in the property. However,

this is a red herring. The question is not how many TILA disclosures Basheera (or for that matter, Eric) were in possession of at the time of discovery, but rather whether at the time of the closing, Basheera herself was given the requisite number of disclosures as required under TILA. As already noted above, the law is clear that at the time of the closing, the creditor must "deliver two copies of the notice of the right to rescind to *each* consumer entitled to rescind." (Emphasis added.) 12 C. F. R. §§ 1026(b)(1), 1026(a)(3)(iii); see also *Financial Freedom*, 2015 IL 119750, ¶30 (holding that "the right to rescind extends to *each* consumer whose ownership interest is or will be subject to the security interest or is subject to the risk of loss.") (Emphasis added). Where "both spouses are entitled to rescind a transaction, *each* must receive two copies of the rescission notice *** and one copy of the disclosures." (Emphasis added.) 12 C. F. R. Pt. 226, Supp. I, § 226.23(b)(1) (2011); see also *Marr*, 662 F. 3d at 968 ("Although the difference between one and two copies may seem to be an empty formality, Regulation Z demands two copies. This is not a situation in which there is any room for some kind of substantial compliance rule. Two copies means two copies, not one."). The record before us, does not indisputably answer, one way or the other, which of those non whole-punched three notices to rescind and one TILA disclosure, if any, were given to Basheera, and which, if any, to Eric, at or after the closing. The fact that they were all placed in the accordion file for the property (while the parties were married) does not resolve the issue of whether Basheera herself was given the mandatory number of disclosures forms, so as to be able to proceed with her rescission claim.

¶ 44 U.S. Bank nonetheless contends that the trial court properly granted summary judgment on the rescission claim because Basheera did not establish her ability to tender the amount owed on the loan. We disagree.

¶ 45 Section 1635(b) of TILA, which governs the rescission process states in pertinent part:

"When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court." 15 U.S.C. § 1635(b) (2006).

¶ 46 Regulation Z similarly describes rescission in the following manner:

"(d) Effects of rescission.

(1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.

(2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.

(3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor ***

(4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order." 12 C.F.R. § 226.23(d).

¶ 47 Both our state and federal courts have repeatedly held that the aforementioned language of TILA and Regulation Z, make clear that the default rule is that a creditor must release its security interest in the property and return all of the borrower's payments, *before* the borrower is required to tender. See *e.g. Johnson v. Thomas*, 342 Ill. App. 3d at 398-99 ("the statute does not require the consumer to prove she had access to the contract price *** before exercising her right to rescind"); *Iroanyah v. Bank of America*, N. A., 851 F. Supp. 2d 1115, 1127 (N. D. Ill. 2012) ("the default procedures under § 1635 (b) and Regulation Z require the creditor to release its security interest and return all of the borrowers' payments before the borrower is required to tender."); see also *Regency Savings Bank v. Chavis*, 333 Ill. App. 3d 865 (2002). While it is also true that under TILA and Regulation Z, the trial court has discretion to modify the default rule and deny rescission to a party if tender is impossible for the borrower, a trial court should not do so without at least first finding a material violation of TILA occurred and then permitting the borrower an opportunity to tender or request a modification of the tender process (so as to obtain reasonable time to tender). See *Johnson*, 342 Ill. App. 3d at 399; see also *Iroanyah*, 851 F. Supp. 2d at 1127 (after consumers conceded that they were not currently able to tender, the court denied summary judgment to the creditor in order to provide the consumers time to obtain financing).

¶ 48 More importantly, in the present case, nothing in the record before us indicates that the trial court below even had an opportunity to consider tender, let alone that it actually made its summary judgment determination based on Basheera's inability to immediately tender. See *Johnson*, 342 Ill. App. 3d at 399 ("Although a court may condition rescission upon the tender of the creditor's property or the reasonable value of the work performed, pursuant to its equitable power under section 1635(b) of the TILA [citation] such a condition was not imposed in this case.") Furthermore, contrary to U. S. Bank's position, the record does not unequivocally establish that it was impossible for Basheera to tender. Basheera only testified in her deposition that she does not presently have $500,000 in her checking account so as to pay off the amount owed. She did not testify that she was unwilling to attempt to obtain financing so as to tender. In fact in her pleadings, and discovery responses, she consistently swore that she was willing and able to meet her tender obligation by seeking financing once the trial court made a finding of the amount owed, as well as by asking the court to modify the tender process. Under this record, summary judgment was premature.

¶ 49 For the reasons set forth above, we reverse and remand the trial court's orders of summary judgment on Basheera's rescission claim, the judgment of foreclosure and the order approving sale. If on remand, Basheera obtains rescission by proving to the trial court that she did not receive the adequate number of disclosure documents, the trial court should set a reasonable time by which tender must be made, and if tender is not made by that date, the trial may enter judgment for U.S. Bank on the rescission claim.

¶ 50 III. CONCLUSION

¶ 51 Reversed and remanded with instructions.