SECOND DIVISION
June 27, 2017

No. 1-16-0576

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, Plaintiff-Appellee, v. KRISTEN M. JASINSKI, WESLEY JASINSKI, KRISTEN JASINSKI, as Trustee of the Kristen M. Jasinski Trust Dated June 18, 2003, THE KRISTEN M. JASINSKI TRUST DATED JUNE 18, 2003, and NATIONAL CITY BANK, Defendants, and ROBIN ABELES, Intervenor, (Kristen M. Jasinski, Wesley Jasinski, Kristen Jasinski, as Trustee of the Kristen M. Jasinski Trust Dated June 18, 2003, and The Kristen M. Jasinski Trust Dated June 18, 2003, Defendants-Appellants).	)	Appeal from the Circuit Court of Cook County No. 09 CH 38485 The Honorables Jean Prendergast Rooney and Michael T. Mullen, Judges Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants' failure to perfect a stay of enforcement of the order approving the sale of the subject property pursuant to Illinois Supreme Court Rule 305 (eff. Jan. 1, 2004) precludes our authority to affect the right, title, and interest of

the intervening purchaser. However, we reverse the circuit court's order granting summary judgment in favor of Chase on defendants' affirmative defense where defendants timely filed their notice of rescission which voided the mortgage. We remand for further proceedings consistent with 15 U.S.C. § 1601 *et seq*.

¶ 2 Defendants, Kristen M. Jasinski individually and as Trustee of the Kristen M. Jasinski Trust Dated June 18, 2003, Wesley Jasinski, and the Kristen M. Jasinski Trust dated June 18, 2003, appeal from the circuit court's orders granting summary judgment in favor of plaintiff and approving the sale of the foreclosed property at issue. Defendants argue that the circuit court erred as a matter of law in holding that there was no Truth-in-Lending Act (TILA) violation where defendants were given inaccurate information as to the right to rescind and in holding that defendants had to file an affirmative action for rescission. Defendants also argue that summary judgment was improper because a question of fact existed as to whether Chase complied with Illinois Supreme Court Rule 114. For the following reasons, we reverse the circuit court's order granting summary judgment to Chase and remand for further proceedings consistent with 15 U.S.C. § 1601 *et. seq* (West 2012).

¶ 3 BACKGROUND

¶ 4 On November 1, 2006, Kristen M. Jasinski, individually and as Trustee of the Kristen M. Jasinski Trust dated June 18, 2003, entered into a mortgage and note in the amount of $2,783,200, with Washington Mutual (WaMu) for property located at 562 Washington Avenue, Glencoe, Illinois. In connection with this transaction, WaMu delivered to Kristen a form notice of right to rescind/notice of right to cancel. This notice stated that under federal law Kristen had three business days from: "(1) [t]he date of the transaction which is 11/1/06; or (2) [t]he date you received your Truth-in-Lending disclosures; or (3) [t]he date you received this notice for your right to cancel" to cancel the transaction. It further stated that "[i]f you cancel by mail or telegram, you must send the notice no later than MIDNIGHT of 11/01/06 (or MIDNIGHT of the

THIRD BUSINESS DAY following the latest of the three events listed above)." Kristen did not rescind within the three-day rescission period.

¶ 5 Plaintiff, JP Morgan Chase National Association (Chase), became the owner of the mortgage and note September 5, 2008. On June 1, 2009, Kristen defaulted by failing to pay the monthly installment owed on that date and thereafter.

¶ 6 On October 18, 2009, Chase filed a complaint for foreclosure against Kristen and her husband Wesley. On October 26, 2009, within three years after receiving her notice of right to cancel, Kristen sent WaMu and Chase a letter notifying them that she was exercising her rescission rights for 562 Washington Avenue, Glencoe, Illinois. Chase refused to rescind on the basis that the notice was not timely. Defendants filed an answer and affirmative defenses on March 3, 2010, alleging that at the time the note and mortgage were executed, violations of the TILA existed that rendered the mortgage and note unenforceable. Thereafter, Chase filed a motion for summary judgment as to defendants' answer and affirmative defenses, which was denied.

¶ 7 On January 3, 2012, Chase filed a second motion for summary judgment and attached a copy of the notice of the right to cancel. Defendants responded and asserted that the notice of the right to cancel violated the TILA thereby giving them an absolute right of rescission. Defendants also submitted the affidavit of Kristen, which had a copy of her timely notice of cancellation under the TILA attached. Chase responded and argued that defendants' TILA affirmative defense did not specifically allege that the notice of the right to cancel was improper because it included the wrong cancellation date.

¶ 8 On August 8, 2012, the circuit court granted Chase's motion for summary judgment as to defendants' affirmative defenses finding that the issue of rescission under the TILA had not been

properly put before the court. Defendants filed a motion for leave to file amended affirmative defenses and a motion to reconsider the order granting Chase's motion for summary judgment as to defendants' answer and affirmative defenses on September 7, 2012. Defendants' motions were denied February 8, 2013. The court found that there was no basis to reconsider the summary judgment motion because defendants' TILA claim was not meritorious.

¶ 9 On March 8, 2013, defendants filed a motion to certify questions for appeal as to whether the notice of right to cancel complied with the TILA. Chase responded and argued that the notice was TILA-compliant and furthermore, Kristen had not filed a claim within one year to enforce her alleged right to rescind and therefore the TILA claim was time barred. On July 1, 2013, the circuit court agreed with Chase and denied defendants' motion to certify "for the reasons stated in [Chase's] response brief."

¶ 10 Chase filed its motion for summary judgment on its complaint for foreclosure of mortgage and sale on January 16, 2015. Defendants opposed the motion asserting that there had been a violation of the TILA. Defendants also argued that the circuit court was previously incorrect when it ruled that Kristen was required to file an affirmative action to enforce her rescission rights under the TILA. Furthermore, defendants claimed that there was an issue of fact as to whether Chase had complied with Illinois Supreme Court Rule 114, which required a lender to comply with a loss mitigation program before moving forward with foreclosure. Defendants submitted Kristen's affidavit stating that she had received no verbal or written communication regarding available loan modification programs.

¶ 11 On May 7, 2015, the court granted Chase's motion for summary judgment on its complaint for foreclosure. The court found that although "it did not need to go there" because the notice of right to cancel was TILA-compliant, Kristen failed to timely file an affirmative

action to enforce her alleged rescission within one year of the submission of the rescission letter. Therefore, the court found that any rights relative to the TILA were forfeited. The court further found that Chase's Illinois Supreme Court Rule 114 affidavit, submitted with the motion for summary judgment, was based on personal knowledge, was factual in nature and contained a proper foundation. Subsequently, the court denied defendants' motion to reconsider the summary judgment ruling.

¶ 12 The property at issue was sold at a judicial auction on January 7, 2016. On January 11, 2016, Robin Abeles, the assignee of the successful third party bidder at the auction, filed a petition to intervene and a motion for order approving report of sale and distribution. The circuit court entered an order on January 26, 2016, granting the motion to intervene and entered an order: (1) for personal deficiency judgment against Kristen in the amount of $2,937,476.52; and (2) an order approving report of sale and distribution, confirming sale and order of possession, and directing the court-appointed sale officer, Judicial Sales Corporation, to execute and deliver a deed.

¶ 13 Defendants filed their notice of appeal on February 24, 2016, but did not seek to stay enforcement of the judgment under Illinois Supreme Court Rule 305.

¶ 14 ANALYSIS

¶ 15 At the forefront we must address plaintiff's contention that this appeal is moot. Plaintiff argues that the appeal is moot because the foreclosed property was sold at a judicial sale to a third-party bidder, Robin Abeles, and defendants failed to post a bond to stay enforcement of the order approving the sale pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004). Defendants respond and argue that the appeal is not moot and that issuance of a deed before the time to appeal has expired cannot bar a mortgagor from appealing the confirmation of sale.

¶ 16 In this appeal, defendants seek two forms of relief. First, defendants seek reversal of the order granting summary judgment in favor of Chase on defendants' affirmative defense for rescission under TILA. Second, defendants seek protection of their interest in the subject property. Defendants claim that Kristen's rescission was effective and therefore the mortgage was void and could not be foreclosed. For the reasons that follow, we find that the question of rescission is not moot, but that defendants' failure to seek or perfect a stay pursuant to Rule 305 means that we have no authority to vacate or alter the January 26, 2016, order approving report of sale and distribution, confirming sale and order of possession, and directing the court-appointed sale officer, Judicial Sales Corporation, to execute and deliver a deed to Abeles.

¶ 17 A reviewing court will not generally consider moot questions "because our jurisdiction is restricted to cases which present an actual controversy." *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 523 (2001). An appeal is moot if no controversy exists or if "events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief." *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005). In the absence of a stay, an appeal is moot if the relief sought involves possession or ownership of property that has already been conveyed to a third party who is not a party to the litigation. *Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 886 (1989). Illinois Supreme Court Rule 305(k) provides that:

> "[i]f a stay is not perfected within the time for filing the notice of appeal, *** the reversal or modification of the judgment does not affect the right, title or interest of any person who is not a party to the action or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before

the judgment is stayed." Ill. S. Ct. R. 305(k) (eff. Jan. 1, 2004).

¶ 18 Simply put, Rule 305(k) protects a third-party buyer of property from the reversal or modification of judgment regarding that property, absent a stay of judgment pending the appeal if: (1) the property passed pursuant to final judgment, (2) the right, title and interest of the property passed to a party who is not a party to the action, and (3) the litigating party failed to perfect a stay of judgment within the time allowed for filing a notice of appeal. *Steinbrecher,* 197 Ill. 2d at 523-34.

¶ 19 As to the first requirement of Rule 305(k), the property passed pursuant to a final judgment. The property at issue was sold to a third-party purchaser at the foreclosure sale who then assigned the certificate of sale to Abeles prior to the order of confirmation. Title to the property passed to Abeles pursuant to the final judgment on January 26, 2016, when the trial court entered an order approving report of sale and distribution. *Margaretten & Co., Inv. v. Martinez,* 193 Ill. App. 3d 223 (1990) (order approving a sale of foreclosed property is a final judgment).

¶ 20 Abeles is not a party to this action filed by Chase against the defendants. As to the second requirement, defendants do not set forth any argument that Abeles is not a "non-party" to the litigation entitled to protection under Rule 305(k). Although Abeles' motion to intervene was granted, it was done so in conjunction with the court's order to approve the report of sale and distribution, confirming the sale and order of possession directing the court-appointed sale officer to execute and deliver a deed to her.

¶ 21 A "party" is "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1231-32 (9th ed. 2009). Indeed, section 2-401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-401 (West 2010)) confirms that a "party" to a litigation is either one filing the action

(plaintiff) or one required to respond to it (defendant) and requires that the names of the parties must be set forth in all pleadings (735 ILCS 5/2-401(c) (West 2010)). Applying these definitions, we find Abeles is not a party to this litigation and the second requirement under Rule 305(k) is satisfied.

¶ 22 Finally, as to the third requirement, defendants do not contest that they failed to perfect a stay of the judgment. Although defendants timely appealed the January 26, 2016 order, there is nothing in the record to show that defendants ever requested or perfected a stay of the judgment at any time. The mere fact that they filed a timely appeal does not automatically stay the foreclosure judgment or order approving report of sale and distribution, confirming sale and order of possession. See Ill. Sup.Ct. R. 305(b) (mandating "[a] bond or other form of security *** to protect an appellee's interest in property."). Accordingly, we find that all three requirements for the application of Illinois Supreme Court Rule 305(k) (eff. Jan. 1, 2004) apply, and the defendants' failure to perfect a stay precludes us from granting defendants any relief in the nature of protecting their interest in the subject property.

¶ 23 Although we have found that Illinois Supreme Court Rule 305(k) is applicable here based on defendants' failure to perfect a stay, we find that the second issue on appeal is not moot. We find that defendants' failure to comply with Rule 305(k) prevents us from providing defendants any relief that would adversely affect Abeles' interest in the property. In this instance, defendants' failure to perfect a stay serves to protect Abeles from the reversal or modification of judgment regarding the property pursuant to Rule 305(k). *Steinbrecher*, 197 Ill. 2d at 523-34. Because issues still remain here with respect to Kristen's alleged rescission, we will address the merits of her rescission claim.

¶ 24 Defendants argue that they were given inaccurate information as to the right to rescind and that this failure to satisfy Truth in Lending Act (TILA) requirements extended the rescission period to three years making their October 26, 2009, notice of rescission timely. Specifically, they argue that the notice of the right to cancel given to Kristen Jasinski on November 1, 2006, contained the wrong date as to when the rescission period expired. Chase argues that the notice of the right to cancel was TILA-compliant because it followed the model form and the incorrect rescission period expiration date given had no effect on the TILA compliance of the notice.

¶ 25 TILA requires that creditors "clearly and conspicuously disclose" to obligors, their right to rescind the credit transaction in any transaction in which a security interest is retained in the obligor's principal dwelling. 15 U.S.C. § 1635(a) (West 2012). Furthermore, the creditor is required to provide the obligor with "appropriate forms" for the obligor to exercise this right to rescind. *Id*. The notice of the right to rescind shall be a separate document that "clearly and conspicuously" discloses, *inter alia*, the date the rescission period expires. 12 C.F.R. § 226.23(b). Under TILA, a consumer may exercise their right to rescission within three days if all proper disclosures are made. 15 U.S.C. § 1635(a) (West 2012). If the required disclosures are not delivered to the borrower, the right of rescission is extended to "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first." 15 U.S.C. § 1635(f) (West 2012). In order to satisfy TILA's disclosure requirements, the creditor is required to provide either the appropriate model form or a substantially similar notice. 12 C.F.R. § 226.23(b)(2). Model form H-8 is the rescission form that has been adopted and provides in relevant part:

"NOTICE OF RIGHT TO CANCEL

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

(1) the date of the transaction, which is _; or

(2) the date you received your Truth in Lending disclosures; or

(3) the date you received this notice of your right to cancel.

***

If you decide to cancel this transaction, you may do so by notifying us in writing, at (creditor's name and business address).

***

If you cancel by mail or telegram, you must send the notice no later than midnight of _ (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." 12 C.F.R § 226.23(b)(1).

¶ 26 In this case, the parties do not dispute that the second blank on the notice of the right to cancel (which closely follows the model form) was filled in with the incorrect date of the transaction, November 1, 2006, rather than the appropriate date the rescission period expired, November 4, 2006.

¶ 27 Chase argues that the lender's verbatim adherence to the model form necessitates that the notice satisfied TILA's disclosure requirements. However, TILA does not easily forgive technical errors. *Handy v. Anchor Mortg. Corp.*, 464 F.3d 760, 764 (7th Cir. 1995). Numerous courts have held that failure to complete the model form accurately and properly is a TILA

violation which gives the obligor the right to rescind within three years. See *Little v. Bank of Am., N.A.*, 769 F. Supp. 2d 954, 962 (E.D. Va. 2011) (finding a violation where the rescission deadline was left blank); *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 703 (9th Cir. 1986) (finding a violation where the expiration date of the rescission right was omitted); *Aubin v. Residential Funding Co., LLC*, 565 F. Supp. 2d 392, 395-398 (D. Conn 2008) (finding a violation where the date of the notice was incorrect and the expiration date of the rescission right was omitted). *Little* and cases like it demonstrate that simple use of the model form does not satisfy the disclosure requirements if the forms are not fully and correctly completed.

¶ 28 Chase relies on *Palmer v. Champion Mortgage*, 465 F.3d 24 (1st Cir. 2006), to support its proposition that use of the model form satisfies TILA's disclosure requirements. Contrary to Chase's argument, the facts of *Palmer* differ from the facts here. In *Palmer*, the lender had completed the form prior to mailing it but the borrower claimed the form did not arrive in the mail until after the written rescission deadline had passed. *Id*. The *Palmer* court noted that "good faith compliance with [the Federal Reserve Board's] commentary affords protection from liability under [the TILA]." *Palmer*, 465 F.3d at 29; see *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-67 (1980). Absent evidence of a good faith effort to comply with the regulations, the safe harbor for use of the model form does not apply.

¶ 29 Chase further argues that the reasoning from *Little* and *Semar* is inapplicable because the rescission deadlines in those cases were left blank whereas the deadline here was inserted, albeit incorrectly. We disagree.

¶ 30 In TILA cases, hyper-technicality reigns. *Handy*, 464 F.3d at 764. We do not agree with the reasoning that inserting the wrong date for the rescission deadline is somehow less of an error than omitting it outright. We find that the notice of the right to cancel was not compliant with

TILA requirements and defendants were therefore entitled to rescind within the three-year period. In this case, the mortgage and note were executed on November 1, 2006. Kristen sent notice that she was exercising her right to rescission on October 26, 2009. Therefore, Kristen's notice of rescission was within the three-year period as allowed by 15 U.S.C. § 1635(f) (West 2012) and was timely.

¶ 31 Chase further asserts that, even if Kristen's rescission notice was timely under 15 U.S.C. § 1635(f) (West 2012), any TILA claim is time barred because Kristen failed to move to enforce her rescission right within one year pursuant to 15 U.S.C. § 1640 (West 2012).

¶ 32 We find *Jesinowski v. Countrywide Home Loans, Inc*., 135 S. Ct. 790 (2015) instructive on the issue of enforcement. In *Jesinowski*, the Supreme Court held that the language of TILA is "unequivocal" and "leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notified within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years." *Id*. at 792. Further, the Court stated that TILA "nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter." *Id*. Courts interpreting *Jesinowski* have similarly found that section 1635 (a) does not require a lawsuit to affect a timely rescission. *Beneficial Illinois, Inc. v. Parker*, 2016 IL App (1st) 160186, ¶ 14. See also *Paatalo v. JPMorgan Chase Bank*, 146 F. Supp. 3d 1239 (D. Or. 2015) (holding that, where the unwinding process is not complete and neither party files suit within the TILA statute of limitations, *Jesinowski* directs that the rescission and voiding of the security interest are effective as a matter of law as of the date of the notice).

¶ 33 Chase cites to the provisions of 15 U.S.C. § 1640 (West 2012) for the proposed one year statute of limitations. Claims for damages arising from TILA disclosure violations must be brought within one year of the date of the occurrence of the violation. 15 U.S.C. § 1640. However, courts have repeatedly held that the one-year limitations period of section 1640 does not apply to rescission actions brought under section 1635. See *Carthan-Ragland v. Standard Bank and Trust Co.,* 897 F. Supp. 2d 706, 708 (N.D. Ill Sept. 14, 2012); *Garcia v. HSBC Bank USA, N.A.*, 2009 WL 4730961, at *3 (N.D. Ill. Dec. 7, 2009); *Basham v. Finance America Corp.*, 583 F.2d 918, 928, n.17 (7th Cir. 1978). We agree with the holdings in *Carthan-Ragland*, *Garcia* and *Basham* and find that the one-year limitations period does not apply to rescission actions brought under section 1635 and, further, Kristen was not required to bring suit to exercise her rescission right.

¶ 34 TILA provides that when a consumer rescinds a transaction, the security interest giving rise to the right of rescission "becomes void upon such a rescission." 15 U.S.C. § 1635(b) (West 2012). Given that we have found that under section 1635 defendants' rescission was effective on the date that she gave notice, the grant of summary judgment in favor of Chase was error. We reverse the grant of summary judgment in favor of Chase and remand to the circuit court for further proceedings consistent with 15 U.S.C. § 1601 *et seq*. (West 2012), to resolve issues that remain between the parties, Chase and the defendants, as a result of the rescission, if any. The judgment of foreclosure and sale and the order approving report of sale and distribution, confirming sale and order of possession, and directing the court-appointed sale officer, Judicial Sales Corporation, to execute and deliver a deed to Abeles remain in full effect pursuant to Rule 305(k). In the interest of judicial economy, we remand specifically to Judge Mullen given his understanding of the factual underpinnings of this case.

¶ 35 CONCLUSION

¶ 36 Based on the foregoing, the circuit court's order granting summary judgment to Chase is reversed. Appellants' rescission was effective when made. We remand to Judge Mullen for further proceedings consistent with 15 U.S.C. § 1601 *et seq*. (West 2012).

¶ 37 Reversed and remanded.