

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-10187-JMD
Chapter 13

Matthew Skwozinski,
Debtor

United Companies Lending Corp.,
Movant

CM No. 00-637

v.

Matthew Skwozinski,
Respondent

United Companies Lending Corp.,
Movant

CM No. 00-638

v.

Kathleen Skwozinski and Roberta Skwozinski,
Respondents

Marc Van De Water, Esq.

THOMAS, UTELL, VAN DE WATER & RAICHE, P.A.

Attorney for Debtor, Kathleen Skwozinski, and Roberta Skwozinski

Gary Burt, Esq.

WIGGIN & NOURIE, P.A.

Attorney for United Companies Lending Corp.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On May 24, 2001, the Court held an evidentiary hearing regarding a Motion for Relief from Automatic Stay Pursuant to 11 U.S.C. §362 and a Motion for Relief from Co-Debtor Stay Pursuant to 11 U.S.C. §1301(c) (collectively the “Motions”), filed by United Companies Lending Corp. (“UC Lending”). In response to the Motions the Debtor, Matthew Skwozinski (the “Debtor”), the Debtor’s spouse, Roberta

Skwozinski (the “Co-Debtor”), and the Debtor’s mother, Kathleen Skwozinski (collectively the “Skwozinskis”) filed responses asserting that they had rescinded the loans in question. See Doc. Nos. 29 and 30. All parties had indicated in their respective papers, and at the beginning of the hearing, that the Court could treat the evidentiary hearing as a hearing on the merits of the Skwozinskis’ claims that the loans had been rescinded. See, e.g., Doc. Nos. 29, 30, and 51. A decision on the merits regarding rescission may affect the validity of a lien which would ordinarily require an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001. As the parties have agreed to have the Court make a decision on the merits, to the extent necessary, the Court has treated these contested matters as an adversary proceeding with the Skwozinskis as the Plaintiffs and UC Lending as the Defendant. After an evidentiary hearing the Court took the matters under submission.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor needed cash to pay some back taxes and make repairs to a business property he and his wife owned. Accordingly, he discussed the possibility of obtaining a loan with UC Lending. The Debtor’s contact person at UC Lending was Michael Couture (“Couture”), a loan originator for UC Lending. According to Couture, in order to obtain all of the money necessary to do the repairs and pay the back taxes it was necessary for the Debtor to mortgage his personal residence in addition to mortgaging his business property. In addition to discussing loans on those properties, discussions also took place regarding the possibility of the Debtor’s mother, Kathleen Skwozinski, obtaining a mortgage loan on her home.

On March 27, 1997, the Debtor, Co-Debtor, and the Debtor’s mother signed closing documents and notes on three loans from UC Lending. As security for the loans UC Lending was granted mortgages

on the Debtor's home, his business property, and his mother's home. The Debtor and the Co-Debtor signed a mortgage for a business property they owned at 102 Blaine Street in Manchester, New Hampshire ("Blaine Street"). The Debtor and his mother signed a mortgage for the Debtor's residence located at 440 Gold Street, Manchester, New Hampshire ("Gold Street").¹ On the same day, Kathleen Skwozinski also signed a mortgage on her personal residence located at 231 Sewall Street, Manchester, New Hampshire ("Sewall Street"). All three closings took place at the same time in Attorney Victor Dahar's office. The Skwozinskis, Attorney Dahar, and Couture were all present at the closing on all three loans.

The Skwozinskis all testified that at the closing there was a myriad of papers being passed around the table for signature and a log jam developed due to the Debtor's attempt to thoroughly read all of the papers before signing them. It was at this point that Attorney Dahar made a statement regarding rescission of the loans. The exact statement made by Attorney Dahar is the subject of some dispute. The Skwozinskis' testimony was that when the log jam developed Attorney Dahar told the Debtor that they would be there all night if the Debtor attempted to read all of the documents. The Skwozinskis testified that Attorney Dahar told the Skwozinskis that they had three days to rescind the loans so the Debtor could take all of the paperwork home and read it. Couture's testimony is somewhat different. While Couture agrees that Attorney Dahar made a statement regarding rescission of the loans, Couture specifically remembers Attorney Dahar saying that the Skwozinskis had three days to rescind on the owner occupied properties. Couture further testified that the Debtor knew prior to the day of the closing that there was not a right of rescission on the Blaine Street property.

The sequence of events taking place after the March 27, 1997, closing is the subject of much debate. According to the testimony of the Skwozinskis the following events took place in the days after the closing. After the closing, the Debtor went home and was organizing all of the papers when he discovered

¹ Although no evidence was presented on whether the Debtor's spouse also signed the Gold Street mortgage in order to waive her homestead right against UC Lending, the Court assumes that she did execute that mortgage.

that there were no rescission papers for the Blaine Street property. As it was too late in the day to get in touch with Attorney Dahar, the Debtor went to Attorney Dahar's office the next day, March 28, 1997, to ask about the missing rescission papers. The Debtor was told at Attorney Dahar's office that he would need to talk to UC Lending about the missing papers.

The Debtor testified that he went to UC Lending on March 28, 1997, to inquire about the missing papers. According to the Debtor, Couture told him not to worry about the fact that there were no rescission papers for the Blaine Street property. Couture indicated to the Debtor that the Gold Street and Blaine Street properties were a package deal and that rescission of the Gold Street loan would automatically rescind the Blaine Street loan. Couture then asked the Debtor if he was thinking about rescinding the loans. The Debtor responded by saying that it was a possibility. Couture then asked the Debtor whether he would keep the loans if the tax escrow was dropped from the loans. The Debtor responded by saying that he did not know if he would keep the loans under those circumstances.

Over the weekend the Skwozinskis decided to rescind all three loans. Roberta Skwozinski testified that she signed the rescission papers for the Blaine Street property over the weekend and her husband, the Debtor, took them to the UC Lending office on Monday.² Kathleen Skwozinski testified that she signed her rescission papers on Sunday, March 30, 1997. The Debtor testified that he too signed the rescission papers for the loans. The Debtor specifically testified that there were no papers to sign for the Blaine Street property.

On Monday, March 31, 1997, the Debtor drove himself and his mother, Kathleen Skwozinski, to the UC Lending office to deliver the rescission papers. Kathleen Skwozinski testified that she did not look

² The evidence established that the Co-debtor only signed the documents pertaining to the loan on the Blaine Street property and that no "Notice of Right of Rescission" form was delivered in connection with that loan because it was not an owner occupied residence. Accordingly, there does not appear to have been any rescission documents which required her signature. Since she likely signed the mortgage on the Gold Street property in order to waive her homestead right, she may have signed the notice of rescission for the Gold Street loan. See note 1 above. In any event, her testimony supported the testimony of the Debtor regarding the discussions over the weekend prior to March 31, 1997, and that she signed some document.

at the papers the Debtor had brought with him, but that she saw the Debtor take her papers and his papers into the UC Lending office while she waited in the car. She also testified that when the Debtor came back out of the UC Lending office he did not have any papers in his hands. With regards to what happened inside the office, the Debtor testified that he went into the office, gave Couture the rescission papers, and then returned to the car. According to the Debtor, little to no conversation took place between Couture and himself while he was delivering the rescission papers. The Debtor stated that he did not get a receipt for the papers he delivered because the directions at the bottom of the rescission notice indicated that all he needed to do was deliver the papers to UC Lending.

According to the Debtor, he next visited the UC Lending office on April 2, 1997, after he received loan distribution checks in the mail. The Debtor was concerned about receiving checks for the loan proceeds on the Gold Street and Blaine Street loans since he had rescinded the loans on March 31, 1997. The Debtor took the checks and copies of the rescission papers with him to the UC Lending office to talk to Couture. When the Debtor attempted to discuss the matter with Couture, Couture allegedly took the copies of the rescission papers the Debtor had brought with him, threw them away, and told the Debtor to deal with the loans the way they were or to get counsel.

Couture's account of the events after the March 27, 1997, closing is somewhat different than the Debtor's. According to Couture, on March 31, 1997, the Debtor contacted him and indicated that he was concerned about the tax escrow. The Debtor indicated to Couture that he would rescind the loans if the tax escrow was not waived. Couture filled out a tax escrow waiver that same day and got the document approved by the appropriate person. See Exhibit 7. Couture then called the Debtor to tell him the tax escrow had been waived and that everything was all set.

The next time Couture heard from the Debtor was at 3:30 p.m. on April 2, 1997, when the Debtor came to the UC Lending office to attempt to rescind the Gold Street and Blaine Street loans. Couture alleges that he attempted to explain to the Debtor that it was too late to rescind on the Gold Street loan, and that there was no three day right of rescission on the Blaine Street loan. As proof of the date and time that

the Debtor had come into the office, UC Lending entered into evidence an envelope that had Couture's hand written note indicating that the envelope was delivered in person at 3:30 p.m. on April 2, 1997. See Exhibit 7. Couture testified that since he knew it was too late for the Debtor to rescind the loans, he marked down the date and time on the envelope the Debtor had left with him when he came into the office on April 2, 1997.

III. DISCUSSION

A. Rescission of the Gold Street Loan

On a motion for relief from the stay the party opposing the relief has the burden of proof on all matters other than the debtor's equity in the property. 11 U.S.C. § 362(g). Accordingly, the Skwozinskis must prove their defense to the Motions by a preponderance of the evidence. See In re Gant, 201 B.R. 216, 224 (Bankr. N.D. Ill. 1996); In re Ascher, 146 B.R. 764, 771 (Bankr. N.D. Ill. 1992); In re Wasserman, 122 B.R. 839, 842 (Bankr. D. Mass. 1991). The parties have agreed to treat this matter as a hearing on the merits in an adversary proceeding to determine whether there was a valid rescission of the loans. In such an adversary proceeding the Skwozinskis, as plaintiffs, would have the burden of proof on the issue of rescission and the Court has found nothing in the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, indicating any different burden of proof. Accordingly, the Skwozinskis must prove that they properly rescinded the loans in question by a preponderance of the evidence.

In an assented to pre-trial statement the parties have agreed that there is a factual dispute over whether the loans on the Gold Street and Blaine Street properties were properly rescinded. All parties agreed at trial, however, that March 31, 1997, was the last day upon which the loan for the Gold Street property could be rescinded and that the Sewall Street loan was timely rescinded by the Debtor's mother. UC Lending asserts that the notice of rescission of the Gold Street loan was not delivered within the statutory time frame and that there was never a right of rescission for the loan secured by the non-residential Blaine Street property. The Debtor and the Co-Debtor assert that the rescission was done in a timely

manner and that UC Lending is equitably estopped from claiming that there was no right of rescission on the Blaine Street property.

The Debtor claims that he delivered all of the rescission notices to Couture on Monday, March 31, 1997. While the Debtor's mother, Kathleen Skwozinski, did ride in the car with him to the UC Lending office on March 31, 1997, she testified that she did not look at the papers the Debtor had with him and took into the office. We know that the Debtor delivered Kathleen Skwozinski's papers for Sewall Street, as that loan was rescinded by UC Lending and Kathleen testified that she gave the Debtor the papers and he took them inside. We also know from Kathleen Skwozinski that the Debtor took some other papers into the UC Lending office and that he did not come back out of the office with those papers.

UC Lending has provided no explanation for the "other papers" that the Debtor took into the office. UC Lending claims that the rescission papers for Gold Street were not delivered until April 2, 1997. Yet, the evidence established that the Debtor's mother signed rescission papers on or before March 31, 1997, and that the Debtor took his mother's papers, and other papers, into the UC Lending office on the afternoon of March 31, 1997, and returned without any papers. UC Lending concedes that the Debtor's mother timely rescinded the Sewall Street loan. If the "other papers" that the Debtor delivered to UC Lending on March 31, 1997, were not rescission papers for the Gold Street loan, as the Debtor claims, then what were they and what happened to them?

As previously noted, UC Lending, through the testimony of Couture, has claimed that the Gold Street rescission papers were not delivered on March 31, 1997, as the Debtor claims, but were delivered on April 2, 1997. In support of its position UC Lending entered two exhibits into evidence. First, UC Lending entered into evidence the envelope upon which Couture wrote the date of April 2, 1997, and the time of 3:30 p.m., which supported Couture's testimony that the rescission papers were delivered on April 2, 1997, and not March 31, 1997. See Exhibit 3. The second exhibit UC Lending entered into evidence to support its position was the Waiver of Pre-Payment Penalties and Escrow Accounts dated March 31, 1997, which

tended to support Couture's testimony that on March 31, 1997, the Debtor had indicated he would rescind the loans if the tax escrow was not waived. See Exhibit 7.

Of course, neither Exhibit 3 nor Exhibit 7 conclusively proves that the notice of rescission of the Gold Street loan was first delivered on April 2, 1997. UC Lending did not produce the rescission papers that the Debtor allegedly brought into the office on April 2, 1997. Instead, UC Lending produced an envelope upon which Couture had handwritten the date and time that the Debtor had come into the office. If the Debtor did in fact deliver the rescission papers on April 2, 1997, then what happened to them? Further, the envelope could have contained anything. An examination of Exhibit 3 shows that the envelope had been sent from Attorney Dahar's office and contained a postage meter postmark dated April 1. Accordingly, it appears likely that the envelope originally contained checks for the loan proceeds on the Gold Street and Blaine Street loans that the Debtor testified he received on April 2, 1997, and immediately took to UC Lending to find out why he had received checks when the loans had been rescinded. Finally, the date on the waiver of the tax escrow paper only shows that the waiver was approved on March 31, 1997, not that the request was made on March 31, 1997.

Based upon the above facts the Court finds that the Skwozinskis have met their burden of proof with respect to rescission of the Gold Street loan.³ The Debtor's testimony that the notice of rescission was properly executed for the Gold Street loan and was timely delivered to UC Lending is supported by other evidence. Further, UC Lending failed to produce any concrete evidence to rebut the evidence submitted by the Debtor. The Court finds it hard to believe that when faced with a borrower who was attempting to rescind a loan in an untimely manner that UC Lending would not have taken some step to mark the date and the time on the actual notice of rescission that the borrower attempted to deliver late.

Although the Debtor may have not have understood every legal nuance and detail of the loan transactions, the evidence established that he understood the concept of rescission and that he placed great

³ No receipt for any notice of rescission was offered into evidence by any party. However, federal law does not require the borrower to obtain a receipt.

significance on his right to read the loan documents and reconsider the loans after the closing. He believed that his spouse and his mother were relying on his judgment in agreeing to the terms of the loans. The Debtor initially insisted on reading all of the loan documents at the closing and only relented under pressure and when he was told that he had three days to look everything over. The Debtor then went home and organized the papers that evening. As a result, he discovered that he did not have a notice of right of rescission for the Blaine Street loan. The Debtor then went the very next day to find out why he did not have the papers. Further, the Debtor claims that the notice of rescission on the Gold Street and Sewall Street loans were executed on or before March 31, 1997, and were hand delivered to the UC Lending office on Monday, March 31, 1997. Couture admits that the Debtor did come into the office that day and UC Lending concedes that the Sewall Street loan was timely rescinded. Lastly, as soon as the Debtor received the loan proceed checks on the Gold Street and Blaine Street loans on April 2, 1997, he immediately went to the UC Lending office to find out why he had received the checks, a fact supported by the handwritten date on the envelope entered into evidence as Exhibit 3.

UC Lending presented no evidence or business records which contradict the Debtor's evidence other than the Couture's testimony of his recollection of the events. The Debtor's testimony was supported by other testimony and is consistent with UC Lending's admission on rescission of the Sewall Street loan and the return of the checks for the proceeds of the Gold Street and Blaine street loans. UC Lending did not present any testimony from its closing attorney or any business records which would support its position. The Court does not understand why a lender engaged in the business of refinancing mortgage loans subject to a borrower's right of rescission under federal law would not have in place procedures and records which would document the time of receipt for notices of rescission. If UC Lending has any such procedures and records, they did not offer them into evidence. Accordingly, the Court finds that the Gold Street loan was properly rescinded.

B. Rescission of the Blaine Street Loan

Since the Court has found that the Debtor properly rescinded the Gold Street loan, the Court must now examine the Debtor's claim that there was a right to rescind the Blaine Street loan under the doctrine of equitable estoppel.⁴ In order to succeed under the doctrine of equitable estoppel the Debtor must show: (1) there was a material misrepresentation by UC Lending of a fact that UC Lending had reason to know was false, (2) the Debtor reasonably relied upon the misrepresentation, and (3) the Debtor was disadvantaged by the misrepresentation. See Falcone v. Pierce, 864 F.2d 226, 228 (1st Cir. 1988). The party asserting equitable estoppel bears the burden of proof on each element. See K-Mart Corp. v. Oriental Plaza Inc., 875 F.2d 907, 912 (1st Cir. 1989).

In this particular case the Debtor claims that he was told by Attorney Dahar at the closing that he could take the loan papers home and read them because he had a three day right of rescission on the loans. The Debtor has further claimed that when he discovered there were no rescission papers for the Blaine Street loan he asked Couture about the matter and was told that Blaine Street and Gold Street were a package deal and rescinding Gold Street would automatically rescind the Blaine Street loan. Accordingly, the Debtor claims that UC Lending is estopped from now claiming that he had no right to rescind the Blaine Street loan.

UC Lending, however, disagrees with the Debtor's testimony and points out that the Debtor has no right to rescind the Blaine Street loan under the Truth in Lending Act. Further, there is Couture's testimony that the Debtor was only told by Attorney Dahar that he had a right to rescind on the owner occupied properties. Finally, Couture claims that he at no time told the Debtor that there was a right to rescind the Blaine Street loan. In fact, Couture claims that the Debtor knew prior to the closing that there was no right of rescission on the Blaine Street loan.

The Court will first address UC Lending's claim that the Blaine Street loan is not subject to rescission because the loan does not fall under the auspices of the Truth in Lending Act. While the Court

⁴ The Court notes that in objecting to the Motion for Relief from Co-Debtor Stay, the Co-Debtor and Kathleen Skwozinski made the exact same claims as the Debtor. Therefore, for the sake of clarity the Court will refer only to the Debtor when discussing the Blaine Street property.

agrees that under federal Truth in Lending laws UC Lending is not required to offer a three day right of rescission on commercial property, federal law does not prohibit UC Lending from agreeing to a right of rescission. See 15 U.S.C.S. § 1635 (Law. Co-op. 1993 and Supp. 2001); 12 CFR 226.23 (LEXIS through April 19, 2001). Accordingly, the Court must determine whether UC Lending made a representation to the Debtor that he could rescind the Blaine Street loan.

Given the testimony at trial, the Court finds that while the Blaine Street and Gold Street properties may have been the subject of separate loans they were in fact being treated by UC Lending as a package deal. Couture testified that in order for UC Lending to grant the Debtor's loan request for his business property it needed additional collateral. The additional collateral was obtained through the refinancing and mortgage of the Debtor's home, the Gold Street property. There was simply not enough equity in the Blaine Street property for UC Lending to loan to the Debtor all of the money that was needed to repair the property and pay the back taxes. Couture told the Debtor that without Gold Street, the Blaine Street property alone could not support the requested loan. Therefore, UC Lending was taking the position that for all practical purposes the Blaine Street and Gold Street loans were one package. The Debtor's understanding that the Blaine Street and Gold Street loans were a package was clearly confirmed at the closing. After hearing Attorney Dahar's statement regarding rescission⁵ the Debtor ceased reading the loan documents and signed them. Couture knew or should have known at that point that, due to UC Lending's treatment of the loans as a package, the Debtor thought he could rescind the Blaine Street loan or that rescission of the Gold Street loan would constitute rescission of the Blaine Street loan.

As further evidence that the Gold Street and Blaine Street loans were being treated as a package, the Court notes that the Blaine Street loan proceeds were not disbursed immediately after the closing, but were held back and were disbursed at the same time as the Gold Street loan proceeds. If the Blaine Street

⁵ The Court makes no finding as to whether Couture's or the Debtor's testimony is correct with regards to the actual statement made by Attorney Dahar because, due to UC Lending's packaging of the loans, the exact words used by Attorney Dahar are irrelevant.

loan was not part of a package deal with the Gold Street loan and rescission of the Gold Street loan would not affect the Blaine Street loan, then the Blaine Street loan proceeds should have been disbursed immediately. The fact that the loan proceeds for the Blaine Street loan were held until the three day right of rescission period had passed for the Gold Street loan indicates that the Blaine Street loan was in fact being treated by UC Lending as part of a package that included the Gold Street loan.

Accordingly, the Court finds that UC Lending, through its actions, represented to the Debtor that the Blaine Street loan was dependant upon the Gold Street loan. The Court further finds that such a representation by implication means that there was a right of rescission on the Blaine Street loan via rescission of the Gold Street loan. Finally, as UC Lending is now claiming that the Debtor had no right to rescind the Blaine Street loan, its representation to the Debtor that the loan was part of a package with the Gold Street loan was misleading. Therefore, the Debtor has proven that UC Lending made a misrepresentation of a fact that it knew to be false.

The Court must now examine the remaining two elements of equitable estoppel. Even if Attorney Dahar stated at the closing that there was a right of rescission on the owner occupied properties, such a statement would apply to the Blaine Street loan due to the representation made by UC Lending. The Debtor obviously relied upon the representations by UC Lending and their agent, Attorney Dahar, that he could rescind the Blaine Street loan when he signed the loan documents, as he stopped reading the loan papers at the closing and simply signed them after Attorney Dahar's statement. The Court was not presented with any evidence indicating that the Debtor knew or should have know that UC Lending's statements were not true. Accordingly, the Court finds that the Debtor reasonably relied upon the representation made by UC Lending. Finally, the Debtor has been harmed by the representation because UC Lending now claims that the Debtor cannot rescind the Blaine Street loan because it is a non-owner occupied property that is not subject to the Truth in Lending Act. For these reasons, the Court finds that the Debtor has met his burden of proof on the final two elements of equitable estoppel. As the Debtor has

met his burden of proof on all three elements of equitable estoppel, UC Lending is estopped from claiming that the Debtor could not rescind on the Blaine Street loan.

IV. ORDER

Based upon the findings and rulings and the reasons set forth in this memorandum opinion, it is hereby ORDERED:

1. The Skwozinskis timely rescinded the Gold Street and Blaine Street loans.
2. UC Lending's Motion for Relief from Automatic Stay and Motion for Relief from the Co-Debtor Stay are **denied**.
3. The Court shall schedule a further hearing to determine the conditions under which the rescission of the Gold Street and Blaine Street loans shall be implemented and the amount of UC Lending's claim in this Chapter 13 proceeding. See Lynch v. GMAC Mortgage Corp. of Iowa (In re Lynch), 170 B.R. 26 (Bankr. D.N.H. 1994).

This opinion and order constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 18th day of July, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge