

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>VERNON J. COOK,</b>	)	
<b>VIKKI RAMEY-COOK,</b>	)	<b>Civil Action No. 7:03CV00686</b>
<b>Plaintiffs,</b>	)	
	)	<b><u>MEMORANDUM OPINION</u></b>
<b>v.</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>AAMES FUNDING CORP., et al.,</b>	)	<b>United States District Judge</b>
<b>Defendants.</b>	)	

Vernon J. Cook and Vikki Ramey-Cook (“Cooks”) borrowed for the purpose of purchasing a house over \$200,000 from Aames Funding Corporation (“Aames”), a mortgage later assigned to EMC Mortgage Corporation (“EMC”), and have been in default since the loan’s origination. Twenty months after closing on the loan, EMC attempted foreclosure, and the Cooks filed this action seeking both damages and rescission of the loan for alleged violations of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.* This action is currently before the court on Aames’s and EMC’s motions to dismiss, and, for the reasons stated, the court grants the motions to dismiss as to the Cooks’ claims for damages, but denies them as to the Cooks’ claim for rescission.

**I.**

Aames provided a \$206,500 first mortgage to the Cooks on February 9, 2002,<sup>1</sup> and later assigned the mortgage to EMC. Although there is some dispute over whether the Cooks’ initial payment was timely, it is uncontested that since the loan’s origination they have tendered only three

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<sup>1</sup> Although all loan documents are notarized and dated January 26, 2002, the Cooks allege that the closing actually occurred on February 9, 2002. Although Aames and EMC contest the Cooks’ allegation, for the purposes of this motion, the facts are viewed in the light most favorable to the Cooks.

payments and twice filed for bankruptcy. EMC attempted to foreclose in October 2003, and the Cooks filed for a temporary restraining order in state court, which they voluntarily dismissed, and this current action, which alleges violations of TILA. Both EMC and Aames now move to dismiss the Cooks' complaint.

In a May 3, 2004, hearing, the parties agreed that the Cooks owed over \$45,000 on the loan to date and that the Cooks had 10 days to pay the arrears. The Cooks have yet to tender any of that amount. Accordingly, the court now considers the motions to dismiss, and, for the reasons stated, grants the motions in part and denies them in part.

## II.

The Cooks claim actual and statutory damages and also seek rescission of the loan. Aames and EMC moved to dismiss the complaint, alleging that any claim for damages is time-barred and that rescission is unavailable because the Cooks are unable to return the money loaned to them.<sup>2</sup> To the extent Aames and EMC move to dismiss the claims for damages, the motions are granted because the claims are barred by the TILA's statute of limitations. However, to the extent the motions seek to bar the claim for rescission, the motions are premature and, therefore, the court denies them.

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<sup>2</sup> The defendants also claim that the complaint should be dismissed because the Cooks failed to join Mary Cecil, the closing agent and notary public, as a necessary party and because the Cooks dismissed with prejudice their application for a temporary restraining order in state court. To the extent the defendants rely on these arguments, their motions are denied. First, although Cecil may have been "an integral part of the loan transaction," the defendants fail to demonstrate, or even attempt to demonstrate, how Cecil's absence precludes complete relief among the parties. See Fed. R. Civ. P. 19(a)(1). Second, presumably relying on *res judicata* to assert that the state action bars the current claims, defendants fail to show how the federal and state actions are based on the same causes of action. See *Pittston, Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999). Accordingly, at this juncture, the defendants' arguments fail.

**A.**

The Cooks' claims for damages are time-barred.<sup>3</sup> TILA allows damages only if a claim is filed within one year of the loan's closing. 15 U.S.C. § 1640(e). Here, according to the Cooks, the loan closed on February 9, 2002, but they did not file their complaint until October 22, 2003. Accordingly, to the extent the Cooks seek damages for violations of TILA, Aames's and EMC's motions are granted.<sup>4</sup>

**B.**

Aames and EMC challenge the claim for rescission by asserting that the Cooks are unable to return the amount tendered to them as required by TILA.<sup>5</sup> See 15 U.S.C. § 1635(b). Aames and EMC claim that the court need not reach the decision of whether rescission is warranted because the Cooks are unable to comply with their rescission obligations. See Yamamoto v. Bank of New York, 329 F.3d 1167, 1173 (9th Cir. 2003) (upholding a district court's dismissal of a claim for rescission, even where there was a triable issue of fact, when the borrower failed to comply with a condition of the court to tender the proceeds within sixty days after the court denied summary judgment). Without

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<sup>3</sup> Although actual claims for damages are barred, to the extent the Cooks seek "damages" associated with their claim for rescission, such as attorneys fees, costs, and finance charges, their claim for damages is not barred. See 15 U.S.C. § 1640(a)(3).

<sup>4</sup> The Cooks claim that the one-year statute of limitations does not apply to "a matter of defense or recoupment to an action to collect a debt brought more than one year after the closing..." Regardless of the validity of this assertion, the Cooks filed this action seeking damages and did not assert the claims as a defense of recoupment or set-off to a claim by EMC or Aames. Accordingly, the claims for damages are barred.

<sup>5</sup> The Cooks base their claim for rescission on the allegation that Aames never provided a copy of the "loan settlement documents," various disclosure documents, or a notice of right to cancel.

passing judgment on whether a court in the Fourth Circuit may impose conditions on rescission *before* passing judgment on the underlying claim, any condition that a court places on rescission depends on the equities of a particular case. See Powers v. Simms, 542 F.2d 1216, 1221-22 (4th Cir. 1976) (“Rescission is an equitable doctrine,” and “when rescission is attempted under circumstances which would deprive the lender of its legal due, the attempted rescission will not be judicially enforced unless it is so conditioned that the lender will be assured of receiving its legal due.”). In this case, however, no party has filed affidavits, depositions, or other evidence examining the equities in this case or the merits of the underlying claim. Accordingly, it is premature for the court to consider the equities in the case, and the court denies Aames’s and EMC’s motions on this claim.

### **III.**

For the foregoing reasons, the Cooks’ claims for damages are time-barred, and Aames’s and EMC’s motions on those claims are granted. The motions to dismiss the claim for rescission, however, are denied.

**ENTER:** This \_\_\_\_ day of June, 2004.

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UNITED STATES DISTRICT JUDGE

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<b>VERNON J. COOK,</b>	)	
<b>VIKKI RAMEY-COOK,</b>	)	<b>Civil Action No. 7:03CV00686</b>
<b>Plaintiffs,</b>	)	
	)	<b><u>ORDER</u></b>
<b>v.</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>AAMES FUNDING CORP., et al.,</b>	)	<b>United States District Judge</b>
<b>Defendants.</b>	)	

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the defendants' motions to dismiss are **GRANTED** on the Cooks' claim for damages and **DENIED** on the claim for rescission.

The Clerk of the Court is directed to send certified copies of this Order and the accompanying Memorandum Opinion to the counsel of record for the plaintiff and the defendants.

**ENTER:** This \_\_\_\_ day of June, 2004.

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UNITED STATES DISTRICT JUDGE