COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1297 **Cir. Ct. No. 2008CV153**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WATERSTONE BANK SSB F/K/A WAUWATOSA SAVINGS BANK,

PLAINTIFF-RESPONDENT,

V.

KIMBERLY A. PANENKA,

DEFENDANT-APPELLANT,

MERS AS NOMINEE FOR COUNTRYWIDE HOME LOANS, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Kimberly A. Panenka appeals from a judgment granting WaterStone Bank SSB a judgment of foreclosure against her and determining the amount rescindable under a 2007 refinance transaction. Panenka argues that WaterStone did not provide acceptable disclosure of her right to rescind because the bank's modified form was not "substantially similar" or "comparable" to federal Truth-in-Lending Act[1] (TILA) model forms. She also challenges the offset application, the calculation of interest and attorney fees, the court's denial of damages and its refusal to extend the period of redemption. For the reasons set forth below, we affirm the judgment.

¶2 The material facts are undisputed. On January 12, 2007 WaterStone made a loan to Panenka pursuant to a note secured by a mortgage on Panenka's property in Chenequa, Wisconsin. This transaction refinanced a 2006 loan from WaterStone to Panenka which, in turn, had refinanced a 2003 loan between the parties. The 2007 refinancing provided $90,765.90 in excess of the unpaid principal balance of $2,095,637.40. In December 2007 Panenka defaulted on the mortgage and WaterStone commenced a foreclosure action. As affirmative defenses Panenka asserted half a dozen federal mortgage lending regulation violations, TILA among them, and stated that "rescission rights may be asserted."

¶3 WaterStone moved for summary judgment. Panenka filed a pro se brief and affidavit in response to the motion, again alleging TILA violations. In particular, she alleged that WaterStone understated by $226 the finance charges due at the consummation of the 2007 loan. She obliquely noted that "the

[1] *See* 15 U.S.C. §§ 1601 *et seq.* (2010). Citations to TILA provisions will take the form "TILA § --," using the Title 15 numbering but omitting the prefatory "15 U.S.C." All references to the United States Code are to the 2010 version.

consumer may exercise the right of rescission if the disclosed finance charge is understated by more than $35.00," *see* TILA § 1635(i)(2), but did not unequivocally state her intent to do so. Panenka then retained counsel, who filed a supplementary affidavit clarifying Panenka's intention to rescind both the 2006 and 2007 loans due to being improperly advised of her right to cancel. The trial court struck the affidavit as untimely and denied WaterStone's motion for summary judgment.

¶4 WaterStone filed a motion for reconsideration in which it conceded the finance charge error. The court permitted Panenka to rescind the principal, interest and costs paid on the portion of the 2007 loan over the amount necessary to repay the 2006 loan but concluded that the 2006 loan was not rescindable because it found WaterStone's Notice of Right to Cancel to be "substantially similar" and "comparable" to the model TILA form. The court granted the judgment of foreclosure, signed over Panenka's objection, but stayed its entry until the amount Panenka was entitled to offset could be determined.

¶5 The court then held an evidentiary hearing to determine attorney fees and the offset due Panenka. It ordered equal attorney fees to each side, the offset to Panenka in the amounts WaterStone requested and rendered the judgment of foreclosure, again over Panenka's objection. The court declined to hear her untimely motion for reconsideration. Panenka appeals.

¶6 Panenka first argues that the trial court wrongly determined that WaterStone's Notice of Right to Cancel was "substantially similar" or "comparable" to the TILA notices. Her claim requires that we apply provisions of

TILA and its implementing regulation, 12 C.F.R. § 226 *et seq.*, known as "Regulation Z."[2] We construe rules and regulations in the same manner as statutes. *See* ***Moonlight v. Boyce***, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). Applying them to undisputed facts presents a question of law that we review de novo. ***Wisconsin DOR v. Menasha Corp.***, 2008 WI 88, ¶44, 311 Wis. 2d 579, 754 N.W.2d 95.

¶7 TILA requires that a lender "clearly and conspicuously" disclose a borrower's rescission rights, including that the lender may retain or acquire a security interest in the consumer's principal dwelling, and the effects of rescission. *See* TILA § 1635(a); *see also* Reg. Z §226.23(b)(1). TILA provides two model forms but does not require a creditor to use them. *See* TILA § 1604(b). "To satisfy the disclosure requirements … the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice." Reg. Z §226.23(b)(2). A borrower has the right to rescind a transaction if the form of notice of rescission is not either the appropriate model form or a comparable written notice. *See* Reg. Z § 226.23(b)(2), TILA §§ 1635(h) and 1635(i)(1)(B).[3]

[2] Citations to Regulation Z provisions will take the form "Reg. Z § --," using the 12 C.F.R. numbering but omitting the prefatory "12 C.F.R." All references to the Code of Federal Regulations are to the 2010 version.

[3] Reg. Z § 226.23(b)(2) provides:

> ….
>
> (2) *Proper form of notice.* To satisfy the disclosure requirements of paragraph (b)(1) of this section ["Notice of right to rescind"], the creditor shall provide the appropriate model form in appendix H of this part *or a substantially similar notice*. (Second italics added.).

(continued)

¶8 The model form relevant here, the H-9, gives notice of rescission when a transaction increases the amount of credit from the same lender. It spells out that the borrower has the right to cancel the new transaction to the extent of the increase in the amount of credit, but that such cancellation will not affect the amount that the borrower already owes or the lender's existing security interest.

TILA § 1635 provides in relevant part, with emphasis added:

> **(h) Limitation on rescission**
>
> An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, *or a comparable written notice* of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.
>
> **(i) Rescission rights in foreclosure**
>
> **(1) In general**
>
> …. [A]fter the initiation of any judicial … foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—
>
> ….
>
> **(B)** the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board *or a comparable written notice*, and otherwise complied with all the requirements of this section regarding notice.

¶9 WaterStone developed its own Notice of Right to Cancel form, which Panenka received at the consummation of the 2006 and 2007 loans. We compare the H-9 model form to WaterStone's modified form:

H-9 model form	WaterStone's modified form
NOTICE OF RIGHT TO CANCEL Your Right to Cancel You are entering a new transaction to increase the amount of credit previously provided to you. Your home is the security for this new transaction. You have a legal right under federal law to cancel this new transaction, without cost, within three business days …. If you cancel this new transaction, it will not affect any amount that you presently owe. Your home is the security for that amount…. Within 20 calendar days after we receive your notice of cancellation of this new transaction, we must take the steps necessary to reflect the fact that your home does not secure the increase of credit. We must also return any money you have given to us or to anyone else in connection with this new transaction.	NOTICE OF RIGHT TO CANCEL Your Right to Cancel You are entering into a transaction that *will result in a mortgage, lien or security interest on/in your home*. You have a legal right under federal law to cancel this transaction, without cost, within three (3) business days …. If you cancel this transaction, the mortgage, lien or security interest is also cancelled. If the proceeds of this loan are being used to repay a previous mortgage from [WaterStone], *only the funds in excess of the amount being repaid are subject to the right to cancel*. Within twenty (20) calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the mortgage, lien or security interest on/in your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction. (Emphasis added.)

¶10 The WaterStone form plainly advised Panenka that she was entering into a transaction that would result in a security interest in her home, that upon rescission the bank must act to cancel the security interest in her home, and that

only the funds over the amount being repaid on a previous WaterStone mortgage would be subject to the right to cancel. In other words, only the new money—the money above the original loans—was subject to the right to rescind. We agree with the trial court that the two forms are substantially similar and provide comparable notice of a borrower's rights.

¶11 Panenka next claims the trial court miscalculated the refund due her when she exercised her right to rescind. Noting that an obligor exercising the right to rescind under TILA is not liable for any finance or other charge, *see* TILA § 1635(b), Panenka contends she is due a refund of all payments, including principal and interest, made on the full refinance amount of the 2007 loan. She calculates this amount to be approximately $150,000. She argues it should be offset against the rescinded loan, the $90,765.90 advanced in 2007, such that WaterStone now owes her approximately $60,000. The trial court determined the refund relative only to fees and charges associated with the new money advanced pursuant to the 2007 loan, or approximately $24,000. The court concluded this method would return Panenka to the position she was in prior to the 2007 refinance, *i.e.*, when she had a loan of approximately $2.1 million.

¶12 We agree. The right to rescind does not apply to a refinancing by the same creditor of an extension of credit already secured by the consumer's principal dwelling, except to the extent the new amount financed exceeds the unpaid principal balance and costs associated with the refinancing. *See* Reg. Z § 226.23(f)(2). Thus, Panenka's right of rescission applied only to the new money financed in 2007—the amount above the unpaid principal balance. Interest on that unpaid principal properly continued to accrue. By refunding the interest charged on the new money and the closing costs associated with that refinancing, WaterStone returned her to the position she was in before the 2007 refinance.

¶13 It makes sense that a borrower may rescind a refinancing's "new money" portion but not the "old." TILA's so-called "buyer's remorse" provision, *see* ***Semar v. Platte Valley Fed. Sav. & Loan Ass'n***, 791 F.2d 699, 701 (9th Cir. 1986), provides borrowers time to reconsider encumbering the title to their homes. A consumer who refinances already has had that time to reflect when it first borrowed. *See* ***Porter v. Mid-Penn Consumer Discount Co.***, 961 F.2d 1066, 1074 (3rd Cir. 1992). While a borrower may want to reconsider further indebtedness to the extent of the added encumbrance, "Congress evidently felt that it would be unfair to lenders if, simply by the expedient of seeking refinancing for the same amount, borrowers could gain the right to cancel the earlier loan." ***Id.***

¶14 Thus, the Reg. Z § 226.23(f)(2) exemption for refinancings serves to protect a lender like WaterStone from rescission of the whole loan for which a borrower like Panenka already has been afforded a cooling-off period to reevaluate the wisdom and desirability of further encumbering her home. Adopting Panenka's rationale and calculations would not foster TILA's goal of returning both parties most nearly to the status quo ante. *See* ***Regency Sav. Bank v. Chavis***, 776 N.E.2d 876, 879 (Ill. App. Ct. 2002). We are satisfied that the court's rationale is correct.

¶15 Panenka also contends the trial court improperly included in the foreclosure judgment $212,722.31 in interest accruing from the date of the transaction. Her claim misstates the judgment read as a whole. The judgment reflects WaterStone's computations which list a total owed of $2,369,742.47. Granted, it includes interest in the amount Panenka cites. The judgment also expressly states, however, that the over $2.3 million is what she owes "prior to any offset due" her. The next paragraph provides that she is entitled to an offset of

$23,711.46 pursuant to her "exercise of the right of rescission under [TILA] of the 2007 loan transaction." That figure takes into account the rescindable interest.

¶16 We note the incongruity of Panenka's earlier argument that the court erred in rescinding only the new money in the 2007 transaction, yet argues here that the offset—by her calculus, including principal and interest from the entire amount—should be taken against only the new money.

¶17 Panenka next argues that she is entitled to statutory damages. She contends the trial court misread TILA § 1635(g), leading it to erroneously conclude that an award of damages was discretionary. TILA § 1635(g) provides:

> **(g) Additional relief**
>
> In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

Panenka asserts that a court may exercise discretion only for "violations of this subchapter not relating to the right to rescind." We disagree.

¶18 By a 1980 amendment to TILA, Congress clarified that a plaintiff bringing a claim for rescission under TILA § 1635 also could sue for statutory damages under TILA § 1640. ***Brown v. Nationscredit Fin. Servs. Corp.***, 349 F. Supp. 2d 1134, 1137 (N.D. Ill. 2005). Before the amendment, some courts required plaintiffs to elect one of the two remedies, rescission or damages. ***Brown***, 349 F. Supp. 2d at 1137. The ***Brown*** court cited this comment from a Senate report on the proposed legislation:

> [T]he bill explicitly provides that a consumer who exercises his [or her] right to rescind may also bring suit under the [Truth-in-Lending] Act for other violations not relating to

> rescission. The Act is currently ambiguous on this issue, and this section codifies the majority position of the courts.

Id. (citation omitted).

¶19 Thus, under TILA § 1635, whether to award damages was a matter within the trial court's discretion. It observed that, under "all the facts and circumstances," including the $226 finance charge understatement and the "substantial" attorney fees incurred, equitable considerations called for it to deny damages. This reflects a reasoned application of the appropriate legal standard to the relevant facts. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶43, 303 Wis. 2d 258, 735 N.W.2d 93.

¶20 Panenka next challenges the trial court's treatment of attorney fees. Both parties sought to recover their fees. Panenka requested approximately $31,000, claiming entitlement under TILA § 1640(a)(3) (providing that attorney fees are recoverable in any action in which a person is determined to have a right of rescission). WaterStone sought approximately $21,000 pursuant to the 2007 mortgage note, which entitled it to all costs and reasonable attorney fees it incurred or paid "by reason of any dispute, issue or claim" arising out of the note, mortgage or its interest on the mortgaged property. After attempting to parse out which fees were attributable to the foreclosure action and which to the successful TILA action, the court struck a sort of rough justice. It ordered that both parties were entitled to $20,000 in attorney fees, each to be offset against the other. We think this a reasonable solution.

¶21 The whole matter began as a foreclosure action. Although she asserted TILA violations as an affirmative defense, Panenka did not unequivocally state her intent to rescind until eight months later after WaterStone filed its

summary judgment motion. Panenka may be correct that addressing the TILA claims generated most of WaterStone's attorney fees but those claims and the foreclosure action remained intertwined. WaterStone had to litigate Panenka's TILA claims to preserve its right to foreclose on the property.

¶22 Furthermore, even when an attorney fee award is mandatory, the amount of the award lies within the trial court's discretion. *See* ***First Wis. Nat'l Bank v. Nicolaou***, 113 Wis. 2d 524, 537, 335 N.W.2d 390 (1983). It was each side's burden to demonstrate the reasonableness of the fees they submitted. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 738, 349 N.W.2d 661 (1984). It was not an erroneous exercise of discretion for the trial court to deny Panenka an award of her full attorney fees when she did not prevail on the bulk of her claim.

¶23 Finally, Panenka claims she is "entitled" to an extended redemption period under WIS. STAT. § 846.101(2) (2007-08).[4] Panenka concedes that the statute sets forth a redemption period and that the time frame "cannot be altered

[4] WIS. STAT. § 846.101(2) provides:

> **(2)** When plaintiff so elects, judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered therein nor separately rendered against any party who is personally liable for the debt secured by the mortgage and the sale of such mortgaged premises *shall be made upon the expiration of 6 months from the date when such judgment is entered*. Notice of the time and place of sale shall be given under ss. 815.31 and 846.16 within such 6-month period except that first printing of a copy of such notice in a newspaper shall not be made less than 4 months after the date when such judgment is entered. (Emphasis added.)

All references to the Wisconsin Statutes are to the 2007-08 version.

under the foreclosure statute." *See* ***M&I Marshall & Ilsley Bank v. Kazim Inv., Inc.***, 2004 WI App 13, ¶9, 269 Wis. 2d 479, 678 N.W.2d 322 ("[C]ourts should not rewrite the clear language of [a] statute"); *see also* ***First Federated Sav. Bank v. McDonah***, 143 Wis. 2d 429, 434, 422 N.W.2d 113 (Ct. App. 1988) (equitable authority does not allow a court to ignore a statutory mandate). She suggests, however, that just as Reg. Z § 226.23(d)(4) permits a court to modify TILA procedures,[5] the court here also had flexibility in setting the redemption period.

¶24 We need not decide whether the court equitably could have extended the statutory redemption period. Panenka fails in any event to establish that the court erroneously exercised its discretion in not doing so. She contends it may take some time to locate a qualified buyer for the house, appraised at $3.2 million, which also needs significant roof repair before it can be sold, and that a sheriff's sale would extinguish her equity recovery. Those considerations do not render the court's decision improper. The court observed the "sad, sorry reality" that many people took out mortgages beyond what they could afford and that banks are not in the business of owning houses. Besides, Panenka has remained there without making mortgage payments since the foreclosure action was filed in January 2008.

¶25 Lastly, we comment on an issue Panenka raises in her reply brief which, unlike her brief-in-chief, was filed pro se.[6] Panenka fleetingly contends that WaterStone "needed to amend its pleadings" because the legal description it

[5] As is relevant here, Reg. Z § 226.23(d)(4) provides that the procedures outlining how the consumer shall tender property to the creditor after rescission may be modified by court order.

[6] We also caution Panenka that she has falsely certified that the reply brief conforms to appellate briefing rules. WISCONSIN STAT. RULE 809.19(8)(b)3. requires that a brief produced with a monospaced font be double-spaced. Hers, at the maximum thirteen pages, plainly uses one-and-a-half spacing, resulting in a brief that far exceeds the allowable length.

used in the mortgage and lis pendens is incorrect, but that the trial court never took up the matter. We do not address this undeveloped argument. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We also generally do not address issues raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

¶26 The equitable nature of rescission generally entitles the affected creditor to judicial consideration of the individual circumstances of the particular transaction. ***Andrews v. Chevy Chase Bank***, 545 F.3d 570, 574 (7th Cir. 2008). Rescinding a loan transaction under TILA "requires unwinding the transaction in its entirety and thus requires returning the borrowers to the position they occupied prior to the loan agreement." ***Id.*** at 573 (citations omitted). We commend the trial court on a job well done.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.