

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

JONATHAN and SHARRON EDWARDS,)	
)	
Plaintiffs,)	
)	
vs.)	CIVIL ACTION NO. 07-0160-KD-C
)	
ACCREDITED HOME LENDERS, INC.,)	
LENDER’S FIRST CHOICE, INC., and)	
LENDER’S FIRST CHOICE AGENCY)	
OF ALABAMA, INC.,)	
)	
Defendants.)	

ORDER

This matter is before the court on the motion for summary judgment as to the claims of Sharron and Jonathan Edwards filed by defendant Accredited Home Lenders, Inc. (doc. 115), plaintiffs’ response (doc. 125), and defendant’s reply (doc. 136). Upon consideration, and for the reasons set forth herein, the motion for summary judgment is GRANTED.

I. Procedural and Factual Background¹

Plaintiffs Jonathan and Sharron Edwards are residents of Alabama and consumers who obtained a residential real estate mortgage on their home with Accredited Home Lenders, Inc.. (Accredited), a California corporation doing business in Alabama, acquires residential mortgage loans. Lender’s First Choice Agency, Inc. is a Florida corporation and controlling parent of Lender’s First Choice Agency of Alabama, Inc., an Alabama corporation (hereinafter Lender’s

¹ The court must construe all evidence and factual inferences in a light most favorable to the plaintiffs. Miller v. King, 384 F.3d 1248, 1258-59 (11th Cir. 2004) citing Burton v. City of Belle Glade, 178 F. 3d 1175 1187 (11th Cir. 1999) (When ruling on a motion for summary judgment, the court "must view all evidence and all factual inferences therefrom in the light most favorable to the non-moving party.").

First). These defendants served as the closing agent on the Edwards' residential mortgage.

Plaintiffs' loan was closed on June 16, 2006. At that time, they obtained a residential real estate mortgage and loan with defendant Accredited which was closed by Lender's First as agent for Accredited. At the loan closing, plaintiffs received a Truth in Lending (TIL) disclosure and a final Good Faith Estimate which were prepared by Accredited, and also received the final HUD-1 Settlement Statement from Lender's First. However, due to time constraints and as accepted by law and industry practice, Accredited used the amounts on the final Good Faith Estimate to prepare the TIL disclosure and did not receive the final HUD-1 until after the closing.

In preparing its final Good Faith Estimate, Accredited obtained then current fee estimates from Lender's First and used these estimates to determine which fees to include in the finance charge and to prepare the TIL disclosure as required by the Truth in Lending Act (TILA). Accredited disclosed these fees on its final Good Faith Estimate which plaintiffs received at closing. Lender's First provided Accredited with estimated fees of \$275.00 for title insurance and \$88.00 for recording the deed and mortgage along with other closing costs. Accredited did not set these fees or retain any portion of either fee. The provision of title insurance and the recording of the deed and mortgage were incident to the loan and required by Accredited.

In their complaint, plaintiffs allege that the title insurance fee was limited by Alabama law to \$155.00 and that Lender's First marked up the title insurance fee by \$120.00 for a total of \$275.00. Plaintiffs also allege that Lender's First marked up the recording fee of \$53.00 by \$35.00 for a total of \$88.00. Plaintiffs argue that Lender's First violated the Real Estate Settlement Procedures Act by marking up these fees and that because these fees were marked up,

the excess amounts of \$120.00 and \$35.00 constitute fees which were not bona fide and reasonable in amount. Therefore, plaintiffs allege that Accredited violated TILA by not including the entire amount of both fees in the finance charge as disclosed in the TIL disclosure.

Accredited has now filed its motion for summary judgment and raises three arguments. First, Accredited argues that TILA has not been violated because creditors such as Accredited may exclude mark-ups by third parties from the disclosure; second, the disclosure must be treated as accurate because the amount disclosed falls within TILA's tolerance range for accuracy; and third, because any disclosure error was bona fide and unintentional.

II. Summary Judgment Standard

Summary judgment should be granted only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).² The party seeking summary judgment bears "the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The party seeking summary judgment always bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers

² Rule 56(c) of the Federal Rules of Civil Procedure, provides that summary judgment shall be granted:

if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c).

to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.” Id. quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986).

Once the moving party has satisfied its responsibility, the burden then shifts to the nonmovant to show the existence of a genuine issue of material fact. Id. “If the nonmoving party fails to make ‘a sufficient showing on an essential element of her case with respect to which she has the burden of proof, ‘the moving party is entitled to summary judgment.” Id. quoting Celotex Corp., v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986) (footnote omitted). “In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determination of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 999 (11th Cir. 1992) cert denied, 507 U.S. 911, 113 S.Ct. 1259 (1993) (internal citations and quotations omitted). However, the mere existence of any factual dispute will not automatically necessitate denial of a motion for summary judgment; rather, only factual disputes that are material preclude entry of summary judgment. Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804, 809 (11th Cir. 2004), cert denied, 543 U.S.1081,125 S.Ct. 869 (2005).

III. Analysis

Accredited argues that even if the alleged mark-ups were finance charges which should have been disclosed, the TIL disclosure must be treated as accurate because the amount disclosed and the amount plaintiffs argue should have been disclosed are within the tolerance range for accuracy set forth in 15 U.S.C. § 1605(f)(1). The statute provides, in relevant part, as

follows:

(f) Tolerances for accuracy

In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance charge—

(1) shall be treated as being accurate for purposes of this subchapter if the amount disclosed as the finance charge—

(A) does not vary from the actual finance charge by more than \$100; or

(B) is greater than the amount required to be disclosed under this subchapter[.]

15 U.S.C. § 1605(f)(1).

The “amount disclosed as the finance charge” was \$3,999.10.³ Plaintiffs argue that the “actual finance charge” or “the amount required to be disclosed under this subchapter” is \$4,177.10⁴; thus, the amount varies more than \$100.00 ($\$4,177.10 - \$3,999.10 = \178.00), therefore, Accredited violated TILA.

In addition to the “padded portion” of the recording fee (\$35.00) and title insurance fee (\$155.00), plaintiffs argue that the “padded portion” of the title abstract fee (\$133.00) was not bona fide or reasonable and should have been included in the TIL disclosure. Plaintiffs assert

³ The TIL disclosure includes the origination fee of \$3,022.50, the flood certification fee of \$7.80, the tax service fee of \$50.00, interest of \$253.80, settlement/closing fee of \$605.00, and document preparation fee of \$60.00 (doc. 115, p. 15).

⁴ Plaintiffs allege that the actual finance charges consists of the origination fee of \$3,022.50, the flood certification fee of \$7.80, the tax service fee of \$50.00, interest of \$253.80, settlement/closing fee of \$450.00, document preparation fee of \$60.00, abstract fee (padded portion) of \$133.00, title insurance premiums (padded portion) of \$120.00, recording fee (padded portion) of \$35.00, wire fee of \$25.00, and delivery fee of \$30.00. (doc. 125, p. 17-18).

that because Accredited raised the tolerance for accuracy argument in their motion for summary judgment, it has brought before the court the issue of the exclusion or inclusion of all charges and fees, not just the recording fee and title insurance fee. However, the court previously denied plaintiffs' motion to amend their complaint to bring this allegation regarding the title abstract fee and will not allow plaintiffs to amend their complaint by way of a response to Accredited's motion for summary judgment. Moreover, Accredited asserted the tolerance for accuracy defense in its answer. Therefore, plaintiffs' argument that the excess title abstract fee should have been included in the TIL disclosure is not properly before the court and, for purposes of this summary judgment, the alleged "padded portion", or \$133.00, shall be deducted from plaintiffs' computation of the alleged that should have been included in the TIL disclosure.

Plaintiffs also included the sum of \$35.00 as the "padded portion" of the recording fee in their "Total Finance Charge Imposed" computation. However, the court previously determined that the actual recording costs were \$75.50. Deducting this sum from the \$88.00 recording fee charged, would result in an allegedly "padded portion" of \$12.50. Therefore, plaintiffs overstated this figure by \$22.50.

Deducting \$22.50 for the overstated or allegedly padded recording fee and \$133.00 for the alleged padding of the title abstract fee, results in a "Total Finance Charge Imposed" of \$4,021.50. The amount actually disclosed by Accredited was \$3,999.10 which is within the \$100.00 tolerance range of accuracy under TILA, even including the wire fee and delivery fee which plaintiffs included in their calculation.

Also, the “amount disclosed as the finance charge” by Accredited, \$3,999.10,⁵ included a settlement/closing fee of \$605.00 which Accredited overstated by \$155.00 above the \$450.00 which plaintiffs actually paid and a document preparation fee of \$60.00 which Accredited overstated by \$10.00 above the \$50.00 which plaintiffs actually paid, for a total overstatement of \$165.00 above the amount required to be disclosed. Therefore, the amount disclosed was “greater than” the amount required to be disclosed and thus within the tolerance range for accuracy. .

IV. Conclusion

For these reasons, the amount disclosed, \$3,999.10, shall be treated as accurate under 15 U.S.C. § 1605(f)(1), and Accredited’s motion for summary judgment (doc. 115) is **GRANTED**.

DONE and **ORDERED** this October 24, 2008.

s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

⁵ Additionally, Accredited points out that it was not required to include the \$7.80 charged for the flood certification fee and the remaining balance of the document preparation fee \$50.00, thus the disclosure of \$3,999.10 was overstated by an additional \$57.80. The flood certification fee could have been excluded under 15 U.S.C. § 1605(e)(5) and the document preparation fee could have been excluded under 15 U.S.C. § 1605(e)(2).