IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
	)	
DAVID DUANE SINCLAIR and	)	
CHERYL JOAN SINCLAIR	)	**Case No. 02-40323-13**
	)	
Debtors.	)	
_____	)	
	)	
DAVID DUANE SINCLAIR and	)	
CHERYL JOAN SINCLAIR	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Adversary No. 02-7040**
	)	
WASHINGTON MUTUAL HOME	)	
LOANS, INC. and ABN AMRO	)	
MORTGAGE GROUP, INC.	)	
	)	
Defendants.	)	
	)	
ABN AMRO MORTGAGE GROUP, INC.	)	
	)	
Third Party Plaintiff,	)	
	)	
v.	)	
	)	
MEYERS' NATIONAL MORTGAGE	)	
COMPANY d/b/a/ NATIONAL MORTGAGE	)	
COMPANY a/k/a NATIONAL MORTGAGE	)	
COMPANY, INC.,	)	
	)	
Third Party Defendant/	)	
Fourth Party Plaintiff,	)	
	)	
v.	)	
	)	
MONTGOMERY HOME TITLE, INC.,	)	
	)	

Fourth Party Defendant.)
)

MEMORANDUM AND ORDER DENYING MOTIONS FOR LEAVE TO ASSERT AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS

This matter is before the Court on the Motions of both defendants ABN AMRO Mortgage Group, Inc. and Washington Mutual Home Loans, Inc for Leave to Assert Affirmative Defense of Statute of Limitations.[1] The Court has reviewed the pleadings by the parties and is now prepared to rule.

I. FINDINGS OF FACT

Plaintiffs entered into a home mortgage loan with ABN AMRO Mortgage Group, Inc. ("ABN AMRO") on March 13, 2001. In February, 2002, Plaintiffs filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. On March 22, 2002, Washington Mutual Home Loans, Inc. ("Washington Mutual") filed Proof of Claim No. 5 in the Plaintiff's bankruptcy case, asserting a claim secured by Plaintiffs' home. ABN AMRO notified the Court in April, 2003 that it was the servicing transferee of Washington Mutual; that notice was docketed as a Proof of Claim pursuant to normal Clerk's Office procedure.[2]

Immediately after filing bankruptcy, on March 26, 2002, Plaintiffs notified Washington Mutual that they had exercised their right to rescind the transaction pursuant to the Truth in Lending Act. On May 23, 3002, Plaintiffs filed their Complaint to Enforce Truth in Lending Recision. In their Complaint, Plaintiffs seek "$2,000.00 in statutory damages in recoupment for ABN AMRO's disclosure violations pursuant to the TILA, 15 U.S.C. § 1640(a)(2)(A)(iii)."

---

[1] *See* Dockets 111 and 112, respectively.

[2] This was docketed as Proof of Claim No. 16.

When Washington Mutual filed its Answer to the Complaint, it did not assert the statute of limitations as an affirmative defense, but reserved the right to "raise each and every other applicable affirmative defense under the Federal Rules of Civil Procedure as the same may become known through the course of discovery." Similarly, ABN AMRO did not raise the statute of limitations as an affirmative defense in its Answer, but reserved the right to "raise additional defenses as they may be disclosed in the discovery process of this lawsuit."

The Court entered a Scheduling Order in December, 2002, which adopted the schedule requested by the parties in their Report of the Parties' Planning Meeting, including the December 30, 2002 deadline to amend pleadings. On May 1, 2003, the Court entered a Modified Scheduling Order, giving Defendants until May 30, 2003 to amend their pleadings. Later, when a third party action was filed, the Court again extended the amendment of pleadings deadline, to November 15, 2003, the date requested by the parties. Neither ABN AMRO nor Washington Mutual amended their Answer to include the statute of limitations as an affirmative defense by any of these deadlines.

The May 1, 2003 Modified Scheduling Order continued the discovery deadline to June 20, 2003, and the second Modified Scheduling Order continued the discovery deadline to March 31, 2004.[3] Over seven months after the last deadline for amending pleadings, and almost three months after the continued discovery deadline, ABN AMRO and Washington Mutual filed their Motions for Leave to Assert Affirmative Defense of Statute of Limitations.

II. CONCLUSIONS OF LAW

[3]Doc. No. 95.

Defendants ABN AMRO and Washington Mutual seek leave to assert the affirmative defense of statute of limitations on the statutory penalties sought by Plaintiffs for alleged violations of the TILA. Plaintiffs oppose these motions both because Defendants failed to timely amend their pleadings to assert this affirmative defense, and because the statute of limitations is not applicable in this case, thus rendering any amendment futile.

A. Defendants' motion to amend their pleadings to include a statute of limitations defense is untimely.

The Court finds that Defendants' request to amend their pleadings to include a statute of limitations defense is untimely, and that they have waived this defense. Pursuant to Fed. R. Civ. P. 8(c),[4] Defendants were required to raise all affirmative defenses, including the statute of limitations, in their responsive pleading. Because the statute of limitations is an affirmative defense, it is subject to waiver if not raised in a timely manner.[5]

Defendants failed to raise the statute of limitations in their initial responsive pleadings, but did reserve the right to amend their pleadings to include any additional affirmative defenses that were disclosed during discovery. In recognizing the occasional need for parties to amend their pleadings, the Court set a deadline for the parties to file any amendments to their pleadings, and then extended it, twice. Defendants

---

[4]Fed. R. Civ. P. 8 is made applicable to this proceeding pursuant to Fed. R. Bankr. P. 7008. Although the Court's June 10, 2004 Scheduling Order (Doc. No. 109) expressly reminded Defendants to comply with D. Kan. Rule 15.1, which requires parties amending pleadings to attach a copy of the proposed pleading, neither Defendant complied with the rule. Because the amendment sought is straightforward, however, the Court will not deny the motions on this procedural basis, as it is able to determine the essential content of the proposed amended pleadings from the motions, themselves.

[5]*Youren v. Tintic School Dist.*, 343 F.3d 1296, 1302, 1304 (10th Cir. 2003) (holding that "a defense is waivable if it is an affirmative defense" and "the statute of limitations defense is an affirmative defense and is subject to waiver").

failed to amend their pleadings by any of the deadlines set by the Court, and did not seek leave until almost three months after the extended close of discovery.

Defendants have provided no justification for their failure to timely assert the statute of limitations, and it is clear to the Court that all relevant facts supporting a statute of limitations defense were readily available to them by a cursory reading of the Complaint.[6] Defendants have failed to show that any good cause exists to allow them to amend their pleadings and assert the defense of statute of limitations at this late date.[7] For these reasons, the Court finds that Defendants have waived any statute of limitations defense. Their attempt to raise the statute of limitations as a defense this late in the proceedings is untimely and must be denied.

Defendants claim that the statute of limitations is jurisdictional in nature and can never be waived. In support of this claim, they rely upon *Rogers v. U.S.*[8] In *Rogers*, the plaintiff, who brought a tax refund lawsuit, argued that IRS had waived the statute of limitations because it failed to include that defense in the Pretrial Order. The court ruled that the tax statutes creating the underlying cause of action required plaintiff to affirmatively show that the case was timely filed and that "the filing of a timely claim for refund, setting forth the specific ground upon which a refund is sought, is a prerequisite to the court's subject matter

---

[6]The Complaint filed in this adversary proceeding stated the date of the alleged violations, which violations clearly occurred more than one year after the Complaint was filed. Thus, no discovery was necessary for Defendants to realize a possible statute of limitations defense.

[7]A showing of good cause is required for any modifications to the Court's Scheduling Order pursuant to Fed. R. Civ. P. 16(b), which is made applicable to this case by Fed. R. Bankr. P. 7016. *See O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d, 152, 154-55 (1st Cir. 2004).

[8]76 F. Supp. 2d 1159 (D. Kan. 1999).

jurisdiction."[9] The court went on to hold that "defendant has not waived the statute of limitations defense because to do so is impossible."[10] However, it is clear from any close reading of *Rogers* that it was the underlying tax law that tied the statute of limitations to the court's subject matter jurisdiction, not some broad rule of law that statutes of limitations are always jurisdictional – as now alleged by both Defendants.

The overwhelming number of cases that have considered the issue of whether the one year statute of limitations in a TILA case is jurisdictional have held that failure to bring the action within the statute of limitations does not deprive the Court of subject matter jurisdiction.[11] Each of those cases held that the one year limitation for TILA claims is subject to equitable principles, such as tolling and waiver. The Court adopts the holding in those cases, and holds the one year limitations period contained in 15 U.S.C. § 1640(e) is not jurisdictional and can be waived.[12]

B. Any amendment to include the statute of limitations defense would be futile.

---

[9]*Id.* at 1167.

[10]*Id.*

[11]*See Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499 (3rd Cir. 1998); *Jones v. TransOhio Savings Ass'n.*, 747 F.2d 1037, 1041 (6th Cir. 1984); *King v. California*, 784 F.2d 910, 914-15 (9th Cir. 1986); *Kerby v. Mortgage Funding Corp.*, 992 F. Supp. 787 (D. Md. 1998).

[12]The Court is disappointed with ABN AMRO and Washington Mutual's reliance on the *Rogers* case, which is clearly, on its face, both factually and legally distinguishable from this case. This reliance is made worse because it was done while simultaneously ignoring a wealth of cases which, although not binding on this Court, certainly should have been referenced, as they were directly on point, and by ignoring Tenth Circuit law applicable by analogy. The Court will give Defendants the benefit of the doubt that their use of *Rogers* was a result of incomplete or inaccurate legal research, rather than an attempt to mislead the Court or opposing counsel in the name of zealous advocacy.

Plaintiffs also oppose Defendants' motion on the basis that the statute of limitations, even if timely raised, does not bar their claim, thus making futile any attempt by Defendants to assert the statute of limitations. The Court agrees, because the statute makes that point express:

> "Any action under [15 U.S.C. § 1640] may be brought . . . within one year from the date of the occurrence of the violation. **This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action**, except as otherwise provided by State law."[13]

Washington Mutual, by filing a proof of claim in this action, is attempting to collect a debt against Plaintiffs/Debtors. Although Debtors initiated this adversary proceeding by filing the Complaint, the Complaint clearly notes monetary damages for violations of the TILA are sought "in recoupment." In other words, Plaintiffs do not affirmatively seek monetary damages from Defendants, but rather seek an award of damages that will be set-off against the secured claim filed by Washington Mutual/ABN AMRO. This type of action is clearly the type anticipated by 15 U.S.C. § 1640(e), and is not barred by the one year statute of limitations.[14]

---

[13]15 U.S.C. § 1640(e) (emphasis added). Defendants have not argued that any Kansas law exists that would alter this rule, and the Court is unaware of any.

[14]*See Matter of Coxson*, 43 F.3d 189, 194 (5th Cir. 1995) (allowing a debtor to bring a TILA claim for recoupment by way of adversary proceeding more than one year after the alleged violations took place); *Roberson v. Cityscape Corp. (In re Roberson)*, 262 B.R. 312, 322 (Bankr. D. Pa. 2001) (holding that "since [the lender] has filed a Proof of Claim in Plaintiff's bankruptcy case and the statute of limitations applicable to claims for statutory damages under TILA does not bar Plaintiff from raising her claim against [the lender] defensively," Plaintiff could bring her claim by way of recoupment); *Shaw v. Federal Mortg. & Inf. Corp. (In re Shaw)*, 178 B.R. 380 (Bankr. D.N.J. 1994) (noting that "The right of a debtor in bankruptcy to invoke the doctrine of recoupment, as authorized by 15 U.S.C. § 1640(e), to reduce a secured proof of claim of a mortgage lender by the amount of statutory TILA damages has been recognized again and again"); and *In re Jones*, 122 B.R. 246 (D. Pa. 1990) (holding that when TILA violations arise from the same transaction and is brought as a defense to a proof of claim, TILA claim is a recoupment defense and is not barred by 15 U.S.C. § 1640(d)). *Cf*.

Because the Court finds that the statute of limitations would not serve as valid a defense in this case, the Court denies the motion for leave to assert the statute of limitations defense on this ground, as well.[15]

III. CONCLUSION

The Court finds that the Motions of Defendants ABN AMRO Mortgage Group, Inc. and Washington Mutual Home Loans, Inc. for Leave to Assert Affirmative Defense of Statute of Limitations must be denied. Defendants failed to seek leave to amend their answers to include the statute of limitations as a defense by the Court imposed deadlines, despite the fact that they were fully aware of the facts necessary to raise such a defense from the outset of this proceeding. Defendants have provided no justification for their failure to raise such a defense until approximately two and one-half years after the Complaint was filed, until the last deadline for amending had expired over 7 months, and the last discovery deadline had expired over two months. The Court rejects Defendants' assertion that the statute of limitations is jurisdictional in nature, and finds that they have waived the statute of limitations as an affirmative defense in this case.

Even if the Court were to find that Defendants had not waived the statute of limitations defense, allowing them to amend their pleadings to raise the defense would still be inappropriate, because such amendment would be futile.

IT IS, THEREFORE, BY THIS COURT ORDERED that ABN AMRO Mortgage Group, Inc.'s Motion for Leave to Assert Affirmative Defense of Statute of Limitations (Doc. 111) and Defendant

---

Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998).

[15]*See Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) (holding that futility of amendment is an appropriate basis for denying a motion to amend a party's pleadings).

Washington Mutual Home Loans, Inc.'s Motion for Leave to Assert Affirmative Defense of Statute of Limitations (Doc. 112) are denied.

IT IS SO ORDERED this 16th day of August, 2004.

_____

JANICE MILLER KARLIN
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **MEMORANDUM AND ORDER DENYING MOTIONS FOR LEAVE TO ASSERT AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS** of the was deposited in the United States mail, postage prepaid on this _____ day of _____, 2004, to the following:

Michael D. Doering
DOERING & ASSOCIATES, P.C.
4344 Belleview
Kansas City, Missouri 64111

Fred W. Schwinn
Consumer Law Center, P.A.
12 South First St., Suite 416
San Jose, CA 95113-2404

Kenneth M. Gay
CONSUMER ADVOCATE LLC
8700 Monrovia, Suite 310-A1
Lenexa, Kansas 66215

Robert D. Kroeker
MARTIN, LEIGH, LAWS & FRITZLEN, P.C.
400 Peck's Plaza
1044 Main Street
Kansas City, Missouri 64105

Douglas K. DeZube
ULLMAN, DEZUBE & MILLER, P.A.

10100 W. 87th Street, Suite 202
Overland Park, Kansas 66212

Douglas D. Silvius
SPRADLEY & RIESMEYER
Belletower Building, Suite 210
4700 Belleview Avenue
Kansas City, Missouri 64112

DEBRA C. GOODRICH
Judicial Assistant to:
The Honorable Janice Miller Karlin
Bankruptcy Judge