

11 U.S.C. § 108(a)
11 U.S.C. § 502(b)(4)
15 U.S.C. § 1635(b)
15 U.S.C. § 1635(f)
12 C.F.R. § 226.2(a)(17)
12 C.F.R. § 226.2(a)(14)
12 C.F.R. § 226.2(a)(17)(i)(f.n. #3)
12 C.F.R. § 226.1(c)
12 C.F.R. § 226.2(a)(20)
12 C.F.R. § 226.2(a)(10)
12 C.F.R. § 226.4(b)(1)
12 C.F.R. § 226.23(a)(3)
12 C.F.R. § 226.2(a)(13)

Off.Staff Intp.12 C.F.R.Pt.226,Supp.I,Subpt A, Cmt.2(a)(20)(5)
Off.Staff Intp.12 C.F.R.Pt.226,Supp.I,Subpt A, Cmt.2(a)(17)(i)(4)
FRBP 7015
FRCP 15(a)
Attorney's fees
Truth In Lending Act (TILA)
Rescission (TILA)
Contract Interpretation

Sticka v. Geller(In re Stratton) Adv. # 02-6311-aer
Main Case # 600-66349-aer7

9/26/03 Radcliffe(Amended Opinion) Published

Debtor was divorced pre-petition in California. Her Chapter 7 Trustee brought an adversary proceeding against Debtor's former dissolution attorney. To evidence the attorney's fees incurred in the dissolution, Debtor and the attorney had entered into a note secured by a trust deed on the marital residence (as of the dissolution). The note was for a principal amount of \$20,000, to be adjusted if the fees exceeded that amount. The trust deed referenced a \$20,000 note as the debt secured thereby.

After the bankruptcy was filed, the marital residence was refinanced by Debtor's ex-husband. The attorney agreed to release his lien, with same attaching to over \$59,000 in proceeds, pending further court order.

The Trustee sought rescission of the note and trust deed and damages under the Truth In Lending Act. He also objected to the attorney's proof of claim (via the adversary) and sought, during the pendency of cross motions for summary judgment, to amend his complaint to add a claim that the note and trust deed should be interpreted so as to preclude any secured claim in excess of \$20,000.

The parties filed cross motions for summary judgment:

Issue #1: The threshold issue under the TILA claims was whether the attorney fell within the scope of TILA as one who "regularly" extends credit. Such requirement imposes certain numerical thresholds. The court rejected the Trustee's argument that an attorney extends credit under an open-end credit plan, with every charge his client incurs. Instead, as per the Federal Reserve Board's Official Staff Interpretations, "accounts", rather than individual charges, are counted for open-end plans. As such, the attorney did not come within TILA's ambit.

Issue #2: Alternatively, the attorney argued the TILA rescission claim was tardy in that it was not filed within 3 years of "consummation" of the transaction (i.e. execution of the note and trust deed), as required by the Act. The Court agreed, following Supreme Court authority that the 3 year period was one of duration not limitation. It thereby rejected the Trustee's argument that 11 U.S.C. § 108(a) operated to extend the time, holding with other courts, that such section had no effect on the statute of duration at issue.

Issue #3: The Court rejected the attorney's argument that because there was no proof the attorney's contract was not enforceable under California law, he was entitled to summary judgment. Under 11 U.S.C. § 502(b)(4), all pre-petition attorney's fees incurred by the debtor, whether or not related to the bankruptcy, must be reasonable. Debtor's declaration raised genuine issues of material facts as to the reasonableness of the attorney's fees, and thus precluded summary judgment.

Issue #4: After applying FRCP 15(a)'s liberal standards, the court allowed the Trustee to amend his complaint to allege that the attorney's secured claim was limited to \$20,000. On the Trustee's cross motion for summary judgment, the court, citing California caselaw, held that, construing the note and trust deed together, the documents were ambiguous, and that each party had submitted evidence supporting a reasonable interpretation. The court noted that even if the documents were facially unambiguous, under California law, the court could look to extrinsic evidence to determine if the parties' respective interpretations were reasonable. As such, the cross motion was denied.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	600-66349-aer7
JUDITH M. STRATTON,)	
)	
Debtor.)	
RONALD R. STICKA, Trustee,)	Adversary Proceeding
)	No. 02-6311-aer
Plaintiff,)	
)	
v.)	
)	AMENDED
LAWRENCE H. GELLER,)	MEMORANDUM OPINION
)	
Defendant.)	

The Defendant is an attorney who represented the debtor in prepetition dissolution of marriage proceedings in the Superior Court of the State of California for Orange County (the California Court). The Defendant claims a lien in certain funds generated by a refinance of the marital residence as ordered by the California Court in those proceedings. The Plaintiff, trustee, seeks to avoid that lien and preserve it for the benefit of the estate, herein, and/or in the alternative, Plaintiff objects to the amount of

1 Defendant's claim, challenging the reasonableness of the fees
2 generated in the dissolution proceedings. The matter is presently
3 before the Court on Cross-Motions for Summary Judgment.

4 **BACKGROUND**

5 From the pleadings and submissions, the court finds the
6 following facts. Debtor retained Defendant to represent her in the
7 dissolution proceedings in August, 1998 when they entered into a
8 written fee agreement.

9 After the commencement of the representation, Defendant and
10 Debtor agreed that Defendant would be paid for the legal services
11 provided (and to be provided) from Debtor's share of the equity in
12 the marital residence in Lake Forest, California. They formalized
13 their agreement by the Debtor executing a promissory note and trust
14 deed on January 11, 1999. The trust deed was recorded in the Orange
15 County real property records on February 24, 1999. Debtor
16 terminated Defendant's services in mid-November, 1999; thereafter
17 she was represented in the dissolution proceeding by other counsel.

18 Defendant claimed a balance due and owing by Debtor at the
19 time Defendant ceased providing services at \$44,593.71, which
20 included \$44,225.17 for services and expenses and \$368.54 in accrued
21 late charges.

22 Judgments entered by the California court in January and May
23 of 2000 awarded the marital residence to Debtor's ex-husband, Frank
24 Miles, (at least for the purpose of refinancing within a given

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1 time)¹ and required payment of Defendant's lien from Debtor's share
2 of the equity therein. In October, 2000, the California court
3 ordered the execution of an interspousal transfer deed documenting
4 the conveyance of Debtor's interest in the marital residence to
5 Frank Miles. The deed was recorded in the Orange County,
6 California, real property records on October 24, 2000.

7 Debtor filed her Chapter 7 petition, herein, on October 27,
8 2000. Defendant filed a proof of claim on March 23, 2001, in the
9 amount of \$48,302.75 secured by the marital residence.

10 Frank Miles refinanced the marital residence in April, 2002.
11 At that time, Defendant claimed a balance owing of \$62,552.33,
12 consisting of \$44,225.17 in fees and expenses through mid-November,
13 1999, \$10,638.27 in accrued late charges, and \$7,688.89 in accrued
14 legal expenses. As insufficient funds were realized to pay the full
15 claim, Defendant agreed to accept \$59,112.47 in satisfaction of his
16 lien. This sum is being held by Defendant's counsel, pending
17 further court order.

18 **Summary Judgment Standards**

19 Summary judgment is appropriate, if there is no genuine issue
20 as to any material fact and the moving party is entitled to judgment
21 as a matter of law. FRCP 56 made applicable by FRBP 7056.

22 The moving party has the burden to establish the absence of a
23 material issue of fact for trial. FRCP 56(c). The substantive law
24 governing a claim or defense determines whether a fact is material.

25
26 ¹ The scope of the judgments is the subject of a separate adversary
proceeding between Plaintiff herein and Frank Miles.

1 T.W. Elec. Service., Inc. v. Pacific Elec. Contractors Ass'n., 809
2 F.2d 626, 630 (9th Cir. 1987). Material facts are such facts as may
3 affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477
4 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). No
5 genuine factual issue exists for trial where a nonmoving party rests
6 on mere allegations or denials, or shows "some metaphysical doubt."
7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
8 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

9 All inferences drawn from the underlying facts must be viewed
10 in the light most favorable to the nonmoving party. Simone v.
11 Manning, 930 F. Supp. 1434 (D. Or. 1996).

12 Discussion

13 Defendant's Motion for Summary Judgment:

14 Claims One & Two:

15 Plaintiff's First Claim for Relief is brought under the Truth
16 in Lending Act (TILA) to rescind the January 11, 1999 note and
17 trust deed. His Second Claim for Relief is for damages and
18 attorney's fees provided by TILA. Defendant argues he is not a
19 "creditor" as that term is defined in TILA and thus is not subject
20 to the provisions thereof.

21 Under 12 C.F.R. § 226.2(a)(17), "creditor" means, in
22 pertinent part: (i) A person (A) who regularly extends consumer
23 credit that is subject to a finance charge or is payable by written
24 agreement in more than 4 installments (not including a downpayment),
25 and (B) to whom the obligation is initially payable, either on the
26

1 face of the note or contract, or by agreement when there is no note
2 or contract. (emphasis added).²

3 "Credit" means the "right to defer payment of debt or to
4 incur debt and defer its payment. 12 C.F.R. § 226.2(a)(14).

5 "Regularly" is defined in pertinent part as follows:

6 A person regularly extends consumer credit only
7 if it extended credit ... more than 25 times (or more
8 than 5 times for transactions secured by a dwelling)
9 in the preceding calendar year. If a person did not
meet these numerical standards in the preceding
calendar year, the numerical standards shall be
applied to the current calendar year.

10 12 C.F.R. § 226.2(a)(17)(i) (f.n.#3).

11 Defendant, by way of his declaration, admits that by virtue
12 of the note, he extended "credit" to Debtor, but denies extending
13 "credit" to enough other clients to meet the "regularity"
14 requirement. Plaintiff counters by arguing that credit extensions
15 need not be to different consumers, and that each separate service
16 billed to Debtor counted as an extension for purposes of the
17 thresholds referenced above. In order to determine what
18 transactions are counted for the "regularity" requirement, the court
19 must first determine what type of "credit" Defendant extended to
20 Debtor.

21

22

23 ² Likewise, TILA generally applies to each individual or business that
24 offers or extends credit when four conditions are met: (i) the credit is offered
25 or extended to consumers; (ii) the offering or extension of credit is done
26 regularly; (iii) the credit is subject to a finance charge or is payable by a
written agreement in more than 4 installments; and (iv) the credit is primarily
for personal, family, or household purposes. 12 C.F.R. § 226.1(c) (emphasis
added).

1 Under TILA, there are two (2) types of "credit", open-end
2 and closed-end. Open-end credit means consumer credit extended by a
3 creditor under a plan in which:

- 4 (i) The creditor reasonably contemplates repeated
5 transactions;
6 (ii) The creditor may impose a finance charge from
7 time to time on an outstanding unpaid balance; and
8 (iii) The amount of credit that may be extended to the
9 consumer during the term of the plan (up to any limit
10 set by the creditor) is generally made available to
11 the extent that any outstanding balance is repaid.

12 12 C.F.R. § 226.2(a)(20). "Closed-end credit" means "consumer
13 credit other than open-end credit as defined in this section." 12
14 C.F.R. § 226.2(a)(10).

15 The note at issue gave Debtor ninety (90) days from January
16 11, 1999, to pay \$20,000 at 10% interest from November 1, 1998,
17 payable in accordance with the Attorney Client Agreement dated
18 August 13, 1998. The note further provides:

19 It is understood that although this note is for
20 the sum of \$20,000, the actual amount of indebtedness
21 shall not be greater than the actual amount of
22 Attorney fees and Costs incurred as set forth in
23 Obligor's monthly statement of account.

24 In the event said statement exceeds the sum of
25 \$20,000, this note shall be adjusted to cover said
26 amount accordingly.³

³ The January 11, 1999 trust deed gives a lien on the marital residence to
secure, among other things, "[p]ayment of the indebtedness evidenced by one
promissory note of even date herewith, and any extension or renewal thereof, in
the principal sum of \$20000.00...."

1 The August 13, 1998 Attorney Client Agreement provides for
2 periodic deposits to trust up to a maximum of \$3,500 at Defendant's
3 request. It further provides:

4 It is understood and agreed that in the event the
5 client's deposit(s) [to trust] ...are depleted, client
6 shall pay any and all billings within fifteen (15)
7 days of receipt of statement. An interest rate of ten
8 (10) percent per annum shall apply to the unpaid
9 balance. In any event the interest shall not exceed
10 that permitted by law.

11 Defendant maintains he extended open-end credit to Debtor,
12 which Plaintiff does not expressly contest. There is no dispute
13 repeat transactions were contemplated, and that a finance charge
14 (the note's interest) applied.⁴ Credit was replenished with each
15 payment (if any), because the amount of debt was tied to the balance
16 of the attorney's fees as they accrued, and for which Debtor
17 received a credit when she paid a particular billing. The credit
18 plan may have been finite in duration (ninety (90) days per the
19 note),⁵ but that does not preclude credit being "open-end." Official
20 Staff Interpretation, 12 C.F.R. Pt. 226, Supp. I, Subpart A, Cmt.
21 2(a)(20)(5) ("[a] line of credit is self-replenishing even though
22 the plan itself has a fixed expiration date, as long as during the
23 plan's existence the consumer may use the line, repay, and reuse the
24 credit").

25 ⁴ "Finance charge" includes interest. 12 C.F.R. § 226.4(b)(1).

26 ⁵ Per Defendant's declaration, he had previously agreed to wait until the
marital residence was sold to obtain payment of his fees out of Debtor's equity
therein. There is no indication Defendant has sought to enforce the note's
ninety (90) day language.

1 As for counting transactions for the "regularity"
2 requirement:

3 For purposes of closed-end credit, the creditor
4 counts each credit transaction. For open-end credit,
5 transactions means accounts, so that outstanding
6 accounts are counted instead of individual credit
7 extensions.

8 Official Staff Interpretation, 12 C.F.R. Pt. 226, Supp. I, Subpart
9 A, Cmt. 2(a)(17)(i)(4) (emphasis added).⁶

10 This Court concludes that Defendant and Debtor entered into
11 only one transaction for purposes of the "regularity" requirement.
12 It follows that Defendant is not a "creditor" under TILA, and he is
13 entitled to summary judgment as a matter of law as to the
14 Plaintiff's First and Second Claims for Relief.

15 In the alternative, Defendant has also raised a timeliness
16 defense to Plaintiff's First Claim for Relief (Rescission). With
17 limited exceptions not applicable here, the right of TILA rescission
18 "expires" at the latest three (3) years after a transaction's
19 "consummation." 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).
20 "Consummation" is defined as "the time that a consumer becomes
21 contractually obligated on a credit transaction." 12 C.F.R. §
22 226.2(a)(13). The Supreme Court has held that the three (3) year
23 period is not a statute of limitations, but is instead a complete
24 bar to assertion of the right, such that it cannot be asserted in
25 the form of recoupment, if the creditor's collection suit was filed
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⁶ Unless demonstrably irrational, the staff interpretations are
dispositive. Ford Motor Credit Company v. Milhollin, 444 U.S. 555, 100 S.Ct. 790,
63 L. Ed. 2d 22 (1980).

1 past the three (3) years. Beach v. Ocwen Federal Bank, 523 U.S.
2 410, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998). Here, the
3 transaction was "consummated" on January 11, 1999, the date the note
4 and trust deed were executed.⁷ Debtor filed her Ch. 7 petition on
5 October 27, 2000. It is undisputed that the first notice of
6 rescission was by way of the present adversary complaint filed on
7 October 4, 2002 and served on October 10, 2002, more than three
8 years from "consummation".

9 Plaintiff contends, however, that because the bankruptcy case
10 was filed before the expiration of the three (3) years, 11 U.S.C. §
11 108(a)⁸ extends the time period another two (2) years.⁹ Since
12 Beach, however, the only authority to construe § 108 as it relates
13 to TILA rescission has held it to be inapplicable.

14
15 ⁷ The parties concede that at the latest, "consummation" occurred on
16 February 24, 1999, the date the trust deed was recorded, which is still more than
17 3 years before the instant adversary complaint.

18 ⁸ Except as otherwise noted, all subsequent statutory references are to
19 Title 11, United States Code.

20 ⁹ Section 108(a) provides:

21 (a) If applicable nonbankruptcy law, an order entered in
22 a nonbankruptcy proceeding, or an agreement fixes a
23 period within which the debtor may commence an action,
24 and such period has not expired before the date of the
25 filing of the petition, the trustee may commence such
26 action only before the later of--

(1) the end of such period, including any
suspension of such period occurring on or
after the commencement of the case; or

(2) two years after the order for relief.
(emphasis added).

1 In Williams v. EMC Mortgage Corp. (*In Re Williams*), 276 B.R.
2 394 (Bankr. E.D. Pa. 2002), the court held § 108(c)¹⁰ did not
3 extend the three (3) years, because "the time period of Section
4 1635(f) does not fix a time period for bringing or continuing a
5 civil action", Id. at 397, quoting the Beach court as follows:

6 [Section 1635(f)] says nothing in terms of
7 bringing an action but instead provides that the
8 'right of rescission [under the Act] shall expire' at
9 the end of the time period. It talks not of a suit's
10 commencement but of a right's duration, which it
11 addresses in terms so straightforward as to render any
12 limitation on the time for seeking a remedy
13 superfluous.

14 Id. at 397 (quoting Beach, supra, 523 U.S. at 417, 118 S.Ct.
15 1408).¹¹

16 ¹⁰ Section 108(c) provides as follows:

17 Except as provided in section 524 of this title, if
18 applicable nonbankruptcy law, an order entered in a
19 nonbankruptcy proceeding, or an agreement fixes a period
20 for commencing or continuing a civil action in a court
21 other than a bankruptcy court on a claim against the
22 debtor, or against an individual with respect to which
23 such individual is protected under section 1201 or 1301
24 of this title, and such period has not expired before the
25 date of the filing of the petition, then such period does
26 not expire until the later of--

(1) the end of such period, including any
suspension of such period occurring on or
after the commencement of the case; or

(2) 30 days after notice of the termination
or expiration of the stay under section 362,
922, 1201, or 1301 of this title, as the case
may be, with respect to such claim. (emphasis
added).

¹¹ Likewise, the court in Thomas v. GMAC Residential Funding Corp. (*In re
Thomas*), 296 B.R. 374 (Bankr.D.Md. 2003), following Williams' rationale, held
that § 108(b) did not apply to give even a 60 day extension to a Chapter 13
(continued...)

1 Section 108(a) has analogous operative language to § 108(c)
2 regarding the time to "commence an action." This court, applying
3 Beach, and in accord with Williams, likewise concludes that § 108(a)
4 is inapplicable. Thus, Plaintiff's rescission claim is time-barred,
5 hence, summary judgment in favor of Defendant on Plaintiff's First
6 Claim for Relief is also appropriate on this alternative basis.¹²

7 Claim Three:

8 Plaintiff's Third Claim for Relief is brought under § 506
9 for a declaration that after nullifying Defendant's lien pursuant to
10 15 U.S.C. 1635(b), [TILA rescission], the court should disallow the
11 lien, and order the refinance proceeds turned over to Plaintiff.
12 Defendant has again moved for summary judgment. This claim is
13 dependent on Plaintiff's rescission claim, which as discussed above
14 should be dismissed.

15 Claim Four:

16 Plaintiff's Fourth Claim for Relief is an objection under §
17 502 to Defendant's secured claim for \$59,112.47, objecting to both
18 its secured status (based on TILA rescission) and the
19 reasonableness of Defendant's fees (to be measured by quantum meruit
20 post-rescission). Defendant has moved for summary judgment.

21
22 ¹¹(...continued)
23 debtor seeking rescission, where notice was given, as here, via an adversary
24 complaint.

25 ¹² Given the court's conclusion that Defendant is not a "creditor" under
26 TILA, and in any event, the rescission claim is time-barred, the court will not
consider Defendant's other defenses to Plaintiff's First Claim for Relief.

1 As to the claim's secured status, this claim as pled, is
2 dependent on Plaintiff's claim for rescission. As such, summary
3 judgment should be granted in Defendant's favor.

4 As to the reasonableness of the fees, Defendant first argues
5 that there is no evidence attacking the validity of the contract
6 between Debtor and Defendant, thus resort to quantum meruit is
7 inappropriate (as that doctrine presupposes the lack of an
8 enforceable contract). Next, he contends Plaintiff has adduced no
9 evidence rebutting the prima facie validity of the proof of claim.
10 He argues that he provided services to Debtor pursuant to their
11 valid written contract at the agreed hourly rate; the contract is
12 clear and unambiguous on its face; and Debtor was obligated to pay
13 for the services as agreed. Plaintiff does not contest (except for
14 his claimed rescission) the enforceability of the contract between
15 Debtor and Defendant.

16 Even with an enforceable contract, however, the Bankruptcy
17 Code, through § 502(b)(4)¹³ overlays state law, and requires (even
18 as to fees not connected to the bankruptcy), that all prepetition
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21 ¹³ Section 502(b)(4) provides as follows:

22 Except as provided in subsections (e)(2), (f), (g),
23 (h) and (i) of this section, if such objection to a claim
24 is made, the court, after notice and a hearing, shall
25 determine the amount of such claim in lawful currency of
26 the United States as of the date of the filing of the
 petition, and shall allow such claim in such amount,
 except to the extent that--

 if such claim is for services of an insider
 or attorney of the debtor, such claim exceeds
 the reasonable value of such services.

1 fees charged by an attorney for debtor be reasonable. See, 4
2 Collier on Bankruptcy, ¶ 502.03(5)(b) (Alan N. Resnick & Henry J.
3 Sommer eds., 15th ed. rev. 2003); Yermakov v. Fitzsimmons (*In re*
4 *Yermakov*), 718 F.2d 1465 (9th Cir. 1983); Landsing Diversified
5 Properties-II v. First National Bank (*In re Western Real Estate*
6 *Fund, Inc.*), 922 F.2d 592 (10th Cir. 1991). Thus, the
7 reasonableness of Defendant's fees is before the court.
8 Debtor's affidavit, particularly at ¶ ¶ 5,6 and 9-12,¹⁴ raises a
9 genuine issue of fact regarding the fees.¹⁵ As such, summary
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13 ¹⁴ In the above-cited paragraphs of her affidavit, Debtor states the
14 following: 1) she would never had signed the note and trust deed if she had known
15 that Defendant's fees would climb anywhere near \$20,000, "let alone what he is
16 claiming now"; 2) Defendant reassured her when she signed the note and trust deed
17 that the fees would "never get anywhere near" \$20,000; 3) up through January 11,
18 1999, Defendant repeatedly called her to go over material which Debtor thought
19 they had already covered during previous office visits, and that each office
20 visit seemed to take longer than necessary to obtain the information he sought
21 from her; 4) by late Spring/Summer 1999 she grew dissatisfied with Defendant's
22 representation, and that during this time, Defendant would never return her
23 calls and was always making excuses for his lack of contact; 5) by fall, 1999,
24 she was most unhappy with Defendant's representation, and "even felt like he was
25 working together with Frank [debtor's ex-husband] and his attorney instead of
26 representing me"; and finally, 6) the terms of a proposed settlement surprised
and angered her, and that eventually she became so upset with Defendant's overall
lack of communication and the above-referenced settlement's terms, that she
fired him.

21 Defendant in his reply memorandum moves to strike the above-referenced
22 portions of Debtor's affidavit as being in violation of the "parol evidence" rule
23 as to the construction of the note and trust deed, which he claims are
24 unambiguous. However, in this context, the affidavit is not being used to
25 interpret the note and trust deed, but rather to express dissatisfaction at the
26 services Defendant rendered. This goes to the reasonableness of the fees.
Further, as discussed below, even if the affidavit's statements were used to
interpret the note and trust deed, they are admissible under California law. See
f.n. 18 (infra.) As such, the motion to strike will be denied.

¹⁵ As noted by Plaintiff, these statements also raise issues as to
defendant's credibility.

1 judgment as to the reasonableness of Defendant's fees should be
2 denied.

3 **Plaintiff's Motion to Amend, and Cross Motion for Summary**
4 **Judgment:**

5 Plaintiff has cross moved for summary judgment, claiming
6 Defendant's lien should at least be limited to \$20,000 + 10% simple
7 interest under the language in the note and trust deed.

8 Defendant notes this claim has not been pled, and argues
9 that because Plaintiff knew about this theory as early as December,
10 2001 (when he raised it in defense of Defendant's first motion for
11 relief from stay), he should not be allowed to amend to add it now.
12 Plaintiff contends the amendment should be allowed, as Defendant has
13 been on notice that this theory was extant and has not been
14 prejudiced.

15 The court has discretion to consider Plaintiff's request in
16 his cross motion as a motion to amend the complaint under FRCP
17 15(a), made applicable by FRBP 7015. William Inglis & Sons Baking
18 Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014, 1053
19 (f.n.68) (9th Cir. 1982). On the merits of the motion to amend, the
20 court is to keep in mind the strong policy in favor of allowing
21 amendment, and is to consider four (4) factors: bad faith, undue
22 delay, prejudice to the opposing party, and the futility of
23 amendment, Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994),
24 bearing in mind that "late amendments to assert new theories are
25 not reviewed favorably when the facts and the theory have been known
26 to the party seeking amendment since the inception of the cause of

1 action." Acri v. International Assoc. of Machinists & Aerospace
2 Workers, 781 F.2d 1393, 1398 (9th Cir. 1986). The court also may
3 consider whether the plaintiff has previously amended the complaint.
4 Royal Ins. Co. of America v. Southwest Marine, 194 F.3d 1009, 1016
5 (f.n.9) (9th Cir. 1999).

6 The record reflects that Plaintiff knew about the subject
7 claim since this adversary proceeding's inception. Defendant,
8 however, has not argued prejudice or bad faith; the complaint has
9 not previously been amended; and amendment would not be futile. As
10 to delay, the complaint was filed on October 4, 2002. Plaintiff's
11 desire to amend was implied in Plaintiff's cross-motion for summary
12 judgment filed on December 27, 2002, and explicit in Plaintiff's
13 reply filed on January 24, 2003, less than four months after the
14 complaint was filed. On balance, the factors favor allowing
15 amendment.¹⁶

16 Plaintiff's cross motion for summary judgment is based on the
17 language of the note and trust deed. As referenced above, the note
18 gave Debtor ninety (90) days from January 11, 1999, to pay \$20,000
19 at 10% interest from November 1, 1998, payable in accordance with
20
21

22 ¹⁶Defendant also argues this new claim has been abandoned, which Plaintiff
23 disputes. Defendant has submitted his counsel, Carolyn Wade's affidavit, stating
24 Plaintiff raised this issue in defense to Defendant's first motion for relief
25 from stay filed in December 2001, and that in the course of defending that
26 motion, Plaintiff stipulated that the trust deed's advance clause was
enforceable, the inference being the trust deed covered all sums owed. Douglas
Schultz, Plaintiff's then counsel, has submitted an affidavit denying any such
stipulation. Thus, there is a genuine material issue of fact as to the
"abandonment" defense.

1 the Attorney Client Agreement dated August 13, 1998. The note
2 further provides:

3 It is understood that although this note is for
4 the sum of \$20,000, the actual amount of indebtedness
5 shall not be greater than the actual amount of
6 Attorney fees and Costs incurred as set forth in
7 Obligor's monthly statement of account.

8 In the event said statement exceeds the sum of
9 \$20,000, this note shall be adjusted to cover said
10 amount accordingly.

11 The trust deed gives a lien on the marital residence to secure,
12 among other things:

13 Payment of the indebtedness evidenced by one
14 promissory note of even date herewith, and any
15 extension or renewal thereof, in the principal sum of
16 \$20000.00 executed by Trustor in favor of Beneficiary
17 or order [and]... Payment of such further sums as the
18 then record owner of said property hereafter may
19 borrow from Beneficiary, when evidenced by another
20 note (or notes) reciting it is so secured.

21 Plaintiff argues that because the trust deed only references
22 a \$20,000 note, that is all the debt it can secure. Defendant asks
23 the court to construe the note and trust deed together and find the
24 trust deed secures all sums advanced under the note.

25 Under California law, "a note and a deed of trust, although
26 two instruments, form parts of one transaction and must be read and
construed together." Kerivan v. Title Ins. and Trust Co., 147 Cal.
App. 3d 225, 230, 195 Cal. Rptr. 53, 56 (Ca. Ct. App. 2nd Dist.
1983). The trust deed references a note for \$20,000. However, at
least by its terms, the note's principal was not static at \$20,000,
rather it provided: "[i]n the event said statement exceeds the sum

1 of \$20,000, this note shall be adjusted to cover said amount
2 accordingly."¹⁷ This creates an ambiguity (two reasonable
3 interpretations) as to whether all sums owing under the note would
4 be secured, or simply \$20,000 of such (plus interest).¹⁸ In any
5 event, the court can look to extrinsic evidence to determine if the
6 interpretations are reasonable, even if the documents appear
7 unambiguous. Newport Beach Country Club, supra.

8 Debtor's affidavit states she would not have executed the
9 note and trust deed had she thought fees would exceed \$20,000, while
10 Defendant's declaration states it was the parties' understanding
11 that all sums due would be secured. This creates a material issue of

12
13 ¹⁷ Conversely, if the fees were less than \$20,000, only the lesser amount
14 would be secured.

15 ¹⁸ Under California law, as recently pronounced in Founding Members of the
Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal.App.4th
16 944, 955, 135 Cal.Rptr.2d 505, 513-514 (Ca. Ct. App. 4th Dist. 2003):

17 The basic goal of contract interpretation is to give
18 effect to the parties' mutual intent at the time of
19 contracting. When a contract is reduced to writing, the
20 parties' intention is determined from the writing alone,
21 if possible. The words of a contract are to be understood
22 in their ordinary and popular sense.

23 Extrinsic evidence is admissible to prove a meaning
24 to which the contract is reasonably susceptible. If the
25 trial court decides, after receiving the extrinsic
26 evidence, the language of the contract is reasonably
susceptible to the interpretation urged, the evidence is
admitted to aid in interpreting the contract. Thus, the
test of admissibility of extrinsic evidence to explain
the meaning of a written instrument is not whether it
appears to the court to be plain and unambiguous on its
face, but whether the offered evidence is relevant to
prove a meaning to which the language of the instrument
is reasonably susceptible.

Id. (internal citations and quotations omitted).

1 fact as to the parties' intent, as such Plaintiff's cross motion
2 should be denied.

3 **Conclusion**

4 Defendant's motion for summary judgment as to claims One
5 through Three should be granted, and those claims dismissed.
6 Defendant's motion as to claim Four should be granted insofar as
7 Plaintiff asserts the voidability of the lien based on his right to
8 rescind under TILA. It should be denied as to the reasonableness of
9 Defendant's fees, hence, the amount of Defendant's claim.

10 Plaintiff's motion to amend to add a claim that Defendant's
11 lien should be limited to \$20,000 plus interest should be granted,
12 and the pleadings deemed amended accordingly. His motion for
13 summary judgment on that claim should be denied.

14 The above constitutes my findings and conclusions under FRBP
15 7052. An order consistent herewith will be entered.

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19 ALBERT E. RADCLIFFE
20 Chief Bankruptcy Judge
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