STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2023AP000125

Bank of America, N.A.,
Plaintiff-Respondent,
v.
Jean-Pierre C. Riffard,
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF MILWAUKEE COUNTY
Case Nos. 2021CV005071 and 2021SC019448
The Honorable Kashoua Kristy Yang Presiding

APPENDIX TO THE BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND WISCONSIN BANKERS ASSOCIATION

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2011 WL 13269115
Only the Westlaw citation is currently available.
United States District Court, N.D. Georgia, Atlanta Division.

CAPITAL ONE, N.A., Plaintiff,

v.

Harold BROWDER, Defendant.

CIVIL ACTION FILE NO. 1:09-CV-02259-MHS-GGB

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Signed 04/05/2011

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Filed 04/06/2011

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FINAL REPORT AND RECOMMENDATION

GERRILYN G. BRILL, UNITED STATES MAGISTRATE JUDGE

***1** The above-styled matter is before the court on the motion for summary judgment filed by Plaintiff Capital One, N.A. ("Plaintiff" or "Capital One") [Doc. 20]. Although Defendant Harold Browder ("Defendant") requested and was granted three extensions of time to respond to Plaintiff's motion for summary judgment, he has not submitted a response, and the time for doing so has now passed. Under Local Rule 7.1(B), failure to file a response indicates that there is no opposition to the motion. Therefore, Plaintiff's motion for summary judgment will be deemed unopposed. For the reasons stated below, I **RECOMMEND** that Plaintiff's motion for summary judgment [Doc. 20] be **GRANTED**.

I. PROCEDURAL BACKGROUND

In this action, Plaintiff seeks declaratory relief with regard to a mortgage loan, note and security deed executed in connection with certain residential real property located in Marietta, Cobb County, Georgia. Plaintiff filed its complaint for declaratory judgment and equitable relief in this court on August 18, 2009. [1] [Doc. 1, Complaint]. Defendant was served with the summons and the complaint on September 12, 2009. Although Defendant's answer was due on or before October 2, 2009, Defendant did not serve his "Answer, Affirmative Defenses and Counterclaim of Defendant to Plaintiff's Complaint" [Doc. 6] until October 6, 2009. Defendant's counterclaim was later dismissed. [Doc. 12].

On September 10, 2010, Capital One served discovery requests on counsel for the defendant, including Capital One's First Request for Admissions and Authentication of Documents [Doc. 20-7 at 2, Gleisner Aff. Ex. H]. Defendant did not respond to Capital One's Request for Admissions and has failed to answer any of Capital One's other discovery requests. [Gleisner Aff. ¶ 14].

After the extended discovery period closed, Capital One filed the instant motion for summary judgment on November 19, 2010 [Doc. 20]. Thereafter, Defendant sought, and was granted, three extensions of time to respond to Capital One's motion

for summary judgment. Defendant was given until January 23, 2011 to file his response to the motion. As of today's date, no response has been filed. Capital One's unopposed motion for summary judgment is now before the court.

II. SUMMARY JUDGMENT STANDARD

***2** Summary judgment is proper when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of showing the court, by reference to materials on file, the basis for the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). However, the nature of the movant's initial burden "varies depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or the non-movant would bear the burden of proof at trial." Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). If the movant bears the burden of proof at trial, that party "must show that, on all the essential elements of its case, ... no reasonable jury could find for the non-moving party." United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991)(en banc). "Only when that burden has been met does the burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

Where the movant bears the burden of proof at trial, the non-movant may avoid summary judgment only by coming forward with evidence sufficient to withstand a motion for directed verdict at trial. Fitzpatrick, 2 F.3d at 1116. The nonmovant is required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, answers to interrogatories, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. See Fed. R. Civ. P. 56(e). "Mere conclusions and unsupported factual allegations are legally insufficient to create a dispute to defeat summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) (citation omitted). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id. at 252.

III. APPLICABLE FEDERAL AND LOCAL RULES

A. Fed. R. Civ. P. 36

Rule 36 of the Federal Rules of Civil Procedure governs requests for admission and allows a party to serve on "any other party a written request to admit ... the truth of any matters within the [general scope of discovery] relating to facts, the application of law to fact, or opinions about either; and the genuineness of any described documents." Fed. R. Civ. P. 36(a)(2011). If a party fails to respond within thirty days, then the matter is admitted. Perez v. Miami-Dade County, 297 F.3d 1255, 1264 (11th Cir. 2002)(internal quote marks and citation omitted).

The record does not indicate that Defendant ever responded to Capital One's Requests for Admission. Therefore, the requests are deemed admitted, pursuant to Fed. R. Civ. P. 36.

B. Local Rule 56.1

Defendant also failed to file a response to Capital One's Statement of Material Facts accompanying its motion for summary judgment. Under Local Rule 56.1 of the Northern District of Georgia, a party moving for summary judgment must include "a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried." LR 56.1(B)(1), NDGa. The court deems the movant's facts admitted unless the opposing party either refutes the facts with citations to evidence or law, or states a valid objection to the movant's evidence. Because Defendant has neither refuted nor stated valid objections to the material facts as set forth in Capital One's Statement of Material Facts, these facts are deemed admitted by operation of law. LR 56.1(B)(2); Reese v. Herbert, 527 F.3d 1253, 1267-69 (11th Cir. 2008).

IV. FACTS

In light of the foregoing summary judgment standard, and the federal and local rules discussed above, the court deems the following facts admitted for the purpose of resolving Capital One's motion for summary judgment only.

***3** On December 8, 2006, Defendant obtained a loan from SunTrust Mortgage, Inc. ("SunTrust") in an original principal amount of $499,958.00 to purchase a parcel of real property located at 600 Bouldercrest Drive, Marietta, Georgia, 30064 (the "Property"). At the time of purchase, the lot was unimproved and did not contain a house. As security for repayment of the loan, Defendant executed and delivered a security deed conveying the Property to SunTrust. Defendant used some of the loan proceeds to finance his acquisition of the Property. He used the remainder of the funds obtained from SunTrust to initiate the construction of a house on the Property. [Doc. 20-2, Pl.'s Stmt. of Undisputed Mat. Facts ("PSMF"), ¶¶ 1-3].

On or about July 19, 2007, Defendant appointed Allison Choate as his attorney in fact regarding the Property and executed a "Limited Power of Attorney—Real Estate" ("POA"). [PSMF ¶ 4; Doc. 20-6 at 2, Gleisner Aff. Ex. D, POA]. The POA authorized Allison Choate, as Defendant's attorney in fact, to "[m]ake, draw and endorse promissory notes, checks, or bills of exchange pertaining to the Property and to waive demand, presentment, protest, and notice of nonpayment of all such instruments." [POA at 1]. The POA also authorized Ms. Choate to "[m]ake and execute any and all contracts pertaining to the Property" and to "[e]xecute any and all documentation necessary to effectuate any transaction described [in the POA], including, but not limited to, closing statements, instruments of conveyance and supporting documentation, certifications, acknowledgements, and like instruments." Id.

On July 27, 2007, Defendant (through Allison Choate as his attorney in fact) obtained a loan from Chevy Chase Bank, F.S.B. ("Chevy Chase")[2] in an original principal amount of $704,000.00 (the "Capital One loan"). To evidence the Capital One loan, Ms. Choate, acting under the authority Defendant granted to her in the POA, executed and delivered an "Adjustable Rate Note" in favor of Chevy Chase (the "Note"). Ms. Choate also executed and delivered a security deed conveying the Property to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Chevy Chase (the "Security Deed"). Thereafter, the Security Deed was recorded in the real estate records of Cobb County, Georgia, on August 3, 2007, in Deed Book 14521, beginning at Page 83. [PSMF ¶¶ 4-10].

Defendant used $403,452.52 of the proceeds obtained from the Capital One loan to pay off the SunTrust loan. Defendant used the remaining funds to pay for the completion of the construction of a house on the Property. [PSMF ¶¶ 11-13]. The City of Marietta (Georgia) Code prohibits occupancy of a new building until the city has issued a certificate of occupancy for the building. MARIETTA, GA. CODE § 7-4-2-050(I)(1)(a) & (b). The City of Marietta issued a certificate of occupancy ("COO") for the Property on February 11, 2008. [Doc. 20-6 at 40-41, Gleisner Aff. Ex. G, COO].

Thereafter, Defendant defaulted on the Capital One loan by failing to make the December 2008 payment and all succeeding payments. [PSMF ¶ 16]. As a result of Defendant's default, Capital One referred the loan to the law firm of Campbell and Brannon, L.L.C. to commence foreclosure proceedings. By letter dated July 1, 2009, Campbell and Brannon, as counsel for Capital One, gave notice to Defendant that the Property was scheduled for foreclosure on the first Tuesday in August 2009. [PSMF ¶¶ 17-18]. By letter dated July 28, 2009 to Campbell and Brannon (the "Ates Letter"), counsel for Defendant, on behalf of Defendant, demanded statutory rescission of the Capital One loan "under the Federal Truth and Lending Act and/or Georgia Fair Lending Act" and the return to Defendant of all funds that he had paid on the subject loan. [Doc. 1-4 at 2, Ates Letter]. No tender of the outstanding principal balance of the Capital One loan accompanied the Ates Letter or was made thereafter. [PSMF ¶¶ 20-21].

***4** At all times relevant to this litigation, Chevy Chase was a federal savings bank regulated by the Office of Thrift Supervision. Capital One is a national banking association, which is regulated by the Office of the Comptroller of the Currency. Capital One is the successor by merger to Chevy Chase Bank, F.S.B. [PSMF ¶¶ 24-26].

The conforming loan size limit for a single-family dwelling as established by the Federal National Mortgage Association ("Fannie Mae") in effect in July 2007, when the Capital One loan was consummated, was $417,000.00. [PSMF ¶ 27; Doc. 20-8 at 33, Gleisner Aff. Ex. I, "Fannie Mae Historical Conventional Loan Limits"].

V. DISCUSSION

Plaintiff Capital One contends that the Capital One loan is not subject to rescission under either the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), or the Georgia Fair Lending Act, O.C.G.A. § 7-6A-1, *et seq.* ("GFLA"), and served requests for admissions ("RFA") to that effect on Defendant on September 10, 2010. [Doc. 20-7, RFA, at 9-10 ¶¶ 24-25]. As a result of Defendant's failure to object or respond to Capital One's RFAs, Defendant has admitted that the Capital One loan is not subject to rescission under either statute. Nevertheless, the court will consider the merits of Capital One's motion for summary judgment. My recommendations are based on the undisputed facts and applicable law.

A. The Capital One Loan Is Not Subject To Rescission Under TILA

Congress's purpose in enacting TILA was "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). TILA provides that in the case of a consumer credit transaction in which the creditor acquires a security interest in property to be used as the principal residence of the borrower, the borrower "shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information or rescission forms...." 15 U.S.C. § 1635(a). This three-day rescission period expands to three years if the requisite information, rescission forms, and disclosures are not provided. See, e.g., Smith v. Highland Bank, 108 F.3d 1325, 1326 (11th Cir. 1997)(recognizing that if a creditor neglects to comply with the § 1635(a) disclosure requirements, "the debtor's right to rescind is extended for up to three years after the transaction is complete").

However, residential mortgage transactions, as defined in 15 U.S.C. § 1602(w), are specifically exempted from TILA's rescission provision. See 15 U.S.C. 1635(e)(1). Section 1602(w) defines the term "residential mortgage transaction" to mean a "transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(w).

Congress delegated to the Federal Reserve Board the power to fill gaps in the TILA statute. See 15 U.S.C. § 1604; see also Perkins v. Central Mortgage Co., 422 F. Supp. 2d 487, 490 n.6 (E.D. Pa. 2006)(citing Ortiz v. Rental Mgmt., Inc., 65 F.3d 335, 339 (3d Cir. 1995)). Federal Reserve Board staff opinions construing TILA are considered dispositive unless they are demonstrably irrational. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980). The Federal Reserve Board's Official Staff Interpretation regarding the term "residential mortgage transaction" states as follows:

> ***5** A transaction meets the definition of this section if any part of the loan proceeds will be used to finance the acquisition or initial construction of the consumer's principal dwelling. For example, a transaction to finance the initial construction of the consumer's principal dwelling is a residential mortgage transaction even if a portion of the funds will be disbursed directly to the consumer or used to satisfy a loan for the purchase of the land on which the dwelling will be built.

Perkins, 422 F. Supp. 2d at 490 (quoting 12 C.F.R. pt. 226, Supp. I, Subpart A, § 226.2(a)(24), cmt. 6). As an example, the commentary states that if one creditor finances the initial construction of the consumer's principal dwelling and another creditor

makes a loan to satisfy the construction loan and provide permanent financing, both transactions constitute residential mortgage transactions under TILA. Id. (citing 12 C.F.R. pt. 226, Supp. I, Subpart A, § 226.2(a)(24), cmt. 4). A residential mortgage transaction also includes a loan to finance the construction of a consumer's principal dwelling on a vacant lot previously acquired by the consumer. 12 C.F.R. pt. 226, Supp. I, Subpart A, § 226.2(a)(24), cmt. 7.

Here, Defendant has not disputed that the proceeds of the Capital One loan were used to satisfy the first loan and to pay for completion of the construction of Defendant's principal dwelling on the Property. Because the loan in this case was used to finance the construction of Defendant's principal dwelling, it was a residential mortgage transaction as defined by TILA. As such, it was non-rescindable under TILA. See 15 U.S.C. § 1602(w); 15 U.S.C. 1635(e)(1); Perkins, 422 F. Supp. 2d at 492 (holding that where a later mortgage replaced a temporary one used to finance the first step in a process that ultimately ended in the erection of the borrower's residence, both loans qualified as a residential mortgage transaction under TILA, and the borrower had no right to rescind the later loan transaction).

For the foregoing reasons and cited authority, Plaintiff Capital One is entitled to a declaratory judgment that Defendant has (and had) no right to rescind the Capital One loan pursuant to TILA.

B. The Capital One Loan Is Not Subject To Rescission Under The GFLA

The Capital One loan is also not subject to rescission by Defendant under the Georgia Fair Lending Act ("GFLA").

1. The Office of Thrift Supervision

At all times relevant to this litigation, Chevy Chase was a federal savings bank which was regulated by the Office of Thrift Supervision (the "OTS"). The Home Owners' Loan Act, 12 U.S.C. §§ 1461-70 ("HOLA"), authorized the OTS (formerly the Federal Home Loan Bank Board) to promulgate regulations providing "for the organization, incorporation, examination, operation, and regulation" of federal savings associations and federal savings banks (collectively referred to as "federal thrifts"). Id. § 1464(a). The OTS received broad rulemaking authority to preempt state laws that would otherwise govern the banking activities of federal thrifts. Id. § 1465; Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 161 (1982).

In 1996, the OTS promulgated 12 C.F.R. § 560.2 to confirm the broad reach of its preemptive regulations. Section 560.2(a) provides that the OTS occupies the entire lending field as regards federal thrifts. In addition to noting OTS's intent to occupy the entire lending field, the regulation also contains a non-exclusive listing of the types of state laws that are preempted pursuant to the regulation. 12 C.F.R. § 560.2(b); In re Thomas, No. 10-40549-MSH, 2011 WL 576830, at *3 (Bankr. D. Mass. Feb. 9, 2011). Section 560.2(b) expressly preempts state laws purporting to impose requirements regarding, among other things, the terms of credit, including the circumstances under which a loan may be called due and payable, loan-related fees, required disclosures in credit-related documents, as well as the processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages. 12 C.F.R. § 560.2(b)(4), (5), (9) & (10). [3]

***6** Additionally, on January 21, 2003, the OTS issued an opinion letter which expressly concluded that federal law preempts the GFLA as to the federal savings associations regulated by the OTS and their operating subsidiaries. See OTS Opinion Letter P-2003-1, *available at* http://www.ots.treas.gov/files/56301.pdf (stating that "GFLA provisions purporting to regulate the terms of credit, loan-related fees, disclosures, or the ability of a creditor to originate or refinance a loan, are preempted by federal law from applying to federal savings associations.").

Based on the OTS opinion letter, and because the state law basis for Defendant's rescission claim under the GFLA (as to Chevy Chase) falls within the category of state laws listed in 12 C.F.R. § 560.2(b), I find that Defendant's claim (as to Chevy Chase) is preempted.

2. The Office of the Comptroller of the Currency

At all times relevant to this litigation, Capital One is a national banking association which is regulated by the Office of the Comptroller of the Currency ("OCC"), the regulatory agency charged with implementing the National Bank Act ("NBA"). [Marquez Aff. ¶¶ 16-17]. The NBA authorizes national banks to engage in mortgage lending, subject to OCC regulation. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 6, 127 S. Ct. 1559, 1564 (2007)(citing 12 U.S.C. § 371(a)). The U.S. Supreme Court has held that state law may not significantly burden a national bank's own exercise of its real estate lending power. Id. at 13, 127 S. Ct. at 1567.

Like the OTS, the OCC has expressly addressed federal preemption of the relevant provisions of the GFLA. On August 5, 2003, the OCC issued a notice entitled, "Preemption Determination and Order" stating that, "the OCC has concluded that the provisions of the GFLA affecting national banks' real estate lending are preempted by Federal law. Therefore, we are issuing an order providing that the GFLA does not apply to National City or to any other national bank or national bank operating subsidiary that engages in real estate lending activities in Georgia." 68 Fed. Reg. 46264-02, 46266, 2003 WL 21785125 (F.R. 2003); see also 12 C.F.R. § 34.4(a)(providing that "state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks."); Watters, 550 U.S. at 21, 127 S. Ct. at 1572 (stating that "[a] national bank has the power to engage in real estate lending ...; that power cannot be significantly impaired or impeded by state law.")(citation omitted).

In Watters, the Court noted that it was clear that "federal control shields national banking from unduly burdensome and duplicative state regulation." Id. at 11, 127 S. Ct. at 1566-67. The Court reiterated that it interprets "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." Id. at 12, 127 S. Ct. at 1567 (quoting Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996)). Although the issue before the Watters Court differs from the issue before this court, the Court's analysis of the scope of the NBA and OCC regulations in preempting state laws is instructive.

In this litigation, Defendant has claimed a state law right to rescind the subject loan transaction based on the lender's conduct related to disclosures made (or allegedly not made) in mortgage lending. [See Doc. 11 at 3]. 12 C.F.R. § 34 is the OCC implementing regulation for 12 U.S.C. § 371 (granting national banks the right to engage in real estate lending activities). Section § 34.4(a) expressly provides that state laws "requiring specific statements, information, or other content to be included in" or disclosed in loan applications or other credit-related documents do not apply to real estate loans made by national banks. 12 C.F.R. § 34.4(a)(9). Notably, Defendant has not contested Plaintiff's interpretation of the preemptive effect of the NBA and OCC regulations on his rescission claim (against Capital One) under the GFLA.

***7** Based on the cited authority, including the OCC opinion letter, and because the state law basis for Defendant's rescission claim under the GFLA (as to Capital One) falls within the category of state laws listed in 12 C.F.R. § 34(a), I find that Defendant's claim (as to Capital One) is preempted.

3. Preemption of the GFLA

Based on the authority discussed above, I conclude, under the facts of this case, that as to Chevy Chase and Capital One, the provisions of the GFLA are preempted by federal law and do not apply to the Capital One loan that Defendant obtained to finance the construction of his residence on the Property. Accordingly, I find that Defendant is not entitled to rescind the Capital One loan pursuant to the GFLA. [4]

VI. CONCLUSION

For the reasons stated, I **RECOMMEND** that Plaintiff Capital One's motion for summary judgment [Doc. 20] be **GRANTED** in its entirety and that Capital One be granted a declaratory judgment, pursuant to 28 U.S.C. § 2201, *et seq.*, that the rights

of rescission granted and defined under TILA and the GFLA are inapplicable to the Capital One loan (and underlying loan transaction) with regard to the Property that is the subject of this litigation.

IT IS SO RECOMMENDED, this 5th day of April, 2011.

All Citations

Not Reported in Fed. Supp., 2011 WL 13269115

Footnotes

1 This litigation arises from a mortgage loan that Chevy Chase Bank, F.S.B. made to Defendant and that Defendant now seeks to rescind. Plaintiff's action seeks a declaratory judgment from the court that the loan is not subject to rescission under either the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), or the Georgia Fair Lending Act, O.C.G.A. § 7-6A-1, *et seq.* ("GFLA"). In filing the lawsuit, counsel for the plaintiff mistakenly named Chevy Chase Bank, F.S.B. as the plaintiff rather than Capital One. Counsel for the plaintiff subsequently moved to substitute Capital One as the real party in interest because nineteen days prior to the filing of this lawsuit, Chevy Chase Bank, F.S.B. merged into Capital One, with Capital One emerging as the surviving bank. [Doc. 7]. Plaintiff's motion to substitute was granted on July 12, 2010, and Capital One, N.A. was substituted for Chevy Chase Bank, F.S.B. as the plaintiff. [Doc. 17, Order].

2 As mentioned above, Capital One is the successor by merger to Chevy Chase Bank, F.S.B.

3 Although TILA has a savings clause which begins, "[T]his subchapter do[es] not otherwise annul, alter, or affect ... the laws of any State ...," 15 U.S.C. § 1610(a)(1), courts that have analyzed the interplay between TILA and the preemptive effect of HOLA have concluded that TILA's savings clause is limited to TILA and does not apply to or trump HOLA and its OTS regulations. See, e.g., Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1007 (9th Cir. 2008).

4 Because I find that the GFLA does not apply to the Capital One loan or underlying loan transaction, I do not reach Plaintiff's argument that even if the GFLA did apply, Defendant has no right to rescission, pursuant to the GFLA, because the subject loan does not meet the definition of "high cost" home loan as defined in the GFLA. [Doc. 20-1 at 15].

2021 WL 3403632
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United States District Court, W.D. Wisconsin.

Carson LAKO, Plaintiff,

v.

PORTFOLIO RECOVERY ASSOCIATES and Raush, Sturm Israel Enerson & Hornik LLP, Defendants.

20-cv-355-wmc

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Signed 08/04/2021

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OPINION AND ORDER

WILLIAM M. CONLEY, District Judge

***1** Plaintiff Carson Lako brings this suit against defendants Portfolio Recovery Associates ("Portfolio") and the law firm of Rausch Sturm Israel Enerson & Hornik, LLP ("Raush"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* and the Wisconsin Consumer Act ("WCA"), Wis. Stat. § 421, *et seq.* Pending before the court is defendants' motion for partial summary judgment (dkt. #12) which the court will grant for reasons explained below.

UNDISPUTED FACTS [1]

On May 9, 2017, Synchrony Bank, a federally chartered savings association, received an online application for a PayPal account in the name of Carson Lako. The application was approved that same day, and an account was opened in Lako's name. The debt in this account functioned something like a credit card in that a consumer incurs charges, then later pays down those charges or at least some minimum payment in order to continue using the account for new charges. Similarly, if Lako did not make timely payments, under the terms of the account, the creditor was allowed to impose late fees and to include those late fees in any minimum payment due.

Between May and June of 2017, Lako incurred over $2,600 in charges on his account, but failed to make any payment. Because of his failure to pay the June 2017 balance, he was charged a $16.64 late fee. On July 28, 2017, Synchrony also mailed a "right to cure" letter to Lako, advising that a minimum payment of $81 was due and had to be paid by August 12, 2017. Although the letter did not state that any portion of this $81 was a late fee, separate billing statements from July 2017 suggest that this minimum payment included the $16.64 late fee for June 2017. [2] Lako continued to fail to make any minimum payments, and he was charged an additional $38 late fee each month between July and October of 2017, for a total of $168.64 in late fees. Indeed, *no* payments were ever made on Lako's account with Synchrony, and so, the account quickly became delinquent.

On December 22, 2017, Synchrony "charged off" the account, and on October 21, 2018, it sold the account outright to Portfolio. Some eight months after that sale, the Rausch law firm, on behalf its client, Portfolio, sent Lako two letters dated June 26, 2019. The first was an initial notice letter setting forth his right to dispute the account debt; the second was titled "notice of right

to cure default" and stated that while Lako owed $3,133.59, he could pay $783 to "cure the default" on his account. Again, this letter did not state that any portion of this $783 was for a late fee. Lako neither responded to these letters, nor did he pay any part of the debt owed.

***2** On August 21, 2019, again on behalf of Portfolio, Rausch next filed a small claims action against Lako in Wisconsin state court. On September 17, 2019, Lako executed a fee agreement with counsel Lawton & Cates, S.C., in which he employed counsel to represent him on a contingent fee basis while also agreeing to pay all costs and out-of-pocket expenses relating to the representation. (Dkt. #34-1.) Subsequently, Lako's retained counsel defended the state court suit against him, contending in part that the notice of default served on him did not itemize delinquency charges as required by Wisconsin law and, therefore, that the suit should be dismissed. On March 4, 2020, in apparent agreement, the state court dismissed the lawsuit with prejudice without issuing a written finding of facts or opinion.

Plaintiff's counsel filed this suit in federal court on Lako's behalf, alleging three causes of action. First, Lako alleges that Rausch violated § 1692e of the FDCPA by falsely representing that an attorney was meaningfully involved in the debt collection process. Second, he alleges that both defendants falsely represented the status of his debt in violation of § 1692e by purporting to have properly accelerated his debt and filed suit against him despite Lako never being provided an adequate right to cure letter pursuant to Wisconsin law. Third, he alleges that both defendants violated § 427.104(1)(k) of the WCA by misrepresenting the level of attorney involvement.

On January 8, 2021, the parties submitted a stipulation proposing the order for litigation of issues. Pursuant to this stipulation, the court agreed that discovery and summary judgment as to plaintiff's second cause of action could proceed first, with discovery and litigation as to the other two issues stayed. In accordance with this plan, defendants have now submitted a partial motion for summary judgment as to plaintiff's second cause of action. Additionally, after oral argument held on April 7, 2021, the court requested supplemental briefing on the issue of standing, as well as a specific issue regarding the operation of the WCA's notice of right-to-cure requirement.

OPINION

Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because the court's subject matter jurisdiction turns on plaintiff's standing to sue, the court must first address that issue, then consider the merits of defendants' partial summary judgment motion under this standard.

I. Standing

The "irreducible constitutional minimum of standing" requires a plaintiff invoking federal jurisdiction to establish that he has suffered an injury in fact fairly traceable to the defendant's challenged conduct and redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Further, these requirements must be proved in "the manner" and with the "degree of evidence required at the successive stages of the litigation." *Id.* at 561.

Recently, the Seventh Circuit has issued a number of cases regarding standing in the FDCPA context, each time emphasizing that a plaintiff must do more than simply claim the act was violated to establish injury in fact. *See Nettles v. Midland Funding LLC*, 983 F.3d 896, 899 (7th Cir. 2020) ("Article III standing requires a concrete injury even in the context of a statutory violation."); *Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282, 286 (7th Cir. 2020) ("The failure to provide information that is required under the FDCPA inflicts a concrete injury only if it impairs a plaintiff's ability to use the withheld information for a substantive purpose that the statute envisioned.") (internal quotations omitted); *Bazile v. Fin. Sys. of Green Bay, Inc.*, 983 F.3d 274, 280 (7th Cir. 2020) ("[A] bare procedural violation, divorced from any concrete harm, does not satisfy the injury-in-fact requirement of Article III.") (internal quotations omitted); *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, 982 F.3d 1069, 1072

(7th Cir. 2020) ("[T]he asserted violation of a substantive right conferred by the Fair Debt Collection Practices Act does not guarantee the plaintiff's standing. There must still be a concrete injury."); *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1068 (7th Cir. 2020), reh'g denied (Jan. 11, 2021) ("[A] plaintiff who lacks a concrete injury cannot sue under the Fair Debt Collection Practices Act or a similar statute just because a statement in a letter is incorrect or misleading."); *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060, 1066 (7th Cir. 2020) ("[I]t's not enough for an FDCPA plaintiff to simply allege a statutory violation; he must allege (and later establish) that the statutory violation harmed him or presented an appreciable risk of harm.") (internal quotations omitted).

***3** Here, the primary injury alleged by plaintiff relates to defendants' state court collection suit, which he claims was wrongly filed against him in violation of Wisconsin law. At the summary judgment stage, plaintiff has produced the following evidence to support his allegations of injury: (1) documents showing the fact of the state lawsuit; (2) the contingent fee agreement between himself and Lawton & Cates, in which counsel agreed both to defend him in the state collection suit and pursue his FDCPA and WCA remedies, while Lako agreed to pay for all costs and out-of-pocket expenses relating to the representation; and (3) a declaration from plaintiff's counsel that Lako incurred $25.55 in costs and fees in the state court suit.

As an initial matter, a plaintiff may not achieve standing in a lawsuit by pointing to the costs of prosecuting the same suit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"). With respect to an FDCPA claim in particular, the Seventh Circuit has further held that a debtor's decision to hire a lawyer due to her confusion over an allegedly misleading dunning letter was *not* a concrete injury. *Brunett*, 932 F.3d at 1069.

Unlike in these cases, however, Lako did not hire a lawyer proactively then claim injury; rather, faced with a lawsuit against which he had to defend, he hired a lawyer to assist in that defense. In *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872 (7th Cir. 2020), the Seventh Circuit explained that this distinction between the cost of *bringing* suit versus the cost of *defending* a lawsuit is relevant to the injury-in-fact analysis. *Id.* at 880-82. In *Crabtree*, a plaintiff filed suit against a consumer credit agency alleging violations of the Fair Credit Reporting Act ("FCRA"), 5 U.S.C. § 1681, *et seq.* 948 F.3d at 875. The consumer credit agency then counterclaimed, alleging that the plaintiff *himself* violated the FCRA by obtaining a consumer report through his attorney for the impermissible purpose of bringing the lawsuit, and asserting as its injury the costs incurred in defending against that suit. *Id.* at 875, 880, 883.

Given those facts, the Seventh Circuit distinguished cases holding that a plaintiff may not satisfy standing by pointing to the cost of bringing suit, noting that the defendant had "alleged that the harm is the cost of *defending* the lawsuit, not bringing it." *Crabtree*, 948 F.3d at 881 (emphasis in original). Instead, the court concluded that "in defending claims, [the defendant] has suffered a redressable injury-in-fact that is traceable to [the plaintiff]." *Id.* at 883. [3] As in *Crabtree*, plaintiff's alleged injury is the cost of defending a lawsuit. Admittedly, the only actual monetary costs claimed in defending were not significant -- only $25.55 -- but standing may be conferred "when the plaintiff suffers an actual or impending injury, no matter how small." *Brandt v. Vill. of Winnetka, Ill.*, 612 F.3d 647, 649 (7th Cir. 2010).

***4** More concerning, as defendants point out, there is no direct evidence that Lako himself had to pay *or* will pay the $25.55. Nor does plaintiff explain why those costs were not sought after prevailing in state court. [4] Troubling though these facts are, the fee agreement indicates that Lako *is* responsible for paying costs, and his counsel avers under oath and as an officer of the court that "Lako owes us that money even if ultimately his cases are unsuccessful." (Pagel Decl. (dkt. #34) ¶ 3.) Moreover, Lako's alleged injury is further braced by the time and energy he had to spend in seeking out an attorney to defend and defending against an allegedly wrongful stat court collection suit. *See Crabtree*, 948 F.3d at 883 (suggesting the injury in fact suffered by defendant included the "time, money, and energy" that the defendant spent in defending against the plaintiff's lawsuit); *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) ("What did provide standing, we held, is that the plaintiffs had altered their daily commute, thus incurring costs in both time and money, to avoid the unwelcome religious

display."); *Leung v. XPO Logistics, Inc.*, 164 F. Supp. 3d 1032, 1037 (N.D. Ill. 2015) ("When a defendant's allegedly wrongful conduct costs the plaintiff time, the plaintiff has suffered an injury in fact.").

Accordingly, as in *Crabtree*, the court concludes that the costs, time, and energy incurred by plaintiff in defending against the suit brought against him amounts to a concrete injury in fact.

II. Motion for Partial Summary Judgment

Satisfied that plaintiff has standing to sue, the court turns to defendants' motion for partial summary judgment on his claim that defendants falsely represented that they could accelerate his debt and file suit against him in violation of § 1692e of the FDCPA. [5] This claim is premised on an underlying alleged violation of two, related provisions of the WCA. First is the WCA's "cure of default" provision, which provides in relevant part:

> (1) A merchant may not accelerate the maturity of a consumer credit transaction [or] commence any action ... unless the merchant believes the customer to be in default (§ 425.103), and then only upon the expiration of 15 days after a notice is given pursuant to § 425.104 if the customer has the right to cure under this section.
>
> (2) ... for 15 days after such notice is given, a customer may cure a default under a consumer credit transaction by tendering the amount of all unpaid installments due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges.... The act of curing a default restores to the customer the customer's rights under the agreement as though no default had occurred.

Wis. Stat. § 425.105(1)-(2). Second is that "[n]otice of customer's right to cure default" section:

> (1) A merchant who believes that a customer is in default may give the customer written notice of the alleged default and, if applicable, of the customer's right to cure any such default (§ 425.105).
>
> (2) Any notice given under this section shall contain the name, address and telephone number of the creditor, a brief identification of the consumer credit transaction, a statement of the nature of the alleged default and a clear statement of the total payment, including an itemization of any delinquency charges, or other performance necessary to cure the alleged default, the exact date by which the amount must be paid or performance tendered and the name, address and telephone number of the person to whom any payment must be made, if other than the creditor.

Wis. Stat. § 425.104.

According to plaintiff, he never received a proper notice, including "an itemization of any delinquency charges" as required by the WCA notice and right-to-cure provisions. Thus, plaintiff argues, defendants were barred from accelerating his debt and filing suit against him. However, this violation of the WCA is *not* the basis of plaintiff's suit. [6] Instead, plaintiff's claim is brought under § 1692e of the FDCPA, which provides that a debt collector "may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt," including the false representation of the "legal status of any debt." 15 U.S.C. § 1692e. Plaintiff argues that defendants misrepresented that they could properly accelerate and sue on the debt, when in fact they could not under Wisconsin law until Lako had been provided with a proper right to cure letter.

***5** Defendants offer a number of arguments against plaintiff's claim, but the court will begin and end with the question of whether the application of the WCA's notice and right-to-cure provisions are federally preempted by the National Bank Act ("NBA"), 12 U.S.C. § 38, *et seq.* The NBA was passed in 1863 and "vested in nationally chartered banks enumerated powers and 'all such incidental powers as shall be necessary to carry on the business of banking.' " *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) (quoting 12 U.S.C. § 24 Seventh). Of course, the only national bank present in this case is Synchrony, which is not named as a party. Still, whether the NBA preempts application of the WCA to Synchrony is relevant to this case because Synchrony's rights and duties were assigned to Portfolio when the account was sold. *See* Wis. Stat. § 422.407(1) ("With respect to a consumer credit transaction ... an assignee of the rights of a creditor is subject to all claims and defenses of the

customer against the assignor arising out of the transaction."); *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288 (7th Cir. 2005) (an assignee "steps into the shoes of the assignor ... whatever the shoe size"). Thus, in order to determine whether defendants acted unlawfully, the court must first ascertain what rights and duties were owed by Synchrony. In turn, this also requires the court to consider whether a national bank, such as Synchrony, may be subject to the notice and right-to-cure requirements of Chapter 425 of the WCA or whether such requirements are preempted by federal law.

This latter question has been directly addressed by both the Wisconsin Department of Financial Institutions ("DFI") and the District Court for the Eastern District of Wisconsin, drawing opposite conclusions. The DFI concluded in a 2018 letter than the notice requirements of Wis. Stat. §§ 425.104 and 425.105 *are* federally preempted as applied to national banks. *Letter from Wis. Dep't of Fin. Inst. to Kohn Law Firm S.C., Request for finding by the Administrator pursuant to s. 425.104(4)(b) Stat. ("DFI Letter")* (Aug. 31, 2018). Further, the DFI concluded that where a national bank has accelerated the maturity of a consumer credit transaction without giving a right to cure notice, a debt collector that has subsequently been assigned that debt and then commences an action against the consumer is not in violation of Wisconsin law. *Id.* [7]

In contrast, in *Boerner v. LVNV Funding LLC*, 358 F. Supp. 3d 767 (E.D. Wis. 2019), Judge Stadtmueller concluded that Wis. Stat. §§ 425.104 and 425.105 are "clearly *not* preempted." *Id.* at 776 (emphasis added). In *Boerner*, the plaintiff defaulted on a debt incurred on a Menard's/Capital One credit card; the debt was charged-off and sold to a debt collector, which then commenced a collections action without providing a right to cure letter. *Id.* at 772-73. Judge Stadtmueller rejected defendants' argument that the notice was not required because of federal preemption, reasoning that the requirement that a debt collector issue a notice of default is only "incidental" to the national bank's lending authority. *Id.* at 778.

Of course, neither the DFI letter nor the Eastern District's decision are binding on this court. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 214 (1985) (preemption is a matter of federal, not state, law); *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987) (district court decisions not binding on other district courts). Given the contrary conclusions of both, this court will undertake its own preemption analysis. [8] To begin, the Supreme Court set forth a general preemption standard for state regulation of national banks in *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25 (1996), holding that the NBA preempts state laws that prevent or "significantly interfere" with a national bank's exercise of its powers. *Id.* at 33. Additionally, the Office of the Comptroller of the Currency ("OCC"), the agency charged by Congress with the supervision under the NBA, has promulgated regulations further clarifying the reach of state law to national banks' operation. *See* 12 C.F.R. § 34.4 (governing the applicability of state law to national bank real estate lending); 12 C.F.R. § 7.4008 (governing the applicability of state law to national bank, non-real estate lending).

***6** Of particular relevance here, 12 C.F.R. § 7.4008 discusses the preemption of state laws affecting non-real estate lending and states in part that:

> A national bank may make non-real estate loans without regard to state law limitations concerning:
>
> ...
>
> (4) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan.

12 C.F.R. § 7.4008(d). This same regulation includes a "saving clause" expressly stating that state laws on the "[r]ight to collect debts" are *not* preempted so long as they are "not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996)." 12 C.F.R. § 7.4008(e).

These preemption regulations were used by the Ninth Circuit and the Fourth Circuit to assess the validity of state notice requirements relating to debt collection in *Aguayo v. U.S. Bank*, 653 F.3d 912 (9th Cir. 2011), and *Epps v. JP Morgan Chase*

Bank, N.A., 675 F.3d 315 (4th Cir. 2012), respectively. At issue in *Aguayo* was a California statute requiring a creditor to provide the borrower certain information after the repossession of the borrower's vehicle, and further providing that the creditor may not collect a deficiency judgment from the borrower if it fails to provide this information. *Aguayo*, 675 F.3d at 919. Ultimately, the Ninth Circuit concluded that the statute regulated debt collection and did no more than "incidentally affect" lending powers, and so, fell under the savings clause of 12 C.F.R. § 7.4008(e) and was not preempted. *Id.* at 925. Similarly, *Epps* involved a Maryland statute that authorizes a creditor to repossess personal property securing a loan only if the creditor complies with specific notice requirements. 675 F.3d at 323. The Fourth Circuit also concluded that the notice requirement related only to debt collection, not lending, and did not "obstruct, impair, or condition" national banks' exercise of "federally authorized powers to extend credit." *Id.* at 324.

Like both the California and Maryland statutes at issue in *Aguayo* and *Epps*, the WCA requires a creditor to provide a specific notice to a borrower before taking certain actions to collect on the debt owed. Unlike the *Aguayo* and *Epps* statutes, however, the WCA goes beyond debt collection and sets conditions on the lending relationship between the creditor and the borrower. In particular, the WCA prohibits a lender not just from pursuing debt collection, but also from accelerating the maturity of a loan, unless and until it provides notice under Wis. Stat. § 425.104. Moreover, this notice must provide a borrower with the opportunity to cure his default, and if he does so, his rights under the agreement are restored "as though no default had occurred." Wis. Stat. § 425.105. In an opinion interpreting Wis. Stat. §§ 425.105 and 425.104, the Wisconsin Supreme Court has explained that "[t]he purpose of the notice of right to cure is to give the customer an opportunity, before the merchant accelerates the obligation, to restore his or her loan to a current status and thus preserve the customer-merchant relationship." *Sec. Fin. v. Kirsch*, 2019 WI 42, ¶ 22, 386 Wis. 2d 388, 926 N.W.2d 167 (internal quotation and citation omitted).

***7** Thus, Wis. Stat. §§ 425.105 and 425.104 go beyond a simple notice requirement and reach into the relationship between a lender and a borrower, affecting the *terms* of credit itself. This is expressly preempted by 12 C.F.R. § 7.4008(d)(4), which provides that state laws affecting the terms of credit are preempted to the extent that they apply to national banks, including the repayment schedule, term to maturity (meaning the date on which a borrower's final loan payment is due), and the circumstances under which a loan may be called due. [9] Nor do these state law provisions fall within the savings clause of 12 C.F.R. § 7.4008. Again, the savings clause provides in part that state laws relating to debt collection are not preempted, but only to the extent they do not prevent or significantly interfere with a national bank's exercise of its powers. 12 C.F.R. § 7.4008(e) (citing *Barnett Bank*, 517 U.S. 25). Here, although the provisions do relate in part to debt collection, they go beyond that by imposing conditions on the terms of credit within the lending relationship. By doing so, the provisions significantly interfere with a national bank's exercise of its lending powers, and so are preempted under the *Barnett Bank* standard. [10]

This court's conclusions are supported by an OCC Notice, which considered whether similar provisions of the Georgia Fair Lending Act ("GFLA") were federally preempted as to national banks. [11] 68 Fed. Reg. 46,264. Like the WCA, the GFLA includes limits on when a loan can be accelerated. *Id.* at 46,276. The OCC concluded that this provision was preempted as applied to national banks on the grounds that "[a] limitation on the ability to accelerate the indebtedness" restricts "the ability of a lender and a borrower to agree to terms that would alter the term to maturity of a loan." *Id.* Also like the WCA, the GFLA includes a right to cure default provision that states a consumer's cure of default reinstates him to the same position as if the default had not occurred. *Id.* at 46,276-77. Again, the OCC found this provision to be preempted as applied to national banks, reasoning that it "requires the original term of the loan to be reinstated upon curing a default, notwithstanding the possibility that prudent underwriting would suggest a modification of terms (including maturity)." *Id.* at 46,277.

***8** Having concluded that Wis. Stat. §§ 425.104 and 425.105 are inapplicable to national banks by reason of federal preemption, the court finds that a debt collector assigned a debt from a national bank is likewise exempt from those requirements. As noted above, an assignee "steps into the shoes of the assignor ... whatever the shoe size." *Olvera*, 431 F.3d at 288. Of course, the court hastens to add that debt collectors, such as Portfolio and its legal counsel, are still expected to comply with all provisions of the WCA with respect to their own actions, a position consistent with that of the Wisconsin DFI. *DFI Letter* (Aug. 31, 2018). Additionally, the court does express some hesitation about the impact of this ruling in a larger context, especially given the

lack of definitive case law, and so again emphasizes that this ruling is limited to the narrow circumstances in which this claim is brought.

For all these reasons, the defendants in this case were *not* required to send Lako a right to cure letter under Wis. Stat. §§ 425.104 and 425.105 as a precondition to accelerating his debt or filing suit against him, and so, they did not misrepresent their ability to do so. Although this conclusion only disposes of one of plaintiff's three claims, the parties represent in a joint stipulation that "an interlocutory appeal of the right-to-cure issue by the losing party would be appropriate" under 28 U.S.C. § 1292(b). (Dkt. #11.) Specifically, § 1292(b) authorizes a court to certify an order for an interlocutory appeal if the order (1) involves a controlling question of law, (2) as to which there is a substantial ground for a difference of opinion, and (3) that an immediate appeal may materially advance the ultimate determination of the litigation. Such interlocutory review is permitted "to assure orderly and efficient administration of complex cases." *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1263 (7th Cir. 1980). Given the closeness of the question as to plaintiff's alleged standing in light of recent caselaw, the importance and novelty of the preemption issue presented, and the likelihood that resolution of either issue will effectively be dispositive of the remaining two issues in suit, the court will certify both the standing and preemption questions to the Seventh Circuit Court of Appeals.

ORDER

IT IS ORDERED that:

1) Defendants' motion for partial summary judgment (dkt. #12) is GRANTED.

2) The standing and preemption questions resolved in this opinion and order are certified for interlocutory appeal to the United States Circuit Court for the Seventh Circuit.

All Citations

Slip Copy, 2021 WL 3403632

Footnotes

1 These facts are derived from the undisputed submissions of the parties, and where disputed from the underlying evidence. The court views all evidence and draws all inferences in the light most favorable to plaintiff as the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

2 In his brief, plaintiff lays out the math behind these minimum payments and persuasively demonstrates that they *do* include late fees. (*See* Pl.'s Opp'n (dkt. #20) 2 n.2.) Because defendants do not appear to dispute that these minimum payments include late fees, however, the court need not recount plaintiff's calculations here.

3 Although the *Crabtree* court concluded that defendant *had* suffered an injury-in-fact, it ultimately affirmed the district court's dismissal of defendant's counterclaim. *Id.* at 881. In doing so, the court explained that "a party injured only by incurring defense costs -- while injured for constitutional purposes -- must find some statutory or common law hook for its motion or claim to recover those costs." *Id.* at 881. According to the court, the defendant lacked the requisite "hook" to bring a cause of action under the FCRA because its claim fell outside of the statute's "zone of interests." *Id.* at 883 ("The statutory objective [of the FCRA] was to confer protections on consumers, not to arm consumer reporting agencies with rights *against* consumers."). Here, however, no such impediment stands in the way of plaintiff. Since his "hook" is the FDCPA, and as a consumer alleging unfair debt collection practices, his cause of action falls within that statute's

"zone of interests." *See Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997) ("The primary goal of the FDCPA is to protect consumers from abusive, deceptive, and unfair debt collection practices.").

4 Certainly, plaintiff would appear to have been entitled to his costs as the prevailing party given that the state court judge dismissed the claim against him *with prejudice*, effectively forgiving his over $3,000 debt.

5 As noted in the fact section, discovery and litigation as to plaintiff's first and third claims relating to misrepresentations of meaningful attorney involvement is currently stayed at the parties' joint request.

6 Likely because Wisconsin courts have held that the proper remedy for such a violation is dismissal of the small claims suit, which occurred here. *See Sec. Fin. v. Kirsch*, 2019 WI 42, ¶ 16, 386 Wis. 2d 388, 926 N.W.2d 167 (where debt collector improperly filed suit before providing a proper notice of right to cure, only remedy was dismissal of the suit).

7 The DFI also clarified that it expects debt collectors to abide by Wis. Stat. §§ 425.104 and 425.105 for their own actions when collecting on consumer credit transactions.

8 Notably, defendants did *not* argue that the DFI letter provided them with a statutory "safe harbor" under the WCA. The safe harbor provision states:

> Any act, practice or procedure which has been submitted to the administrator in writing and either approved in writing by the administrator or not disapproved by the administrator within 60 days after its submission to the administrator shall not be deemed to be a violation of chs. 421 to 427 and 429 or any other statute to which chs. 421 to 427 and 429 refer notwithstanding that the approval of the administrator or nondisapproval by the administrator may be subsequently amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Wis. Stat. § 426.104(4)(b). Defendants' conduct would arguably appear to be approved by the DFI letter, and so fall under the safe harbor. *But see Boerner*, 358 F. Supp. 3d at 776-77 (concluding similar conduct was not protected by the DFI letter pursuant to the safe harbor provision). Regardless, because defendants did not raise this argument, it is waived. *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002).

9 The court considered whether the WCA's notice provision could be read independently from the right to cure provision, but Wisconsin law suggests that the answer is no. In particular, Wisconsin courts have explained that "a customer is entitled to notice only if the customer has a right to cure the default." *Rosendale State Bank v. Schultz*, 123 Wis. 2d 195, 198, 365 N.W.2d 911 (Ct. App. 1985). This is for the obvious reason that where there is no right to cure, "[t]he purpose of the statute would not be served by requiring notice of the right to cure." *Id.* at 199. Having concluded that a national bank is not required to give a borrower the opportunity to cure his default and restore his rights under the agreement, it would follow that a national bank is therefore also not required under Wisconsin law to provide a borrower with the notice provided in Wis. Stat. § 425.104.

10 To give an example of this interference -- national banks are required to charge off an open-end credit loan when 180 days past due. OCC Bulletin 2000-20, Uniform Retail Credit Classification and Account Management Policy: Policy Implementation (June 20, 2000) (citing Uniform Retail Credit Classification and Account Management Policy, 65 Fed. Reg. 36903 (June 12, 2000)). To "charge off" a loan means "[t]o treat (an account receivable) as a loss or expense because payment is unlikely." "Charge Off," Black's Law Dictionary (11th ed. 2019). If applied to national banks, a circumstance could arise in which Wisconsin law would require a bank to restore a borrower's pre-default rights at the same time that federal law would require the bank to charge off the account as a loss.

11 Because the GFLA regulates real estate loans, the OCC applied 12 C.F.R. § 34.4 -- which governs the applicability of state law to real estate loans by national banks -- rather than 7 C.F.R. § 7.4008 -- which governs non-real estate loans, and is the provision relevant to this case. This distinction is not material, however, as the relevant provisions of both regulations are the same. *Compare* 12 C.F.R. §§ 34.4(a)(4), (a)(9), (b)(5) *with* § 7.4008(d)(4), (d)(8), (e)(4).

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1409 WEST DIVERSEY CORPORATION, Plaintiff,
v.
JPMORGAN CHASE BANK, N.A., Defendant.

No. 16 C 256
|
Signed 08/03/2016

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MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

***1** This matter is before the court on Defendant JPMorgan Chase Bank, N.A.'s (Chase) motion to dismiss. For the reasons stated below, the motion to dismiss is granted.

BACKGROUND

Plaintiff 1409 West Diversey Corporation (Hotel) allegedly does business as the Bellwood Hotel at 1409 West Diversey in Chicago, Illinois. The Hotel allegedly employed Marie Liszewski (Liszewski) and issued two payroll checks (Checks) to her in February 2014. Liszewski allegedly deposited the Checks in her Chase account remotely using her Mobile Check Capture app on her smart phone. Chase then allegedly presented the Checks to the Hotel's bank, MB Financial Bank (MB), and MB deducted those amounts from the account of the Hotel. Shortly thereafter Liszewski allegedly presented the Checks at a currency exchange (Currency Exchange) and again received payment. When the Currency Exchange presented the Checks to MB, MB allegedly refused to honor them on the grounds that they had already been paid. The Hotel was then allegedly obligated to pay the Currency Exchange. The Hotel filed the instant action in state court and included in its complaint a state law negligence claim. The Hotel also seeks to certify a class in the instant action. Chase removed the instant action to federal court and now moves to dismiss the instant action.

LEGAL STANDARD

In ruling on a motion to dismiss brought pursuant Federal Rule of Civil Procedure 12(b)(6) (Rule 12(b)(6)), the court must draw all reasonable inferences that favor the plaintiff, construe the allegations of the complaint in the light most favorable to the plaintiff, and accept as true all well-pleaded facts and allegations in the complaint. *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 622 (7th Cir. 2012);*Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002). A plaintiff is required to include allegations in the complaint that "plausibly suggest that the plaintiff has a right to relief, raising that

possibility above a 'speculative level' " and "if they do not, the plaintiff pleads itself out of court." *E.E.O.C. v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007)(quoting in part*Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)); *see also Morgan Stanley Dean Witter, Inc.*, 673 F.3d at 622 (stating that "[t]o survive a motion to dismiss, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," and that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged")(quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009))(internal quotations omitted).

DISCUSSION

Chase argues that it cannot be liable to a third party for negligence and contends that even if it could be held liable the negligence claim is preempted by federal law.

I. Liability to Third Party

Chase argues that it cannot be held liable for negligence by a third party such as the Hotel. For a negligence claim brought under Illinois law, a plaintiff must establish: (1) that there was a "duty of care owed by the defendant to the plaintiff," (2) that there was "a breach of that duty," and (3) that there was "an injury proximately caused by that breach." *Vesely v. Armslist LLC*, 762 F.3d 661, 665 (7th Cir. 2014). Chase argues that based upon the Hotel's own allegations it is clear that the Hotel was never a customer of Chase. Chase contends that it thus had no contractual relationship with the Hotel and owed no duty to the Hotel. Under Illinois law absent a duty owed by a bank to a plaintiff, a "plaintiff cannot set forth a cause of action for negligence against" the bank. *Radwill v. Romeo*, 2013 IL App (1st) 110912-U, ¶ 30. A bank does have a duty of care in regard to its acceptance of deposits. *Id.* at ¶ 29. Under Illinois law "[t]he relationship between a bank and its depositor is contractual in nature, and implicit in that contract is the common-law duty of the bank to use ordinary care in disbursing the depositor's funds." *Id.* A bank, however, "does not owe a common law duty of care to a non-customer." *Id.* at ¶ 30; *Zachman v. Citibank, N.A.*, 2016 WL 2352883, at *2 (N.D. Ill. 2016)(indicating that under Illinois law a bank does not owe a duty to a non-customer under common law). The Hotel references cases dealing with general legal principles, but the Hotel fails to cite any case that would contradict the established state law or indicate that Chase would owe a duty to a third party such as the Hotel. Nor does the Hotel cite to any similar case where a court held that such a mobile deposit system exposed a bank to liability to third parties. Under Illinois law, a bank such as Chase owes no duty to a non-customer under circumstances such as in this case. The Hotel seeks to have this federal court create new Illinois common law that no Illinois state court has recognized and is contradictory to the established law by the Illinois state courts. The Seventh Circuit has indicated that federal courts should be cautious in expanding the liability under state common law. *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 963 (7th Cir. 2000)(stating that when the court is "faced with two opposing and equally plausible interpretations of state law," the Court "generally choose[s] the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability")(internal quotations omitted)(quoting *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996)).

***2** The Hotel also argues in support of its right to pursue this action and create a class that it and other employers need to be protected from "epidemic" fraud. (Resp. 1-4). However, the Hotel's recourse is with the employee who twice deposited the Checks and perpetrated the alleged fraud. Nothing in this ruling prevents the Hotel from pursuing such a remedy against such an employee. In addition, if the Hotel faces a repetition of such conduct by its employees with Chase accounts and the Hotel is dissatisfied with the services it receives, the Hotel can always choose in this free market system to switch to a new bank. Neither the law nor equity supports creating a new common law claim under the circumstances in this case to protect the Hotel from potential fraud by its own employees. The Hotel has thus failed to allege facts that would plausibly suggest a valid negligence claim.

II. Preemption

Chase argues that even if the Hotel had stated a valid negligence claim, such claim is preempted by federal law. Pursuant to "the Supremacy Clause, state laws that interfere with, or are contrary to the laws of congress, made in pursuance of the

constitution are invalid." *Aux Sable Liquid Products v. Murphy*, 526 F.3d 1028, 1032-33 (7th Cir. 2008)(internal quotations omitted)(quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991)). The National Bank Act (NBA), 12 U.S.C.§ 1 *et seq.*, gives national banks authority "to exercise "all such incidental powers as shall be necessary to carry on the business of banking," such as "by receiving deposits...." 12 U.S.C. § 24. The Comptroller of the Currency's regulations implementing the NBA also regulates the deposits and services by electronic means. 12 C.F.R. § 7.4007(a)(stating that "[a] national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law"); 12 C.F.R. § 7.5002(a)(stating that "[a] national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver"). The NBA preempts state law that substantially interferes with its provisions and regulations. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007)(stating that "[s]tates are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator" exercise of its powers," but that "when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way");*Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996)(stating that "[i]n defining the pre-emptive scope of statutes and regulations granting a power to national banks," the "cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted"); *see also Am. Deposit Corp., v. Schacht*, 84 F.3d 834, 837 (7th Cir. 1996)(stating that "[i]t is well settled that a federal law" such as the National Bank Act "preempts a conflicting state law under the Supremacy Clause of Article VI of the Constitution").

In the instant action, the negligence claim that the Hotel seeks to bring would impose a common law obligation under Illinois law on banks that would significantly interfere with their authorized power to take deposits. Particularly as technology advances and paperless deposits become more prevalent allowing a state common law to micro-manage the deposit procedures of banks would intrude far into the realm reserved for federal law when regulating national banking institutions. Absent a preemption of such common law claims, banks could also face a myriad of conflicting laws across this county relating to deposit procedures. Thus, even if the Hotel had stated a valid claim in this case, it would be preempted by federal law. Based on the above, Chase's motion to dismiss is granted.

CONCLUSION

***3** Based on the foregoing analysis, Chase's motion to dismiss is granted.

All Citations

Not Reported in Fed. Supp., 2016 WL 4124293

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