NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2791-09T2

BANK ONE, N.A., by and through its servicing agent, Systems & Services Technologies, Inc.,

Plaintiff-Respondent,

v.

KEVIN JOHN WITASICK and WHITNEY S. WITASICK,

Defendants-Appellants.

Argued October 20, 2010 - Decided May 27, 2011

Before Judges Cuff, Fisher and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-427-09.

A. John Falciani argued the cause for appellants.

Sergio I. Scuteri argued the cause for respondent (Capehart & Scatchard, P.A., attorneys; Mr. Scuteri, on the brief).

PER CURIAM

In this appeal defendants, Kevin and Whitney S. Witasick, challenge the trial court order granting summary judgment in favor of plaintiff, Bank One, N.A., by and through its servicing agent, Systems & Services Technologies, Inc. (SST), on its

liability claim for breach of contract, conversion, and replevin and dismissing defendants' counterclaim alleging violations of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20; the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. §§ 1692 to -1692p; and the Fair Credit Reporting Act (FCRA), 15 U.S.C.A. §§ 1681 to -1681x. We affirm.

Plaintiff entered into a financing agreement for defendants' purchase of a motor home in 2000. Defendants made regular payments for approximately eighteen months and thereafter commenced a pattern of late payments that sometimes resulted in their making double and triple payments on the loan. Notwithstanding this pattern, plaintiff continued to accept payments from defendants made on an irregular basis until August 2008. At that time, plaintiff accelerated the loan and attempted to repossess the motor home but was unsuccessful because defendants did not cooperate in turning over the vehicle.

In March 2009, SST filed a three-count complaint against defendants alleging breach of contract and conversion, and seeking damages and a writ of replevin. Plaintiff sought the entry of judgment in the amount of $71,013.14, which represented the balance due on the loan, plus interest at the rate of $18.49 per day from March 5, 2009, and attorney's fees and costs.

Default was entered against defendants on May 6, 2009, but later vacated. Defendants filed an answer denying the allegations and asserting a counterclaim alleging violations of the CFA, FDCPA and FCRA. Plaintiff filed an answer denying all of the allegations set forth in the counterclaim.

On September 1, 2009, SST moved for partial summary judgment on the issue of defendants' liability and also sought dismissal of defendants' FCRA claim. On October 9, the court issued an order granting plaintiff's motion, finding that defendants were in default on the loan. The court also dismissed defendants' FCRA claim. The order denied the entry of judgment as to damages, stating: "Exact amount of Judgment to be determined once def[endant] produces full acc[ounting] to Pl[aintiff] on or before 10-20-09, [and] deficiency, if any, is determined. Full accounting means a list of all payments, dates made [and] alleged balances." The order also granted full possession of the collateral to plaintiff and authorized the "Sheriff of whichever County the Vehicle may be located [in]" to seize it. Further, the order directed that defendants cooperate in the surrender of the vehicle and ordered defendants to report the location of the vehicle to plaintiff's attorney within seven days.

Plaintiff subsequently filed a second summary judgment motion seeking the entry of judgment on the balance of its claims and dismissal of the remaining counts of defendants' counterclaim. Plaintiff submitted a certification in support of the motion from its representative, Tammy Wilson, who asserted that defendants failed to comply with the court's October 9 order by providing an accounting. She also certified that the vehicle had been seized in late October and defendants were notified of their right to redemption, but as of the filing of the motion, had failed to do so. Finally, Wilson certified that the vehicle was pending sale but would not be sold "for two to three more months due in part to the upcoming holiday season being a very poor time of year to sell the Vehicle." Plaintiff additionally urged that it was entitled to summary judgment on the FDCPA and CFA counterclaims. Specifically, plaintiff argued that the FDCPA applies to debt collectors, not a holder of a loan, which in this case was Bank One. Likewise, the FDCPA does not apply to a loan servicer such as SST.

The court conducted oral argument on the motion on January 8, 2010. At that time, defense counsel represented to the court that the default entered in October 2009 was not "really the issue before the [c]ourt[.]" Defense counsel advised the court that defendants "don't dispute the payments and the dates of

payments as recorded. The issue would be the interest that would be due[.]" Nonetheless, defense counsel raised three issues, two of which related to damages and one related to defendants' counterclaim.

First, defendants argued that plaintiff's motion was premature because the amount of the money judgment was not certain since the vehicle had not been sold, and if the vehicle was sold for less than $32,000, then defendants would be entitled to credits.

Second, defendants urged there were genuinely disputed issues of fact that plaintiff violated the CFA because plaintiff engaged in a course of conduct that acquiesced in defendants' underpayment and overpayment of the note for years, leading defendants to believe their method of payment was acceptable, and when finally there was payment made on August 28, 2008, that brought the note current, "there's a declaration of default, a demand for the accelerated amount due under the entire note, and a lawsuit filed shortly after that." Based upon these facts, defendants contended a jury could reasonably "find that there were false promises, false pretenses made here to secure certain funds. And, there was a type of bait and switch, not necessarily contemplated by the Consumer Fraud Act."

Third, defendants claimed establishing the exact amount due on the note was not their burden, and if there was a genuine question of fact in the court's mind related to credits due to them, summary judgment should be denied.

The court acknowledged that it was plaintiff's burden to establish the amount of the judgment and that plaintiff put forth a calculation, but defendants failed to proffer any "countervailing calculations" for the court's consideration. The court also rejected defendants' argument that plaintiff's course of dealing with defendants acted as a waiver of the precise language in the agreement that permits acceleration of the loan upon default. Finally, although recognizing that the amount of credit to defendants was uncertain because the vehicle had not been sold, the court noted that defendants had contributed to the delay by their refusal to disclose the location of the vehicle until the court entered its order in October 2009, and, thus, there was no reason to delay enforcement.

The court entered judgment in favor of plaintiff in the amount of $83,292.43, together with interest in the amount of $18.49 per day from November 19, 2009, until January 8, 2010, as well as costs. The court's order directed plaintiff to file a post-judgment motion at a later date to "adjust the judgment

amount to[:] (a) give fair credit for the net sale proceeds of the Vehicle once it has been recovered and sold; and (b) reflect the additional reasonable attorneys fees and costs incurred or to be incurred by SST for the balance of the litigation[.]" Finally, the court dismissed the remaining counts in defendants' counterclaim.

On appeal, defendants contend genuinely disputed issues of fact related to plaintiff's status under the FDCPA and commercial practices under the CFA precluded the grant of summary judgment in plaintiff's favor on defendants' counterclaim. Additionally, defendants contend summary judgment should not have been granted prior to the actual sale of the vehicle in order that the amount due could be fixed with certainty rather than left open.

When reviewing a grant of summary judgment, we employ the same standards used by the trial court, which grants summary judgment if the record shows that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Therefore, we first

determine whether the moving party has established that genuinely disputed issues of material fact exist, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in a light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). We review issues of law de novo and accord no deference to the motion judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

I.

The FDCPA was enacted by Congress "to protect debtors from . . . 'abusive, deceptive, and unfair debt collection practices[.]'" Rutgers-The State Univ. v. Fogel, 403 N.J. Super. 389, 394 (App. Div. 2008) (quoting 15 U.S.C.A. § 1692). To bring a private cause of action under the FDCPA, the alleged violator must qualify as a debt collector under the statute. Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 403 (3d Cir. 2000). In specifying the distinction between a creditor and a debt collector, the Third Circuit has instructed, "Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or

debt collector under the FDCPA." FTC v. Check Investors, Inc., 502 F.3d 159, 173 (3d Cir. 2007), cert. denied, ___ U.S. ___, 129 S. Ct. 569, 172 L. Ed. 2d 429 (2008). "Congress has directed us to focus on whether a debt was in default when acquired to determine the status of 'creditor' vs. 'debt collector.'" Id. at 174. The status of the debt is also relevant in determining whether an assignee of a creditor remains a creditor or is a debt collector for purposes of the FDCPA. In interpreting the FDCPA, federal courts have specified that "an assignee of an obligation is not a 'debt collector' if the obligation is not in default at the time of the assignment; conversely, an assignee may be deemed a 'debt collector' if the obligation is already in default when it is assigned." Pollice, supra, 225 F.3d at 403.

Here, as evidenced by plaintiff's billing records, the accuracy of which defendants conceded before the motion judge, SST began servicing the loan as early as January 2005. Defendants were not in default at that time. Hence, consistent with Pollice, SST did not qualify as a debt collector under 15 U.S.C.A. § 1692a(6)(F)(iii) at the time defendants defaulted on the note. Ibid. Therefore, defendants were not entitled to relief against plaintiff pursuant to the FDCPA.

II.

Defendants' CFA claim is premised upon plaintiff's alleged acquiescence in their long history of sporadic payments on the note, which defendants contend acts as a waiver of the strict default terms of payment conditions set forth in the financing agreement. Plaintiff urges that we reject this argument given the clear and unambiguous language in the agreement that states "[t]he acceptance by . . . [SST] of partial payments . . . shall not be construed as a waiver of any subsequent defaults on Debtor's part nor shall it waive the 'time is of the essence' provision."

The CFA establishes a private cause of action against a person subject to the act who engages in conduct deemed unlawful under the CFA, and provides for the award of damages, including counsel fees, where the aggrieved party establishes a causal connection between the unlawful conduct and the aggrieved person's ascertainable loss. Dabush v. Mercedes-Benz USA, LLC, 378 N.J. Super. 105, 114 (App. Div.), certif. denied, 185 N.J. 265 (2005). Unlawful conduct consists of three categories: "(1) affirmative acts; (2) knowing omissions; and (3) regulatory violations." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 245 (2005). Affirmative acts "include unconscionable

commercial practices, fraud, deception, false promise, false pretense, and misrepresentation." Ibid.

The clear and unambiguous language of the financing agreement executed between plaintiff and defendants addresses the consequences of partial payments. This language militates against any finding that defendants were misled by plaintiff's acceptance of defendants' sporadic payments over the years. Moreover, defendants failed to create any genuinely disputed issue of fact establishing an ascertainable loss resulting from plaintiff permitting them to make sporadic payments over the years.

III.

In their final argument, defendants urge that the court erred in entering a monetary judgment before the vehicle was liquidated. We disagree.

Although afforded an opportunity for an accounting, defendants did not undertake the accounting. Plaintiff thereafter filed a second summary judgment motion in early December 2009. In opposing the motion, defendants did not dispute the accuracy of the payment history presented by plaintiff. The motion resulted in a second order entering judgment in favor of plaintiff for $83,292.43 with an additional

provision directing plaintiff to make an application to amend the judgment

> at a later date to adjust the judgment amount to (a) give fair credit for the net sale proceeds of the Vehicle once it has been recovered and sold; and (b) reflect the additional reasonable attorneys[''] fees and costs incurred or to be incurred by SST for the balance of the litigation[.]

As the court noted, defendants contributed to the delay in the sale of the vehicle by concealing it from plaintiff following their default on the note. We are satisfied the terms of the court's order provide appropriate protection to defendants.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION