IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MOUTAIN STATE ADJUSTMENT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No.: CPU4-10-000383**
	)	
DUSTIN J. ALFREE,	)	
	)	
Defendant and	)	
Counterclaim Plaintiff,	)	
	)	
MOUNTAIN STATE ADJUSTMENT and HARLEY DAVIDSON CREDIT CORP.,	)	
	)	
Counterclaim Defendants.	)	

MEMORANDUM OPINION ON DEFENDANT AND COUNTERCLAIM PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TO:

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Date Submitted: August 5, 2011
Date Decided: September 19, 2011

Dear Counsel,

I. Introduction.

Briefing in the above captioned matter on Defendant and Counter-Claim Plaintiff's Motion for Summary Judgment has now been completed by counsel of record and the matter is ripe for decision.[1]

The Court finds further Oral Argument is not necessary on Mr. Shachtman's Motion.

II. Facts & Procedural Posture

On March 3, 2009, Dustin Alfree ("Alfree") purchased a motorcycle from Mike's Famous Harley-Davidson, Inc. (Alfree's Br. 2.) Alfree purchased the motorcycle on secured credit through Eaglemark Savings Bank ("ESB"), a 3rd party lender. (Alfree's Br. Ex. A.) The total amount of the loan was $9,809.00 plus interest at the rate of 16.65%. (Alfree's Br. Ex. A.) Under the terms of the loan contract, ESB retained a security interest in the motorcycle. (Alfree's Br. 2.) ESB later assigned the debt to Harley Davidson Credit Corp ("HDCC"). (HDCC's Interrogs. ¶ 2.) Alfree failed to make monthly payments as required by the contract. (Compl. ¶ 11.) On November 11th, 2008, pursuant to the terms of the contract, HDCC repossessed the motorcycle. (Alfree's Br. 2.)

On November 12, 2008, HDCC mailed Alfree a letter titled "Notice of Our Plan to Sell Property." (Alfree's Br. Ex. C.) The letter states the following, in pertinent part:

[1] The record contains Mr. Shachtman as the attorney for Defendant and Counter-Claim Plaintiff's Motion for Summary Judgment which was presented on Friday, August 5, 2011 at 9:00 a.m. in New Castle County Court of Common Pleas. On August 15, 2011 Mr. Shachtman filed a Reply Brief in Support of his Motion for Summary Judgment. Also in the record is Blake A. Bennett, Esquire as Attorney for Mountain State Adjustment as to the Counter-Claim only Response to Mr. Shachtman's Motion for Summary Judgment as to the FDCPA's Counter-Claim which was filed with the Court electronically on August 24, 2011. Third, Mr. Daniel C. Kerrick, Esquire, on behalf of Harley Davidson Credit Corp. filed a Response in Opposition to Mr. Shachtman's Motion for Summary Judgment and presented the same on Friday, August 5, 2011 at 9:00 a.m . at the Motion hearing.

> To get your collateral back you must pay off your loan, which includes but is not limited to the outstanding balance, plus interest, and expenses by November 22, 2008. As of the date of this letter you must pay:
>
> | | |
> |---|---|
> | *Outstanding Balance, plus interest | $8,971.24 |
> | *Expenses (repo fee, estimated) | $600.00 |
> | *Total | $9,571.24 |
>
> We will sell the collateral at a private sale sometime after November 23, 2008. A sale could include a lease or license.
>
> ….
>
> If you do not remit the above referenced amount in the allotted time, you still have the opportunity to get the property back at any time before we sell it by paying us the full amount you owe (not just past due payments), including our expenses. Funds must be received by date of sale. To learn the exact amount you must pay, call us at the phone number stated above.
>
> If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at the phone number stated above or write us at the address stated above and request a written explanation.

(Alfree's Br. Ex. C.)

On January 21, 2009, the collateral was sold at auction for $4,300.00.[2] (HDCC's Interrogs. ¶ 2.) The sale proceeds were applied to Alfree's loan balance. (HDCC's Interrogs. ¶ 2.) As of January 21, 2009, a deficiency balance of $6,092.07 remained unpaid on the loan. (HDCC's Interrogs. ¶ 2.) On September 22, 2009, HDCC assigned the account to the plaintiff, Mountain State Adjustment ("MSA"). (Compl. Attach. 1.)

On January 20, 2010, MSA filed a complaint against Alfree to recover deficiency judgment in the amount of $6,092.07 in principal plus $964.30 in interest, for a total amount of $7,056.37 plus post judgment interest and reasonable attorney's fees. In the complaint, MSA first asserts that it is the assignee of the debt from HDCC. (Compl. ¶ 1.) However, MSA then states

[2] MSA asserted in the Complaint that the collateral was sold at public auction. In the motion *sub judice*, MSA and HDCC assert that they believe the collateral was actually sold at a private sale. It is undisputed that the HDCC notice of sale specified that the collateral would be sold at a private sale.

that “Plaintiff” and “Defendant” entered into the contract at issue, “Plaintiff” loaned “Defendant” the money pursuant to the agreement, “Plaintiff” retained a security interest in the motorcycle, “Plaintiff” gave “Defendant” notice after default and repossession that the motorcycle would be sold, and as a result, “Plaintiff” suffered damages. (Compl. ¶ 3-12.) Documentation of the debt is attached to the Complaint, including the Mike’s Famous Harley Davidson sale invoice, signed credit application, contract, payment history, and assignment to MSA.

On December 20, 2010, Alfree filed an Answer, denying all averments in the complaint. Further, Alfree requested monetary damages based on the following counterclaims: (1) violation of UCC pre-sale notice requirements; (2) violation of the Federal Fair Debt Collection Practices Act (“FDCPA”); (3) violation of the Federal Service Members Civil Relief Act; and (4) conversion. Additionally, Alfree, as a third-party-plaintiff asserted a claim against HDCC alleging violations of UCC pre-sale notice requirements identical to its UCC counterclaim against MSA.

On July 1, 2011, Alfree filed a Motion for Summary Judgment with respect to its UCC counterclaim against MSA; its UCC 3rd party claim against HDCC; and its FDCPA claim against MSA. On August 3, 2011, MSA and HDCC filed separate responses to Alfree’s motion. On August 8, 2011, a hearing was held on Alfree’s Motion for Summary Judgment. Following oral argument, the Court ordered supplemental briefing based on FDCPA case law raised by MSA for the first time at oral argument. On August 15, 2011, Alfree filed a reply brief addressing the case law. On August 24, 2011, MSA filed its response. This is the Court’s final opinion and Order on Alfree’s Motion for Summary Judgment.

III. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CCP Civ. R. 56(c). The Court must review the facts in the record in a light most favorable to the non-moving party. *Borish v. Graham,* 655 A.2d 831, 833 (Del. Super. 1994). The moving party bears the burden to demonstrate that there is no genuine issue of material fact. *Id.* Summary judgment is not appropriate "when the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances." *Wilson v. Triangle Oil Co.*, 566 A.2d 1016, 1018 (Del. 1989).

IV. Discussion

There are two questions presented in this Motion for Summary Judgment. First, whether MSA and HDCC violated UCC pre-sale notice requirements by sending Alfree impermissibly ambiguous pre-sale notice instructions. Alfree alleges two separate UCC notice violations: (i) the notice established an artificially short redemption period; and (ii) the notice provided that a private sale would be held, but a public sale was in fact held. The second issue is whether MSA violated the FDCPA when it filed a Complaint with the Court without adequately disclosing its status as assignee of the debt. The Court finds that there is no material fact in dispute and Alfree is not entitled to judgment as a matter of law on the first UCC claim. Further, there remain disputed issues of material fact with respect to the second UCC claim. Finally, Alfree is not entitled to judgment as a matter of law on the FDCPA claim. Therefore, Defendant's Motion for Summary Judgment is DENIED.

a. <u>UCC Counterclaims</u>

The Uniform Commercial Code ("UCC") provides that after default, a secured creditor may sell the collateral, provided that all aspects of the sale are commercially reasonable. 6 *Del. C.* § 9-610. More specifically, the UCC requires the secured creditor give the debtor reasonable pre-sale notification of the disposition of the collateral. 6 *Del. C.* § 9-611(b). Among other requirements, 6 *Del. C.* § 9-613 and 614 require the pre-sale notice to contain the method of disposition and certain information concerning the statutory right of redemption. Written notice gives the debtor the opportunity to exercise her statutory redemption rights, enables the debtor to find alternative buyers for the collateral, and allows the debtor to oversee all aspects of the disposition of the collateral, thus maximizing the likelihood of a fair sale price. *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 776 (Del. 1980). If a secured creditor fails to comply with UCC notice provisions, she is absolutely barred from seeking a deficiency judgment, and the debtor is entitled to recover damages under 6 *Del. C.* § 9-625(c). *Id.* at 777.

6 *Del. C* § 9-623 provides that a debtor may exercise the right to redeem at any time prior to the disposition of the collateral. In *Todd v. PNC National Bank*, the court held that when a secured creditor sends the debtor a post-repossession notice of sale that "establishes a shorter period of redemption, *either expressly or by implication*, the secured party has violated the 'reasonable notification' requirement." *Todd v. PNC National Bank*, 1988 WL 765408 (Del. Com. Pls.). As such, in *Ayers v. Mellon Bank* the Court held that notice of sale was not reasonable because it specified that the debtor "must" redeem by December 14, but the sale did not actually occur until February 11, almost two months later. *Ayers v. Mellon Bank*, 1987 WL 8274 (Del. Super.). *See also*, *Davis v. ACC Consumer Finance Corp*., 1999 WL 1847408, *3 (Del. Com. Pls.). In short, a secured creditor may not state nor imply in its notice of disposition

that the right of redemption must be exercised by a specific date prior to the actual date of disposition. This rule extends to prohibit secured creditors from sending the debtor two separate notices with conflicting information concerning the right to redeem. *Loyola Federal Savings and Loan v. Hopson*, 1993 WL 331154 (Del. Super.).

Also, secured creditors may not state in the notice that the collateral will be sold at one type of sale and then actually sell the collateral at another type of sale. *Stigars v. Mellon Bank,* 1998 WL 996471 (Del. Super.). For example, in *Taylor v. Mellon Bank,* the secured creditor sent the debtor notice that the collateral would be sold at a public sale, but that if the public sale did not result in a commercially reasonable price, then the collateral would be sold at private sale. *Taylor v. Mellon* Bank, 1989 WL 147361, *1 (Del. Super.). However, the property was in fact sold at private sale, without an attempted public sale. *Id.* at *2. The Court found the notice misleading in violation of the UCC, reasoning:

> [i]t is not commercially reasonable to notify a debtor in default of an obligation of both a public and a private sale where the private sale is expressly made contingent upon the failure of the public sale. This is truly misleading where the secured party at no time ever contemplated a public sale. Given that the notice called for public sale first, the plaintiffs could only conclude that a public sale would be held…Mellon sent the plaintiffs a notification for both a public and private sale, never intending a public sale. This is not a mere technical violation. This is a commercially unreasonable notice.

Id. at *3. Finally, the court noted that it is important to inform the debtor of the specific type of sale to be held because debtors may be inclined to exercise less oversight over a secured creditor conducting a public sale because of the open nature of the sale. *Id.* In other words, it is foreseeable that debtors may engage in varying levels of oversight of the disposition depending on the type of sale held, and therefore the type of sale held must match the type specified in the notice.

In the instant case summary judgment is not appropriate because HDCC and MSA did not establish an artificially short redemption period in violation of the UCC. Unlike the impermissible notices in *Todd*, *Ayers*, *Davis*, and *Loyola*, the notice here is not vague or ambiguous concerning the right to redemption. The notice provided that Alfree could exercise the right to redemption by paying the outstanding balance plus interest totaling $9,571.24 by November 22, 2008. Additionally, the notice stated that if Alfree did not pay this amount in time, he still could exercise the right to redemption up to the date of sale provided that he called HDCC at the provided phone number to determine the current amount of interest owed. The only reasonable reading of this notice is that Alfree maintained the right to redeem up until the date of sale at the price of $9,571.24, and that the amount necessary to exercise the right to redeem would increase after November 22, 2008 by virtue of the contractually agreed to 16.65% interest continuing to accrue.

Summary judgment is likewise not appropriate because there is a genuine issue of material fact regarding the type of sale held. The pre-sale notice provides that the collateral will be sold at private sale. MSA's complaint provides that the collateral will be sold at public sale. HDCC and MSA argue that HDCC now "believes the sale of the collateral was private" and argue further that it the complaint can simply be amended to correct the misstatement. Alfree argues that the averment in the complaint is a binding judicial admission. Delaware law plainly requires the type of sale stated in the pre-disposition notification to match the type actually performed. Thus, the outcome turns on whether the Court is bound by MSA's characterization of the sale in the complaint as a judicial admission.

Statements of fact in pleadings are judicial admissions. *Kraus v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2830889, *4 (Del. Super.). "A judicial admission is a formal statement by a

party or his or her attorney, in the course of judicial proceedings, which removes an admitted fact from the field of controversy." *Id.* Judicial admissions include statements of fact made in pleadings. *Id.*

Nonetheless, pleadings can be amended, so not all statements made in pleadings are binding judicial admissions. Court of Common Pleas Civil Rule 15(a) allows for amendment of pleadings and provides:

> [A]t any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

CCP Civ. R. 15(a). Delaware state courts liberally construe this rule and permit "amendments to pleadings at all stages of the proceedings unless the opposing party shows that it would be seriously prejudiced thereby." *Paul v. Chromalytics Corp.*, 343 A.2d 622, 625 (Del. Super. 1975). Parties may even be permitted to amend their pleadings to plea contradictory facts "unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like." *Hess v. Carmine*, 396 A.2d 173, 177 (Del. Super. 1978). For example, in *E.J Deseta HVAC SVCS., Inc v. Conaty*, the court permitted the plaintiff to amend the pleadings to change the amount of damages requested, reasoning that the plaintiff was not changing legal theories or introducing new causes of action, but instead correcting mistakes in good faith. *E.J Deseta HVAC SVCS., Inc v. Conaty*, 2005 WL 1950799, *2 (Del. Super.).

Here, MSA's characterization of the nature of the sale in the complaint is not a binding judicial admission. MSA and HDCC do not know whether the sale of the collateral was a public sale or private sale. As such, the inclusion of the averment in the complaint was likely not a

conscious tactical decision, but rather a mistake. Moreover, Alfree neither argues nor presents evidence of severe prejudice necessary to bar amendment under Rule 15. MSA may file a Rule 15(a) motion to amend the complaint, and the parties will be entitled to an evidentiary hearing and argument on the motion. More importantly for purposes of the instant motion, there remains a genuine issue of material fact as to the type of the sale held and summary judgment is therefore not appropriate.

b. <u>FDCPA Counterclaims</u>

The federal FDCPA controls false or misleading communications by debt collectors and provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. This subsection includes a non exhaustive list of conduct, that if engaged in by debt collectors, is *per se* in violation of § 1692e. Included in this list is "[t]he false representation of – the character, amount or legal status of any debt." 15 U.S.C. § 1692e(2)(A). Debt collectors that fail to comply with the FDCPA are liable to the offended debtor for money damages. 15 U.S.C. § 1692k.

Only certain representations made by the debt collector qualify as actionable communications under the FDCPA. *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938, 941-44 (7th Cir. 2011). The FDCPA was enacted to protect consumers from being intimidated or tricked by professional debt collectors. *Id.* at 941-42. As such, debt collection complaints filed in state court only qualify as communications governed by the FDCPA when the consumer alleges that the communication would be false, misleading, or deceitful to a reasonable consumer. *Id.* It is important to note that the FDCPA does not require any specific level of detail in debt collection complaints. *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 472 (7th Cir. 2007). Rather, the level of detail required is governed by rules of pleading. *Id.* Finally,

complaints are not misleading or deceitful in violation of the FDCPA solely because they contain shorthand or simplistic means of describing the parties to a consumer credit card contract. *Id.*

To determine whether representations in communications made by a debt collector to a consumer are false, deceptive, or misleading in violation of the FDCPA, courts apply the "least sophisticated debtor" standard. *Dutton v. Wolhar*, 809 F. Supp. 1130, 1135 (D. Del. 1992), *aff'd* 5 F.3d 649 (3d Cir. 1993). This standard requires the Court to consider whether an unsophisticated consumer would have been deceived, misled, or harassed by such practices. *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 392 (D. Del. 1991). In short, "[a] communication is deceptive for purposes of the Act if 'it can be *reasonably read* to have two or more different meanings, one of which is inaccurate.'" *Campuzano-Burgos v. Midland Credit Mgmt., Inc.*, 550 F.3d 294, 298 (3d Cir. 2008) (emphasis added). Emphasizing reasonableness protects debt collectors from liability for "bizarre or idiosyncratic interpretations of collection notices" and presumes "a basic level of understanding and willingness to read with care [on the part of the recipient]." *Id.* at 299 (quoting *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008)).

Alfree argues that MSA's complaint was deceptive in violation of the FDCPA because while it does initially state that MSA is the assignee of the debt from HDCC, it then says that Plaintiff (i.e. MSA) entered into the contract with Alfree, loaned the money, retained a security interest in the motorcycle, repossessed the motorcycle after default, and sent Alfree notice of sale. Alfree argues that use of this language would mislead a reasonable consumer as to who took these actions, and therefore the complaint is misleading in violation of the FDCPA. The Court disagrees.

Taken as a whole, a reasonable consumer would not find MSA's complaint to be misleading or deceptive. MSA disclosed its status as assignee of the account in the initial averment of the complaint. Then, it describes the sale of the motorcycle, at a specific price, followed by the subsequent default, repossession, and sale. Finally, it demands a deficiency judgment for the remainder of the money owed under the contract. Documentation of the assignment from HDCC to MSA is attached to the complaint, along with the promissory note/security agreement, and a copy of Alfree's original signed application for credit, and an invoice from Mike's Famous Harley Davidson for the sale of a motorcycle to Alfree. A reasonable consumer reading the complaint and attached materials together would believe that the debt for the purchase of the motorcycle had been assigned to MSA, and that MSA was now attempting to collect on the account. Because the complaint is not deceptive or misleading, Alfree is not entitled to judgment as a matter of law with respect to the FDCPA claim and the motion for summary judgment is therefore denied.

V. Conclusion

For the foregoing reasons, Alfree's Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED this ___ day of September, 2011.

_____

John K. Welch, Judge

/jb
cc: Ms. Tamu White, CCP Chief Civil Case Manager