CASE NO. 20-CI-004827 (Business Court Docket)

JEFFERSON CIRCUIT COURT
DIVISION FOUR (4)
JUDGE CHARLES L. CUNNINGHAM, JR.

DOROTHY MILES AND MATTHEW JUMP — PLAINTIFFS

V.

ORDER

MARINER FINANCE, LLC — DEFENDANT

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This is a "complex consumer class action" brought first by Plaintiff Dorothy Miles then later joined by Plaintiff Matthew Jump (collectively referred to as "Borrowers") seeking injunctive relief / declaratory judgment and damages for violations of Kentucky law including the Consumer Protection Act and the usury statute. Defendant Mariner Finance, LLC, purchased the original debts in this case from Regency Finance Company. (Both Regency and its successor Mariner will be referred to collectively as "Lender.") The Borrowers bring this action individually on behalf of all other Kentucky borrowers similarly impacted by Lender's conduct. Borrowers contend such a class would amount to hundreds or possibly thousands of Kentuckians.

A central legal issue in this dispute involves the proper calculation of interest following judgments on defaulted consumer precomputed finance charge loans. A precomputed finance charge loan is just what it sounds like: The interest for the term of the loan is calculated and called a "finance charge." The finance charge is added back to the principal, then divided by the number of payments in the loan term. This creates an account balance. If the precomputed loan is paid off early, the unearned "interest" is refunded to the borrower (or, as a practical matter, the payoff amount is reduced).

If the borrower pays each payment on time, there is little difference between a precomputed finance charge loan and a simple interest loan, which involves the recalculation of interest due with each payment of principal. The difference arises when the stream of payments is interrupted by the borrower's desire to pay off the loan before the end of the term or the inability of the borrower to make the payments at they fall due, resulting in a default. In early payment of a precomputed loan, the borrower arguably would be due a refund or discount for the amount of pre-charged interest (finance charges) that never actually accrued.

Precomputed interest loans are often made on car loans to borrowers with subprime credit. The allegation in this case is that Lender, through the defaulted loans, seized an opportunity to convert a loan involving finance charges based on the rate of 35.4700% (just under Kentucky's maximum interest rate of 36%) into a simple interest rate loan of 34.60% and charging interest on the finance charges already built into the balances due for the loans. Moreover, Borrowers contend, since the judgments are for liquidated amounts and the Note does not provide for the Lender to convert their contract into an interest-bearing loan, Lender arguably is only entitled to the 8% judgment rate of interest from the date of judgment until the judgment is paid. Borrowers allege they have been systematically hit with greater obligations in their default judgments than is justified. Borrowers estimate there are 896 such cases like this in Kentucky and seek to certify a class to make this a class action law suit.

The Lender responded by moving to dismiss the case pursuant to CR 12.02. It argues Borrowers are subject to an arbitration clause signed the same day they signed the note and security paperwork. They also object to the certification of a class and object to the Borrowers' motion to file a second amended complaint. Therefore, there are four motions to rule on: 1. Borrowers' motion to file a second amended complaint; 2. Lender's motion to compel arbitration; 3. Lender's motion to then dismiss the matter or hold it in abeyance pending the

arbitration ruling; and 4. Borrowers' petition for declaration of rights. The last three are so intertwined they must be resolved as a single issue.

MOTION TO FILE A SECOND AMENDED COMPLAINT

After filing a first amended complaint to add Matthew Jump as a named Plaintiff, the Borrowers have filed a motion to file a second amended complaint to accomplish two purposes. First, to address the arbitration issue and second, to remove the allegations of Matthew Jump from the claim since he has asked to be dismissed as a party plaintiff from this action. The Lender replied that the second amended complaint failed to make any reference to the arbitration agreement. It is therefore unclear to Lender why the second amended complaint is necessary to address any issue concerning arbitration. Lender also argues the Amended Complaint sufficiently isolates the Matthew Jump case from any other case. Nevertheless, no harm would seem to arise from permitting the amendment. CR 15.01 provides that "a party may amend her pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice requires." The Borrowers' Second Amended Complaint is therefore accepted and deemed entered of record as of the date it was filed.

ENFORCEMENT OF THE ARBITRATION AGREEMENT / LENDER'S MOTION TO DISMISS / BORROWERS' MOTION FOR DECLARATORY JUDGMENT

As the Borrowers point out, the existence of an enforceable arbitration agreement is a legal question for the Court to decide. The Lender has established a valid arbitration agreement exists. The arbitration agreement was executed by Miles as part of her loan transaction on November 28, 2018. The paperwork consisted of three parts: a Loan Note, a Truth-in-Lending Disclosure Statement, and an Arbitration Agreement. The Arbitration Agreement is straight-forward and contains all the required material terms. The Borrower signed all three documents and is presumed to have understood the documents she signed. The Borrower argues that the Arbitration agreement is a stand-alone document not referenced or incorporated in the note.

There is no requirement that it be. There is no evidence that the page for the Arbitration Agreement was falsely shuffled in with the other documents or that the borrower did not sign the agreement to arbitrate. The Borrower argues the arbitration agreement is faulty in that it fails to identify the parties to the contract, the specific loan subject to arbitration, and the document is undated and contains no effective date. There is no evidence that Miles thought she had signed a free-floating arbitration agreement that would apply to some other contract. Indeed, there is no evidence she had any other contracts with the Lender The stand-alone aspect of the document makes the arbitration agreement more visible to the Borrower; it is not hidden in a forest of legalese and papers. The arbitration agreement is therefore presumptively enforceable.

The fact that Lender came to District Court rather than seeking arbitration when seeking to collect on the note is not a basis to find Lender waived its rights to now seek arbitration. Who would the Lender arbitrate with in a default? Moreover, the arbitration agreement expressly states that Lender may go to court to enforce the note and subsequently elect to arbitrate. In District Court, no party elected arbitration. In Circuit Court, the Lender elected arbitration.

Borrowers then argue the entire agreement is void by the application of K.R.S. 286.4-991(9) to the actions taken in the collection case. But as Lender points out, the issue of the proper rate of interest is not in the making of the loan but rather in the collection of the loan. Any doubts concerning the application of the arbitration agreement should be decided in favor of arbitration. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W. 3d 850, 855 (Ky. 2004).

The conventional law claim of whether Borrowers owe money to Lender on the Note and, if so, how much, could have been decided by arbitration (which could have been compelled if necessary) so long as one side elected that method to resolve that dispute. However, Lender did not so elect -- it went to court.

Lender filed a motion to dismiss this case pursuant to CR 12.02 on the basis that the parties are required to arbitrate the matter once it elects to do so; something it now chooses to do. The Court has determined that the arbitration agreement is enforceable in a conventional sense. Despite that, the Court typically does not dismiss actions even when compelling arbitration but instead holds such matters in abeyance. That is because an arbitrator has no power to order folks around, particularly third parties who have never signed any agreement to do what an arbitrator tells them to do. Thus, if the winning side in arbitration wanted to file a garnishment on a bank account of the losing side, that garnishment order needs to come from a judge rather than an arbitrator. There is no other way to compel a third-party bank to pay its customer's money to a creditor of that customer.

The Jefferson Circuit Court is a court of general jurisdiction. The old days of courts of law and courts of equity are gone. While this Court doesn't spend a lot time addressing injunctive relief, it does have those powers. While two entities or individuals may enter into a contract or an agreement to resolve their financial disputes as they see fit (as long as it isn't by way of a duel with deadly weapons), they cannot decide between themselves how this Court should wield its equitable powers. Nor can they agree to assign such powers to an arbitrator – no matter how capable and fair said arbitrator might be.

The General Assembly has found that "the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer and the ethical sellers of goods and services." KRS 367.120(1). It has declared "unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce" to be unlawful. KRS 367.170(1). Any person suffering injury by reason of such an unlawful act may seek judicial intervention and the court may, in its discretion, "provide such equitable relief as it deems necessary or proper." KRS 367.220(1). Borrowers, by their request for a declaration of rights, have essentially invoked their rights under these (and possibly other)

statutes. This Court must review the conduct in question and, if necessary or proper, enjoin any unlawful conduct going forward.

To the extent Lender would argue the arbitration agreement is so broad as to consume such consumer rights, the Court must respectfully disagree. Such claims simply are not expressly envisioned in the agreement. More importantly, if the agreement is so broad, it is unconscionable and therefore unenforceable. Two controlling precedents closely match the issues in this case and would compel such a finding if Lender sought to compel arbitration on the statutory rights Borrowers have invoked. *Mortgage Electronic Registration Systems, Inc. vs. Abner,* 260 S.W.3d 351 (Ky.App. 2008) involved a residential mortgage loan contract with an arbitration clause which the lender relied upon to seek dismissal of a claim it had violated several statutory rights of the borrower including the Consumer Protection Act. *Valued Services of Kentucky, LLC vs. Watkins,* 309 S.W.3d 256 (Ky.App. 2009), involved a payday loan with an arbitration clause and that lender similarly relied upon it to seek dismissal of the borrower's claims for, among other things, declaratory / injunctive relief. The circuit judges in both cases refused to enforce the mandatory arbitration provision, finding them to be unconscionable in that context. Both those rulings were promptly appealed, and both resulted in published opinions upholding the decisions of the trial judge. Both appear to still be good law. This Court is bound by those precedents. SCR 1.040(5).

ORDER

For the reasons set forth, it is hereby ordered and adjudged that:

1) The motion for leave to file Plaintiffs' Second Amended Complaint is GRANTED.

2) The Motion to Compel Arbitration of Plaintiffs' statutory / declaratory judgment / injunctive claims and to dismiss this case is DENIED.

3) The motion for a Declaratory Judgment, etc., is DENIED at this time as premature, at best. Counsel are directed to confer and schedule a BCR 4.2 Case Management Meeting. The Court will subsequently meet with counsel for a Case Management Conference after the filing of a Case Management Report. Pursuant to current Kentucky Supreme Court guidance, such conferences should be conducted remotely.

This is an interlocutory ruling, albeit one subject to an immediate appeal. KRS 417.220(1)(a), *Diversicare vs. Estate of Hopkins,* 434 S.W.3d 70 (Ky.App. 2014).

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JUDGE CHARLES L. CUNNINGHAM, JR.

xc: counsel of record