UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 08-10936-RGS

JOHN S. CUNNINGHAM
And
BRIAN M. DELAURENTIS,
On Behalf of Themselves and All
Others Similarly Situated

v.

NATIONAL CITY BANK

MEMORANDUM AND ORDER ON
DEFENDANT'S MOTION TO DISMISS

January 7, 2009

STEARNS, D. J.

On July 7, 2008, plaintiffs John S. Cunningham and Brian DeLaurentis, the recipients of a home equity line of credit (HELOC), filed this putative class action against the issuer, National City Bank (National). Plaintiffs assert individual and class claims against National for violations of the Truth in Lending Act (TILA), 15 U.S.C., § 1601, *et seq*., breaches of contract, and violations of Mass. Gen. Laws c. 93A. On July 25, 2008, National moved to dismiss plaintiffs' First Amended Class Action Complaint (Amended Complaint). As all claims are resolved by the unambiguous terms of plaintiffs' contract with National (the contract is attached to the Amended Complaint), the court initially decided to treat the motion to dismiss as one for summary judgment.[1] The court heard oral argument on December 16, 2008.

[1]The court gave the parties notice of its intention to convert the motion to dismiss to one for summary judgment under Fed. R. Civ. P. 12(d) prior to the hearing.

BACKGROUND

On November 26, 2004, plaintiffs jointly closed on a $100,000 HELOC with National. The HELOC, which was for a term of ten years, was secured by the plaintiffs' home in Provincetown, Massachusetts. The specific terms of the HELOC are set out in an "Equity Reserve Agreement" (Agreement). On January 7, 2008, plaintiffs drew $50,000 against the HELOC (the January withdrawal). National sent plaintiffs an account statement indicating that the due date for the first installment on the January withdrawal was February 22, 2008. On February 4, 2008, plaintiffs drew an additional $49,500 against the HELOC. National sent plaintiffs an account statement indicating that the due date for the first installment on the February withdrawal was March 22, 2008.

On February 27, 2008, Cunningham gave an online instruction to Citibank to remit a check to National in the amount of $60,500. This amount was intended to repay the January withdrawal in full, and the February withdrawal in part.[2] On February 29, 2008, National informed plaintiffs by letter that their payment was past due, and that the HELOC had been terminated.[3] Plaintiffs called a telephone number listed in the termination letter to complain. They were connected to a debt collector who informed them that National would not reinstate the HELOC. On March 19, 2008, DeLaurentis wrote to National objecting to the cancellation of the HELOC. He demanded reinstatement of the credit line, but was refused. According to plaintiffs, National was under increasing stress from the

[2]National posted this payment to plaintiffs' HELOC account on March 3, 2008.

[3]Although terminating the HELOC, National did not accelerate the repayment schedule.

collapsing sub-prime mortgage market, and had decided to reduce its risk exposure by terminating existing lines of credit.

Plaintiffs' case hinges on a single argument. They contend that a late-fee provision in the Agreement creates a ten-day grace period contractually extending the due date listed on National's account statements. Plaintiffs argue that because of this provision, loan payments like theirs may be made at any time between the actual due date and the expiration of the ten-day grace period. Plaintiffs maintain that as a result the true "drop dead" due date for their January withdrawal payment was March 3, 2008 (ten days after the listed due date of February 22, 2008), thereby rendering their February 27, 2008 payment timely. Plaintiffs' instant litigation challenges National's allegedly wrongful disregard of the supposed grace period. National, for its part, argues that plaintiffs' position is contradicted by the express terms of the Agreement.

DISCUSSION

1. Breach of Contract

Any interpretation of the Agreement must conform to Ohio law. On this proposition the parties agree. Under Ohio law, as would also be the case in Massachusetts, the interpretation of an unambiguous contract is a question of law, properly determined by the court on a motion to dismiss. See Ohio Water Dev. Auth. v. W. Reserve Water Dist., 776 N.E.2d 530, 535 (Ohio App. 2002).[4]

To survive a motion to dismiss, a complaint must allege "a plausible entitlement to

[4]As there is no reason for the court to resort to extrinsic evidence, the practical effect of the Rule 12(d) conversion is a nullity. The outcome, in any event, would be the same under either a motion to dismiss or a summary judgment standard.

relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, ___, 127 S.Ct. 1955, 1965 (2007). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1964-1965 (internal citations and quotations omitted). "Specific facts are not necessary; the statements need only 'give the defendants fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, ___ U.S., 127 S.Ct. 2197, 2200 (2007), quoting Twombly, 127 S.Ct. at 1964.

The Ohio Appeals Court has explained the rule of decision as follows:

> [t]he cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties . . . [which] is presumed to reside in the language they chose to employ in the agreement. Where the written instrument is unambiguous, a court must give effect to the parties' expressed intentions; unexpressed intentions are deemed to have no existence.

Covington v. Lucia, 784 N.E.2d 186, 189 (Ohio. App. 2003).

National argues that plaintiffs were required to make a minimum payment by the due date shown on their monthly statement. The Agreement provides

> **Payments.** Your payments will be due monthly. You may pay the entire unpaid balance of your Line and/or your FRP(s) at any time. **You are required to pay a minimum payment by the Due Date shown on your statement equal to the sum of the Line Minimum Payment and the FRP Minimum Payment for each FRP in use.**

(Emphasis added). This emphatic language would seem to conclude the matter. But there is more. The Agreement additionally provides (in a clause entitled "Termination of Line") that National "can terminate [your HELOC] and require you to pay the entire outstanding balance in one payment if you . . . do not meet the repayment terms of this Agreement."

Plaintiffs base their theory of a contractual ambiguity on a section of the Agreement captioned "Other Charges." Among these charges is rooted the language that plaintiffs assert establishes a "contractually binding" grace period. This language provides that National will apply:

> a late payment fee of the greater of 10% of the unpaid minimum payment or $40 if the Bank does not receive your minimum payment at the address shown on your statement within ten days of the Due Date.

Immediately following the list of discretionary fees is the statement that National "does not lose any of its other rights under this Agreement whether or not it charges late payment or over limit fees. **The application of any fee shall not cure the default which initiated the fee.**" (Emphasis added).

Plaintiffs' attempt to suggest that this discretionary fee schedule introduces ambiguity into an unambiguous contract eludes rational analysis.[5] "Contract language is [only] ambiguous if it is subject to two reasonable interpretations." Schachner v. Blue Cross & Blue Shield of Ohio, 77 F.3d 889, 893 (6th Cir. 1996). An ambiguity is not created simply because a controversy exists between parties to a contract. Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 904 (6th Cir. 2006). Nor is an ambiguity created "merely because an imaginative reader devises a way to split hairs." Lexington Ins. Co. v. Gen. Accident Ins. Co. of Am., 338 F.3d 42, 47 (1st Cir. 2003). The Agreement expressly states that payments are to be made by the Due Date, and that failure to make payments as required gives National cause to terminate the HELOC. The provision cited by plaintiffs simply deals with

[5]At oral argument, the court asked plaintiffs' counsel how she would have written the Agreement differently to eliminate the supposed ambiguity. It was not clear to the court that she had an answer.

fees that the National is permitted to assess as "other charges" in those cases in which it chooses to impose a penalty short of termination.[6]

Plaintiffs' reliance on Krivins v. Smyers, 1981 WL 3945 (Ohio App. April 22, 1981), is misplaced. Plaintiffs argue that Krivins holds that, as a general proposition under Ohio law, if a contract contains late payment penalties, "it shows that [defendant] would, in fact, accept late performance." Id. at *3. However, the contract at issue in Krivins specifically provided that "in the event the buyer had been in default for 30 days, the seller was to send the buyer a notice of that fact, giving him ten more days to cure the default or face forfeiture of the contract. Thus, the buyer was permitted to be in default for a total of 40 days before the seller was permitted to rescind the contract." Id. at *1. The Agreement at issue here contains no remotely comparable term.

The parties agree that the due date provided on the account statement for the January withdrawal was February 22, 2008. Plaintiffs did not make their payment until (at the earliest) February 27, 2008. Therefore, plaintiffs breached the express terms of the Agreement, and National was entitled to terminated the HELOC.[7]

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[6]The fee provision that plaintiffs rely on is clearly meant to allow National discretion to forgive late payments of smaller consumer loans (as the $40 figure indicates), where the costs of termination exceed the risk of a borrower coming into belated compliance with the repayment schedule. It seems somewhat doubtful in plaintiffs' case that had the Citibank payment been posted on March 4, 2008 (instead of March 3), that National would have been entitled to not only terminate the HELOC, but also to assess plaintiffs a $9,950 late fee.

[7]In light of the clear language of the Agreement, the court is not persuaded by plaintiffs' post-argument submission of a newspaper article describing a program instituted by National to buy-back HELOCs from its customers. Even if this extrinsic evidence were admissible, it does not inject any ambiguity into the Agreement or even remotely demonstrate the existence of a belief on National's part that it was required to abide by a

2. Truth in Lending Act

Plaintiffs claim that National violated TILA and its attendant Regulation Z. The TILA requires 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). Regulation Z, in pertinent part, provides that a creditor must provide "[a]n explanation of how the minimum periodic payment will be determined and the timing of payments." 12 C.F.R. § 226.5b(d)(5)(ii). Plaintiffs argue that National "unilaterally" extinguished the contractually guaranteed grace period, and thereby caused a material change in the terms of the Agreement in contravention of the TILA and its Regulations. However, because the Agreement contains no binding grace period, plaintiffs' TILA claim fails as a matter of law.

3. Chapter 93A

Because National neither unilaterally modified the Agreement, nor breached any of its provisions, there is no claim under Mass. Gen. Laws c. 93A. Cf. Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-101 (1979).

ORDER

For the foregoing reasons, the motion to dismiss is ALLOWED . The Clerk will enter judgment for National and close the case.

SO ORDERED.

s/ Richard G. Stearns

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late payment grace period. Under Ohio law, courts will "not use extrinsic evidence to create an ambiguity; rather, the ambiguity must be patent, i.e., apparent on the face of the contract." Aerel, S.R.L., 448 F.3d at 904, quoting Covington v. Lucia, 784 N.E.2d at190.

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UNITED STATES DISTRICT JUDGE