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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
CHERYL KAY NAVE,	**CASE NO. 99-40928-13**
	CHAPTER 13
DEBTOR.	
CHERYL KAY NAVE,	
PLAINTIFF,	
v.	**ADV. NO. 99-7085**
COMMUNITYAMERICA CREDIT UNION, f/k/a/ Santa Fe Credit Union,	
DEFENDANT.	

ORDER ON MOTION TO STRIKE AFFIRMATIVE DEFENSES AND MOTION FOR SUMMARY JUDGMENT

This proceeding is before the Court on plaintiff-debtor Cheryl Kay Nave's motion for summary judgment. Ms. Nave appears by counsel Fred W. Schwinn. Defendant-creditor CommunityAmerica Credit Union, f/k/a Santa Fe Credit Union ("the Credit Union"), appears by counsel James S. Willard. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

On August 31, 1998, Cheryl Kay Nave and Kelvin Wiley signed two promissory notes and security agreements with the Credit Union, incurring obligations secured by a 1992 Ford Explorer and

a 1984 Chevrolet Silverado. The parties agree the transactions were covered by the Truth in Lending Act ("TILA"), 15 U.S.C.A. §1601, *et seq*. In each transaction, the borrowers elected credit disability insurance coverage on Ms. Nave, and credit life insurance coverage on both of them. The parties agree the borrowers voluntarily chose to buy the insurance coverage, and had the option to cancel it at any time.

The Credit Union prepared a TILA disclosure statement for each transaction. For the Ford transaction, the TILA disclosure statement indicated: (1) the borrowers were obliged to make 48 monthly payments of $332, beginning on October 15, 1998, and then a final payment of $100.15; (2) the finance charge was $3,588.92; (3) the amount financed was $11,657.40; and (4) the total of payments was $16,036.15. Although the stated monthly payments add up to the total of payments figure given, the finance charge and amount financed do not. Instead, separately-stated charges of $468.05 and $321.78 for the disability and life insurance must be added to the finance charge and amount financed to equal the total of payments. For the Chevrolet transaction, the TILA disclosure statement indicated: (1) the borrowers were obliged to make 36 monthly payments of $215.79, beginning on October 15, 1998; (2) the finance charge was $1,613.85; (3) the amount financed was $5,858.62; and (4) the total of payments was $7,768.44. Again, the separately-stated insurance charges of $175.39 and $120.58 must be added to the finance charge and the amount financed to equal the total of payments figure (or the sum of the stated monthly payments).

In 1999, Ms. Nave ("the debtor") filed a bankruptcy petition. She proposed to pay the value of the Ford to the Credit Union through a chapter 13 plan, and to abandon the Chevrolet to it. Her

plan was confirmed. The Credit Union's secured claim was valued at about $8,000, and it was left with an unsecured claim of over $9,000.

The debtor subsequently commenced this proceeding against the Credit Union, alleging that its failure to include the cost of the insurance coverage in either the "finance charge" or the "amount financed" on the TILA disclosure statements constituted violations of the TILA and the Kansas Consumer Protection Act ("KCPA"), K.S.A. 50-623, *et seq*.[1] The Credit Union answered the debtor's complaint in September 1999 (serving a copy on the debtor's counsel), contesting her claims and asserting a number of affirmative defenses.

In June 2000, the debtor filed a motion to strike the Credit Union's affirmative defenses and a motion for summary judgment. The Credit Union opposes both motions. It contends the motion to strike is untimely. In support of its opposition to the summary judgment motion, it submitted the affidavit of one of its employees. Among other things, the employee asserts that: "Premiums for credit union insurance are not added to the loan at its inception. They are instead added on a monthly basis - the amount is determined monthly based upon the balance owed." Although it has not asked for summary judgment, the Credit Union argues that if it is found liable to the debtor under the TILA or the KCPA, it is entitled to recoup its unsecured claim against any damages it is found to owe the debtor.

DISCUSSION AND CONCLUSIONS

[1]Mr. Wiley has not joined in this proceeding, and has apparently not filed for bankruptcy.

The Court will first address the debtor's motion to strike the Credit Union's affirmative defenses. Federal Rule of Civil Procedure 12(f), made applicable here by Federal Rule of Bankruptcy Procedure 7012(b), provides in pertinent part: "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party . . . the court may order stricken from any pleading any insufficient defense." Since the Credit Union's answer to the debtor's complaint did not assert any counterclaim, the debtor was not permitted to file a pleading responding to it. *See* Fed. R. Civ. P. 7(a) (made applicable by Fed. R. Bankr. P. 7007). The debtor's motion to strike was filed about nine months after the Credit Union served it on her, well beyond the 20-day time limit fixed by Rule 12(f). Consequently, the motion is hereby denied.

The Court will now turn to the debtor's motion for summary judgment. The debtor's first cause of action alleges that the Credit Union violated the TILA. The parties' dispute about this cause of action revolves around the question whether, as the debtor argues, the Credit Union had to include the cost of the insurance coverage in either the finance charge or the amount financed as stated on the TILA disclosure statements or, as the Credit Union argues, could disclose that cost separately. The relevant portions of the TILA, the Federal Reserve Board's regulations interpreting the TILA, 12 C.F.R. Part 226 (2001) ("Regulation Z"), and the Board's Official Staff Interpretations, 12 C.F.R. Part 226, Supp. I (2001) ("Staff Interpretations"), reveal that the Court cannot resolve that dispute based on the facts as presently established.

The debtor's transactions with the Credit Union were "closed-end credit" transactions under the TILA and Regulation Z. *See* TILA §1602(i) & §1638; Regulation Z §226.2(10) & (20). As a

result, the Credit Union was required to disclose, among other things, the "amount financed," the "finance charge," the "payment schedule," and the "total of payments" for the transactions. TILA §1638(a)(2)(A), (3), & (5); Regulation Z §226.18(b), (d), (g), and (h). Charges for credit life or disability insurance are to be included in the "finance charge" on a TILA disclosure statement unless: (1) the insurance is not required by the creditor and this fact is disclosed; (2) the premium for the initial term of the insurance is disclosed; and (3) the consumer makes an affirmative written request for the insurance. TILA §1605(b); Regulation Z §226.4(d). The parties agree that the Credit Union qualified for this exception, so the insurance premiums were properly excluded from the finance charge on the disclosure statements.

The debtor then points to the following from the Staff Interpretation of §226.18(b)(2) of Regulation Z:

> Fees or other charges that are not part of the finance charge and that are financed rather than paid separately at consummation of the transaction are included in the amount financed. Typical examples are . . . premiums for voluntary credit life and disability insurance excluded from the finance charge under §226.4.

Staff Interpretations at 403. The Credit Union points out that this statement applies only to items that are "financed" and, relying on its employee's affidavit, asserts that the insurance premiums charged in the debtor's transactions were "not added to the loan[s] at [their] inception" but were "instead added on a monthly basis." However, under the TILA, the word "credit" means "the right granted by a creditor to a debtor to defer payment of debt or *to incur debt and defer its payment*." TILA §1602(e) (emphasis added); *see also* Regulation Z §226.2(14) ("credit" means "the right to defer payment of debt or to incur debt and defer its payment"). The Staff Interpretation of §226.2(a)(14)

describes a number of situations that are not considered to be "credit" under Regulation Z, including: "Insurance premium plans that involve payments in installments with each installment representing the payment for insurance coverage for *a certain future period of time*, unless the consumer is contractually obligated to continue making payments." Staff Interpretations at 318 (emphasis added). Paragraph 1 of the Staff Interpretation of §226.18(g) concerns the payment schedule and explains that: "The payments may include amounts beyond the amount financed and finance charge. For example, the disclosed payments may, at the creditor's option, reflect certain insurance premiums where the premiums are not part of either the amount financed or the finance charge." Staff Interpretations at 407. Under these provisions and explanations, the relevant question is not when the insurance charges were added to the loan, but whether, when they were added, they were to pay for insurance coverage for a past period or for a future period. If they were to pay for a past period, the Credit Union allowed the debtor to "incur debt and defer its payment," because the insurance coverage was provided before the debtor was supposed to pay for it. On the other hand, if they were to pay for a future period, Regulation Z simply allowed the Credit Union to compute the debtor's payment schedule and total of payments based on the assumptions that the debtor would not cancel the insurance and would make all payments timely, thus always paying for the insurance coverage at or before the start of each period for which coverage was provided. In this situation, the Credit Union would not have been allowing the debtor to defer payment of the debt she was incurring for the insurance coverage.

The affidavit of the Credit Union's employee does not indicate whether the insurance premiums were intended to pay for past or future coverage when they were due from the debtor. The TILA disclosure statements show that the loans were made in late August or early September, but the first

payments were not due until the middle of October. The insurance coverage presumably began when the loans were made, so the disclosure statements give some indication that the insurance premium portion of each monthly payment was to pay for past, not future, coverage. However, the question is not definitively answered by either type of evidence. Because the materials presented are insufficient to establish this necessary fact, the debtor's motion for summary judgment on her TILA claim must be denied. The Court notes the debtor also claims that the Credit Union's calculation of the annual percentage rate of interest on the loans was incorrect and violated the TILA, but that claim relies on the assumption that the insurance premiums had to be included in the amount financed on the disclosure statements, and so cannot be resolved at this time either.

The debtor's second cause of action asks the Court to conclude that the Credit Union's alleged violation of the TILA constitutes a *per se* violation of, or alternatively, an "unconscionable" practice under, the Kansas Consumer Protection Act ("KCPA"), K.S.A. 50-623 to -643. Since the Court cannot now determine whether the Credit Union in fact violated the TILA, the Court also cannot grant summary judgment for the debtor on this cause of action. However, the Court wishes to point out that, even if it ultimately turns out the Credit Union did violate the TILA, the Court is not at all likely to conclude that the violation was either a *per se* violation of, or an unconscionable practice under, the KCPA.

To support her claim that any violation of the TILA constitutes a *per se* violation of the KCPA, the debtor relies solely on statutes and court decisions from other states, citing none from Kansas. While this is may be the law in some states, apparently neither the Kansas legislature nor any Kansas state or federal court has yet declared it to be the law in Kansas, even though the KCPA itself has been

a part of Kansas law since 1973. *See* 1973 Kan. Sess. Laws, ch. 217, §§1 to 21. The Court declines the debtor's apparent invitation to be the first Kansas court to declare that all TILA violations also violate the KCPA.

In the alternative, the debtor asks the Court to determine that the Credit Union's possible violation of the TILA constitutes an "unconscionable" practice under K.S.A. 2000 Supp. 50-627 of the KCPA. That statute provides:

> (a) No supplier shall engage in any unconscionable act or practice in connection with a consumer transaction. An unconscionable act or practice violates this act whether it occurs before, during or after the transaction.
>
> (b) The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable, the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following that:
>
> (1) The supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;
>
> (2) when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers;
>
> (3) the consumer was unable to receive a material benefit from the subject of the transaction;
>
> (4) when the consumer transaction was entered into, there was no reasonable probability of payment of the obligation in full by the consumer;
>
> (5) the transaction the supplier induced the consumer to enter into was excessively onesided in favor of the supplier;
>
> (6) the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment; and
>
> (7) except as provided by K.S.A. 50-639, and amendments thereto, the supplier excluded, modified or otherwise attempted to limit either the implied warranties of merchantability and fitness for a particular purpose or any remedy provided by law for a breach of those warranties.

The debtor is relying solely on the contents of her agreements with the Credit Union to prove her claim of unconscionability. Because, as discussed above, the TILA and Regulation Z permitted the insurance

premiums to be omitted from both the finance charge and the amount financed but included in the schedule and total of payments on the TILA disclosure statements as the Credit Union did so long as the premiums were due from the debtor at or before the start of the period of coverage they were to pay for, the Court is convinced that the Credit Union's alleged error in treating the premiums this way if they were not due from the debtor until after the coverage period could not amount to an unconscionable practice under 50-627. The KCPA proscribes only deliberate efforts to take unfair advantage of superior bargaining power to the detriment of the consumer in the transaction, *see Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 759 (1976) (doctrine of unconscionability directed against "one-sided, oppressive and unfairly surprising contracts"), and the alleged TILA error here simply does not amount to that kind of conduct.

For these reasons, the Court concludes that both the debtor's motion to strike affirmative defenses and her motion for summary judgment must be denied. Because the Credit Union has not asked for summary judgment on its recoupment claim and because the Court cannot yet determine whether the Credit Union is liable to the debtor, the Court will not address recoupment at this time.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of June, 2001.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE