

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

JANICE CLARK,
Plaintiff

v.

CAPITAL ONE BANK (USA), N.A.
Defendant

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No. 17-2608

FILED
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CARBON COUNTY
PROTHONOTARY

John DiBernardino, Esquire

Counsel for Plaintiff

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Counsel for Defendant
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - August 13, 2018

This Memorandum Opinion addresses Defendant Capital One Bank (USA), N.A.'s Preliminary Objections to Plaintiff's Complaint filed on February 15, 2018 ("Capital One's Preliminary Objections"). For the reasons set forth herein, Capital One's Preliminary Objections are **GRANTED** and the Complaint is **DISMISSED** with prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. Plaintiff Janice Clark's Complaint.

In her Complaint, filed January 29, 2018, Plaintiff Janice Clark ("Plaintiff" or "Ms. Clark") claims that on multiple occasions between January 5, 2016 and April 2, 2016, Defendant Capital One Bank (USA), N.A. ("Capital One") - after having been notified by John DiBernardino, Esq. ("Mr. DiBernardino") that Ms.

Clark had retained him to file a bankruptcy petition on her behalf - nonetheless inappropriately communicated with Ms. Clark regarding her consumer debts. See Complaint at ¶¶5-8.

Particularly, with respect to liability, Ms. Clark contends, *inter alia*, that Capital One "...violated the Pennsylvania Fair Credit Extension Uniformity Act (73 Pa.C.S.A. 2270.4(b)(2)(ii) and 73 Pa.C.S.A. 2270.4(b)(1)(vi) by communicating with Clark directly concerning the debt after Capital One and Kohl's had been informed that the Plaintiff was represented by an attorney with respect to the debts." See Complaint at ¶10. Ms. Clark alleges that Capital One owned and bore servicing responsibility for various Capital One and Kohl's credit card accounts that she maintained. See Complaint at ¶2.

With respect to damages, Ms. Clark contends that, "[a]s a direct result of the unfair acts of Capital One set forth, Clark sustained damages of a loss of money in the form of the cost of first-class postage charges to send each of the documents comprising Exhibit B from Clark to Clark's counsel" and that "Clark also suffered worry, embarrassment and anger as a result of receiving each of the documents comprising Exhibit B." See Complaint at ¶9.

B. Defendant Capital One's Preliminary Objections.

Capital One raises two preliminary objections to the Complaint, each pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.¹ The Court, finding each of the preliminary objections to be meritorious and independently fatal to Ms. Clark's Complaint, shall grant both of them, and shall order that this case be dismissed with prejudice.

II. DISCUSSION.

A. Defendant Capital One's First Preliminary Objection.

In its first preliminary objection, Capital One contends that provisions of the federal Truth in Lending Act (the "TILA"), particularly 15 U.S.C. §1637(b), and provisions of Regulation Z promulgated thereunder, particularly 12 C.F.R. §226.7(b), required Capital One to mail periodic statements to Ms. Clark, that such provisions of the TILA and Regulation Z preempt any contrary Pennsylvania state law, and that as a consequence Ms. Clark's claims under the Pennsylvania Fair Credit Extension Uniformity Act (the "FCEUA") stand preempted by the TILA and Regulation Z. See Capital One's Preliminary Objections at ¶¶12-23.

¹See generally Capital One's Preliminary Objections. See also Pa.R.C.P. 1028(a)(4) ("(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:...(4) legal insufficiency of a pleading (demurrer);").

As indicated, Ms. Clark alleges, *inter alia*, that Capital One "...violated the Pennsylvania Fair Credit Extension Uniformity Act (73 Pa.C.S.A. 2270.4(b)(2)(ii) and 73 Pa.C.S.A. 2270.4(b)(1)(vi)..." by virtue of its communications with Ms. Clark subsequent to Mr. DiBernardino's notification to Capital One that he had been retained by Ms. Clark with respect to her consumer debts, See Complaint at ¶10.

Section (b) of 73 Pa.C.S.A. §2270.4, in its prefatory language, provides:

(b) By creditors. - With respect to **debt collection activities** of creditors in this Commonwealth, it shall constitute an unfair or deceptive debt collection act or practice under this act if a creditor violates any of the following provisions:

See 73 Pa.C.S.A. §2270.4(b) (emphasis added).

Subsection (b)(1)(vi) of the FCEUA provides:

(b) By creditors. - With respect to **debt collection activities** of creditors in this Commonwealth, it shall constitute an unfair or deceptive debt collection act or practice under this act if a creditor violates any of the following provisions:

(1) Any creditor communicating **with any person other than the consumer for the purpose of acquiring location information about the consumer** shall:

(vi) after the creditor knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of or can readily ascertain such attorney's name and address, not communicate with any person other than the attorney unless the attorney fails to respond within a reasonable time to communication from the creditor.

See 73 Pa.C.S.A. §2270.4(b)(1)(vi) (emphasis added).

Subsection (b)(2)(ii) of the FCEUA provides:

(b) By creditors. - With respect to **debt collection activities** of creditors in this Commonwealth, it shall constitute an unfair or deceptive debt collection act or practice under this act if a creditor violates any of the following provisions:

(2) Without the prior consent of the consumer given directly to the creditor or the express permission of a court of competent jurisdiction, a creditor may not communicate with a consumer **in connection with the collection of any debt:**

(ii) if the creditor knows the consumer is represented by an attorney with respect to such debt and has knowledge of or can readily ascertain such attorney's name and address unless the attorney fails to respond within a reasonable period of time to a communication from the creditor or unless the attorney consents to direct communication with the consumer;

See 73 Pa.C.S.A. §2270.4(b)(2)(ii) (emphasis added).

The TILA and Regulation Z require credit card entities such as Capital One to transmit or furnish periodic statements to customers at the conclusion of each billing cycle. See 15 U.S.C. §1637(b); 12 C.F.R. 226.7(b).

The documents attached to the Complaint collectively as Exhibit "B" constitute such periodic statements. That certain of the Capital One account statements at issue in this case bear the notation "Past Due" and that the Kohl's statements at issue in this case contain the notation "YOU MUST CALL US IMMEDIATELY AT 888-768-5741 REGARDING YOUR ACCOUNT" and "FAILURE TO DO SO MAY RESULT IN YOUR ACCOUNT BEING TURNED OVER TO A COLLECTION AGENCY"

does not compel recasting said documents as anything other than periodic statements. See *Marcotte v. General Elec. Capital Services, Inc.*, 709 F.Supp.2d 994, 1002 (S.D.Cal. 2010) (reviewing 15 U.S.C. §1637(b) and 12 C.F.R. 226.7(b) criteria for periodic statements and finding that mere language in periodic statements that amounts were "past due" would not re-characterize such statements as "demand letters or efforts at debt collection"). See also *Kelliher v. Target National Bank*, 826 F.Supp.2d 1324, 1328-1329 (M.D.Fla. 2011) (increasingly threatening language contained in periodic statements - as opposed to indicia such as exists in the instant case that an account **might** be placed for collections - constitutes debt collection language that transforms periodic statements into demand letters.).

Ms. Clark candidly and repeatedly refers to the documents attached to the Complaint collectively as Exhibit "B" as "billing documents," and "periodic statements" and does not contend the subject documents to be anything other than periodic statements wholly compliant with the criteria for periodic statements delineated in 15 U.S.C. §1637(b) and 12 C.F.R. §226.7(b). See Complaint at ¶7; Plaintiff's Brief Contra Defendant's Preliminary Objections to Plaintiff's Complaint at 1 - 3.

Rather, Ms. Clark contends that, "[p]ursuant to 12 C.F.R. 226.5(b)(2)(i) a periodic statement need not be sent for an account 'if the creditor deems it uncollectible, if delinquency collection

proceedings have been instituted, if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account, or if furnishing the statement would violate federal law.'" See Plaintiff's Brief Contra Defendant's Preliminary Objections to Plaintiff's Complaint at 3. However, while Ms. Clark alleges in her Complaint that "Capital One **knew** the accounts were uncollectible," she nowhere suggests that Capital One acted upon such knowledge or in any fashion affirmatively **deemed** the relevant accounts to be uncollectible. See Complaint at ¶6 (emphasis added).

The Court accordingly holds that Capital One's mailing of periodic statements to Ms. Clark does not constitute debt collection activities.

Because the Court holds that Capital One did not engage in "debt collection" activities and because neither the terms "collection" nor "debt collection" stand defined within the FCEUA, the Court finds the provisions of the FCEUA found at 73 Pa.C.S.A. §2270.4(b) and at issue in this case to be inapplicable to Capital One's alleged behavior. Accordingly, as a matter of law, Ms. Clark's claims fail as to both 73 Pa.C.S.A. §2270.4(b)(1)(vi) and 73 Pa.C.S.A. §2270.4(b)(2)(ii).

Even if Ms. Clark's claim with respect to 73 Pa.C.S.A. §2270.4(b)(1)(vi) did not fail as a matter of law by virtue of the

language of 73 Pa.C.S.A. §2270.4(b) confining its applicability to "debt collection activities," Ms. Clark's claim also fails as a matter of law because 73 Pa.C.S.A. §2270.4(b)(1)(vi) applies solely to communications "with any person other than the consumer for the purpose of acquiring location information about the consumer..." See 73 Pa.C.S.A. §2270.4(b)(1)(vi). Ms. Clark nowhere complains of communication with anyone other than herself and nowhere suggests that any communication involved in this matter pertained to acquiring location information about Ms. Clark. See *generally* Complaint.

Likewise, even if Ms. Clark's claim with respect to 73 Pa.C.S.A. §2270.4(b)(2)(ii) did not fail as a matter of law by virtue of the language of 73 Pa.C.S.A. §2270.4(b) that confines its applicability to "debt collection activities," her claim also fails as matter of law because 73 Pa.C.S.A. §2270.4(b)(2)(ii) contains yet additional language that proscribes only communication that is rendered "in connection with the collection of any debt." See 73 Pa.C.S.A. §2270.4(b)(2)(ii).

Even if Ms. Clark's claims did not fail as a matter of law for the foregoing reasons, her claims fail as a result of the application of federal preemption principles to the FCEUA. Insofar as both the TILA and Regulation Z contain unambiguous provisions that directly preempt any conflicting state laws, the TILA and Regulation Z each preempt the FCEUA to the extent that it prevented

Capital One from acting pursuant to the federal statutory and regulatory scheme by disseminating the periodic statements to Ms. Clark. See 15 U.S.C. §1610(a)(1) ("Except as provided in subsection (e), this part and parts B and C, do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.") See also 12 C.F.R. §226.28(a)(1) ("Except as provided in paragraph (d) of this section, State law requirements that are inconsistent with the requirements contained in chapter 1 (General Provisions), chapter 2 (Credit Transactions), or chapter 3 (Credit Advertising) of the act and the implementing provisions of this regulation are preempted to the extent of the inconsistency."). See also *Marcotte v. General Elec. Capital Services, Inc.*, 709 F.Supp.2d at 1000 ("...both TILA and Regulation Z have provisions expressly preempting any conflicting state laws."). See generally *Cellucci v. General Motors Corp.*, 676 A.2d 253, 257 (Pa.Super. 1996).

Ms. Clark contends that Regulation Z at 12 C.F.R. §226.28(d) confines the scope of federal preemption of state laws regarding communications involving credit transactions solely to credit or charge card applications or solicitations. See Plaintiff's Brief

Contra Defendant's Preliminary Objections to Plaintiff's Complaint at 4.

In so contending, Ms. Clark misapprehends the language of 12 C.F.R. §226.28(d). Contrary to her contention, 12 C.F.R. §226.28(d) sets forth a stand-alone preemption regimen that governs only the disclosure of credit information pertaining to credit or charge card applications or solicitations and accordingly stands inapplicable to the instant matter. See 12 C.F.R. §226.28(d) ("Special rule for credit and charge cards. State law requirements relating to the disclosure of credit information in any credit or charge card application or solicitation that is the subject to the requirements of section 127(c) of chapter 2 of the act (§226.5a of the regulation) or in any renewal notice for a credit or charge card that is subject to the requirements of section 127(d) of chapter 2 of the act (§226.9(e) of the regulation) are preempted. State laws relating to the enforcement of section 127(c) and (d) of the act are not preempted.").

For these reasons, the Court grants Capital One's first preliminary objection.

B. Defendant Capital One's Second Preliminary Objection.

The FCEUA does not contain a private cause of action provision but rather "is enforced through the remedial provisions of the UTPCPL [the Pennsylvania Unfair Trade Practices and Consumer

Protection Law ("UTCPL"])." See *Kaymark v. Bank of America, N.A.* 783 F.3d 168, 182 (3d Cir. 2015). The FCEUA's enforcement provision specifically provides that "[i]f a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of the [UTCPL]." See *Id.* at 182 citing 73 P.S. §2270.5(a).

In its second preliminary objection, Capital One contends that "[w]orry, embarrassment, and anger," which Ms. Clark has claimed as damages in this matter, do not constitute ascertainable losses under the UTCPL - leaving Ms. Clark with only the cost of first class postage as potential damages. See Capital One's Preliminary Objections at ¶28-29. See also Complaint at ¶9. Capital One additionally contends that Ms. Clark's claims pertaining to the cost of first class postage fail because costs attendant to hiring counsel do not qualify as ascertainable losses under the UTCPL and because she cannot adequately plead justifiable reliance under the UTCPL in this case. See Capital One's Preliminary Objections at ¶¶24-34.

1. Ms. Clark's Lack of Ascertainable Loss.

In order to adequately state a claim under the UTCPL a party must "(1) allege ascertainable loss by 'point[ing] to money or property that he would have had but for the defendant's fraudulent actions' and (2) plead facts to support the conclusion that the reliance on defendant's actions was justifiable." See *Walkup v.*

provided in this section, costs and reasonable attorney fees.

See 73 Pa.C.S.A. §201-9.2(a).

"Shame, embarrassment, and emotional distress are personal injuries and are thus not cognizable under the UTPCPL." See *Walkup v. Santander Bank, N.A.* 147 F.Supp.3d at 358. Accordingly, Ms. Clark's damage claim for worry, embarrassment, and anger - each sounding equally as claimed damages grounded in emotional distress - fails as a matter of law. See Complaint at ¶9.

Ms. Clark's only other claimed damages consist of "a loss of money in the form of the cost of first-class postage charges to send each of the documents comprising Exhibit B from Clark to Clark's counsel." See Complaint at ¶9. These claimed damages likewise fail as a matter of law. "Costs" and "reasonable attorney fees" do not comprise a component of "ascertainable loss" under Section 201-9.2 of the UTPCPL. See *Grimes v. Enterprise Leasing Co. of Philadelphia, LLC*, 105 A.3d, 465-466 (Pa. 2014).

For these reasons, Ms. Clark has failed as a matter of law to state a claim for "ascertainable loss" under the UTPCPL necessary to support Ms. Clark's FCEUA claim.

2. Justifiable Reliance.

Ms. Clark's Complaint stands devoid of any allegations of justifiable reliance, including with respect to her claimed damages for postage expenditures and for worry, embarrassment and

anger. See generally, Complaint. Ms. Clark concedes as much and instead contends that she should not be made to plead justifiable reliance because her claims do not sound in fraud but rather describe unfair, prohibited acts. See Plaintiff's Brief Contra Defendant's Preliminary Objections to Plaintiff's Complaint at 4-6 ("Plaintiff suggest that imposing a requirement that FCEUA plaintiffs must plead and ultimately prove justifiable reliance in claims not sounding in fraud would effectively eviscerate much of the FCEUA protections which prescribe unfair creditor and debt collector activities."). Ms. Clark's suggestion, however, does not reflect the above-delineated status of Pennsylvania jurisprudence which mandates the pleading and demonstration of justifiable reliance by plaintiffs in FCEUA cases.

For these reasons, the Court grants Capital One's second preliminary objection.

III. CONCLUSION.

Accordingly, for the reasons set forth herein, the Court enters the following order:

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Counsel for Defendant
Counsel for Defendant

ORDER OF COURT

AND NOW, this 13th day of August, 2018, upon consideration of Defendant's Preliminary Objections filed February 15, 2018, Defendant's briefs in support thereof, and Plaintiff's brief in opposition thereto, it is hereby **ORDERED** and **DECREED** that Defendant's Preliminary Objections are **GRANTED**. Plaintiff's Complaint is **DISMISSED** with prejudice.

BY THE COURT:



Joseph J. Matika, J.