

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSLYN PORTER,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 03-03768
	:	
v.	:	
	:	
NATIONSCREDIT CONSUMER	:	
DISCOUNT COMPANY, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J.

June 22, 2006

The procedural history of this litigation is reminiscent of the hydra, that multi-headed beast of Greek mythology, which would grow two heads to replace any head severed by an adversary. Similarly, as soon as one issue is decided in this case, two new issues take the place of the original. The parties have now filed cross-motions seeking reconsideration of my March 31, 2006 Memorandum and Order. That Memorandum and Order granted in part and denied in part the second motion for summary judgment (the "underlying motion") filed by defendants NationsCredit Consumer Discount Company ("NCCDC"), now known as NationsCredit Financial Services Corporation, Bank of America, N.A., NationsCredit Consumer Corporation, NationsCredit Insurance Corporation, and NationsCredit Insurance Agency, Inc. (collectively the "NationsCredit Defendants"). For the reasons that follow, I will deny the NationsCredit Defendants'

motion for reconsideration. I will, however, conditionally grant plaintiff Roslyn Porter's motion for reconsideration, but only to the extent that I will reconsider the issue of attorney's fees and costs should Plaintiff succeed at trial.

I. BACKGROUND¹

The genesis of this case is a loan agreement between Plaintiff and NCCDC entered into on March 26, 1998. Plaintiff received \$33,265.34 in loan proceeds from the loan agreement, while NCCDC received a mortgage on Plaintiff's residence. As a part of this transaction, Plaintiff allegedly signed a number of documents provided to her by NCCDC during the mortgage closing (the "closing documents"). The gravamen of the litigation is whether Plaintiff purchased credit life insurance from NCCDC as a part of the loan agreement. The NationsCredit Defendants allege that Plaintiff purchased credit life insurance issued by defendant Protective Life Insurance Company ("Protective") by signing the closing documents. By contrast, Plaintiff maintains that she did not purchase credit life insurance because she already had life insurance coverage from a different source.

After a long and tumultuous trip through a number of courts and federal judges, the NationsCredit Defendants filed the underlying motion on March 21, 2005. The issues remaining in the case at the time of filing were: (1) whether the NationsCredit Defendants had violated the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* (the

¹I write for the parties who are by now intimately familiar with the facts of this case. I have therefore included only the background of the case relevant to deciding the cross-motions for reconsideration.

"TILA") or the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1639(a), by failing to include the amount of the credit life insurance premium paid by Plaintiff in the "amount financed" portion of the TILA Disclosure Statement; (2) whether Plaintiff was overcharged for the credit life insurance because NCCDC sold the insurance for a longer term than it was authorized; and (3) whether either of these actions violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 PA. CONS. STAT. § 201-1, *et seq* (the "UTPCPL").

I granted the underlying motion in part and denied it in part in my Memorandum and Order dated March 31, 2006. I granted the underlying motion as to all of Plaintiff's remaining claims except for her claims that NCCDC had improperly omitted the credit life insurance premium from the finance charge under the TILA and the UTPCPL. I denied summary judgment on Plaintiff's TILA claim because there was a genuine issue of material fact as to whether the NationsCredit Defendants had met all of the requirements of 12 C.F.R. § 226.4(d)(1). That subsection of Regulation Z allows a lender to exclude credit life insurance premiums from the finance charge when three requirements are met.²

I found that the NationsCredit Defendants had met the first two requirements of section 226.4(d)(1), but I determined that there was a genuine issue of material fact as to

²Section 226.4(d)(1) allows a lender to exclude credit life insurance premiums from the finance charge when: (1) credit life insurance is not a condition of extending credit and the lender discloses that fact to the consumer in writing; (2) the lender discloses the premium for the initial term of insurance coverage to the consumer; and (3) the consumer signs an affirmative written request for the insurance. 12 C.F.R. § 226.4(d)(1).

whether they had met the final requirement for two reasons. First, Plaintiff allegedly received a document in the mail stating that she had not purchased credit life insurance from NCCDC (the "Blue Card"). The return address printed on the Blue Card states that it had been sent by "Mortgage Management Specialists," but at the time of my decision I did not have any information regarding the Blue Card's sender. Instead, I "assum[ed] that the NationsCredit Defendants mailed the Blue Card to Plaintiff's home" after viewing the facts and inferences in the light most favorable to Plaintiff. Second, Plaintiff testified at her deposition that she "did not sign for any credit life insurance."

II. LEGAL STANDARD

A court deciding a motion for reconsideration may alter or amend a judgment "if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . .; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing N. River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). See also Cont'l Cas. Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995) ("Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly").

III. DISCUSSION

A. The NationsCredit Defendants' Motion for Reconsideration

1. The Newly Discovered Evidence Argument

The NationsCredit Defendants have submitted with their motion for reconsideration what they term "newly discovered" evidence. First, they have included the affidavit of Steve Honowitz. Mr. Honowitz's affidavit states that: (1) he does business under the name of Mortgage Management Specialists; (2) he has never been employed by the NationsCredit Defendants and has never had any business affiliation with them; and (3) he reviewed the Blue Card addressed to Plaintiff and has concluded that it was sent by Mortgage Management Specialists. Second, the NationsCredit Defendants have submitted a record from the Pennsylvania Department of State which provides that: (1) Mortgage Management Specialists is owned and operated by Mr. Honowitz; and (2) the company provides mortgage, life, and disability insurance brokerage services.³

³The NationsCredit Defendants also argue that the Blue Card is irrelevant to Plaintiff's TILA claim. This argument is nonsensical. Whether Plaintiff believed she had signed the closing documents is indeed irrelevant. That, however, is not the only conclusion supported by Plaintiff's receipt of the Blue Card. If the Blue Card had been mailed by NCCDC or a related entity, as was the case after taking all inferences in Plaintiff's favor at summary judgment, a jury could use the Blue Card as evidence to find that Plaintiff did not sign the closing documents. In other words, NCCDC's act of sending the Blue Card to Plaintiff after the loan transaction could suggest that NCCDC did not have any records demonstrating that Plaintiff signed the closing documents. This conclusion is further bolstered by Plaintiff's deposition testimony, as described in the March 31, 2006 Memorandum and Order.

As I have previously noted, courts will amend a prior judgment for newly discovered evidence only where the evidence submitted "was not available when the court [decided] the motion." See Quinteros, 176 F.3d at 677. I find that the affidavit and the record from the Pennsylvania Department of State do not constitute newly discovered evidence because this evidence was available when I ruled on the underlying motion. The NationsCredit Defendants knew of the Blue Card's existence because Plaintiff produced it during discovery. They should have recognized the sender as an unrelated third-party at that time, and performed the investigation they made for their motion for reconsideration before filing the underlying motion for summary judgment. Moreover, the NationsCredit Defendants have not alleged that Mr. Honowitz was unavailable as a witness before I decided the underlying motion. Nor have they alleged that the Pennsylvania Department of State record could not be obtained before my decision. I therefore find that the submitted evidence is not newly discovered, and consequently I will deny their motion for reconsideration on this argument.⁴

2. The Clear Error of Law or Fact or Manifest Injustice Argument

The NationsCredit Defendants argue that the law of this case requires me to reconsider my decision on the underlying motion, and that a failure to do so constitutes clear error and would create a manifest injustice. The law of the case doctrine provides

⁴The NationsCredit Defendants may call Mr. Honowitz to testify at trial to discredit the importance of the Blue Card. Moreover, they may use the Pennsylvania Department of State record at trial to further cast in doubt the evidence suggesting that Plaintiff did not sign the closing documents.

that "when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation." Devex Corp. v. Gen. Motors Corp., 857 F.2d 197, 199 (3d Cir. 1988) (citations omitted). A party seeking to establish that a court has made a manifest error by a motion for reconsideration is required to persuade the court that, not only was the prior decision wrong, but that it was clearly wrong and that adherence to the decision would create a manifest injustice. See In re City of Philadelphia Litig., 158 F.3d 711, 718 (3d Cir. 1998). In other words, my decision not to apply the law of the case doctrine to this issue must have been both clearly wrong and must create a manifest injustice.

The NationsCredit Defendants have not met their burden in this case. My decision not to apply the law of the case to the final element of 12 C.F.R. § 226.4(d)(1) did not create a manifest injustice with regard to the NationsCredit Defendants. It did not prejudice any defense they may choose to raise at trial. Rather, my decision merely denied the underlying motion as to an issue on which they may still prevail at trial. Accordingly, my decision did not create a manifest injustice, and I will deny the NationsCredit Defendants' motion for reconsideration on this argument.

B. Plaintiff's Motion for Reconsideration

Footnote 8 of my March 31, 2006 Memorandum and Order states:

[The Court] note[s] that Plaintiff's summary judgment victory on this claim may be a hollow one as [the Court] will not award any costs or fees even if Plaintiff is successful on this claim at trial. Judge Newcomer stated in his order dated

August 1, 2005 that he would not award any costs or fees in this case. Judge Newcomer's Order and Memorandum of August 1, 2005 at 11. [The Court] agrees with Judge Newcomer and will hold the same.

March 31, 2006 Memorandum and Order at 18 n.8.

Plaintiff argues that I erred in denying her any attorney's fees or costs if she is successful on her TILA claim at trial. The TILA expressly provides for the recovery of attorney's fees. See 15 U.S.C. § 1640(a). Section 1640(a) provides in relevant part:

[A]ny creditor who fails to comply with any requirement imposed under this part . . . is liable to [the consumer] in an amount equal to the sum of—

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court. . . .

16 U.S.C. § 1640(a). The plain language of the statute therefore grants courts at least some discretion to award attorney's fees and costs. Whether courts must award at least some fees or costs to a successful TILA claimant, however, has not been addressed by the Third Circuit.

The portion of Judge Newcomer's Memorandum and Order upon which I based my reasoning for footnote 8 considered Plaintiff's recovery of fees and costs under her UTPCPL claim. I therefore agree with Plaintiff that footnote 8 in the March 31, 2006 Memorandum and Order may take Judge Newcomer's finding out of context.

Accordingly, I will conditionally grant Plaintiff's motion for reconsideration, but only to the extent that I will reconsider the issue of attorney's fees and costs should Plaintiff be successful at trial. The parties will be directed to fully brief this issue should the jury find for Plaintiff.

IV. CONCLUSION

For the reasons described above, I will deny the NationsCredit Defendants' motion for reconsideration. However, I will conditionally grant Plaintiff's motion for reconsideration, but only to the extent that I will reconsider the issue of attorney's fees and costs if Plaintiff is successful at trial. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSLYN PORTER,	:	CIVIL ACTION
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Plaintiff,	:	NO. 03-03768
	:	
v.	:	
	:	
NATIONSCREDIT CONSUMER	:	
DISCOUNT COMPANY, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 22nd day of June, 2006, upon consideration of the NationsCredit Defendants' Motion for Reconsideration (Docket No. 146), Plaintiff's Motion for Reconsideration (Docket No. 145), and the responses thereto, it is hereby **ORDERED** that:

1. The NationsCredit Defendants' motion is **DENIED**.
2. Plaintiff's motion is conditionally **GRANTED**; the Court will reconsider the issue of attorney's fees and costs should Plaintiff be successful at trial.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.