

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

LEONARD APPLEBAUM : CIVIL ACTION
 :
 v. :
 :
 :
 NISSAN MOTOR ACCEPTANCE CORP. & :
 REITENBAUGH ENTERPRISES, INC. : NO. 97-7256

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

April 21, 1999

The complaint of plaintiff Leonard Applebaum ("Applebaum") alleges defendants Nissan Motor Acceptance Corp. ("NMAC") and Reitenbaugh Enterprises, Inc. ("Reitenbaugh Dealership") violated the Consumer Leasing Act ("CLA"), 15 U.S.C. §§ 1667 - 1667f. Now before the court are defendants' motions for summary judgment, plaintiff's motion for partial summary judgment, and plaintiff's motion to amend the complaint to add a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Con. Stat. Ann. §§ 202-1 - 202-8. For the reasons stated below, defendants' motions for summary judgment will be granted and plaintiff's motion for partial summary judgment will be denied; plaintiff's motion to amend the complaint will be denied without prejudice.

BACKGROUND

On November 2, 1994, Applebaum entered into a closed-end¹ lease with Reitenbaugh Dealership for a 1995 Nissan Maxima ("1994 lease"). On January 20, 1997, Applebaum terminated this lease early and entered into a new closed-end lease for a 1997 Nissan ("1997 lease"). The signed leases were assigned by Reitenbaugh Dealership to NMAC. Both these leases contained an Early Termination Liability clause to govern the lessee's liability in case the lease was terminated before the end of its term.

The early termination clause of each lease states:

[I]f [the lessee] terminate[s] early, in addition to the above charges, [the lessee] must pay [the lessor] an Early Termination Charge which is determined as follows: First, all monthly payments, which under the terms of [the] lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which [the lessor] receive[s] for the vehicle. The balance due [the lessor] is the Early Termination Charge which [the lessee pays the lessor] immediately. If there is an excess, however, [the lessor] will not refund it to [the lessee].

NMAC calculated the Early Termination Charge for the 1994 lease as \$5611, and rolled this amount into the payments under the 1997 lease. Applebaum spoke with Reitenbaugh Dealership and NMAC representatives to ascertain the calculation method for the

¹ A "closed-end lease" is any lease that is not an "open-end lease." See 12 C.F.R. § 213.2. An "open-end lease" is one in which the lessee is liable for any value the lessor does not recover upon resale of the vehicle at the end of the lease. See id.

charge, but they could not explain the "constant yield method" used in the calculation.

Applebaum filed suit under the CLA for disclosure violations. After discovery, defendants, moving for summary judgment, asserted that the Early Termination Liability clauses did not violate the CLA; Reitenbaugh Dealership also claimed it was not liable for any violation of the CLA because it had no control over the language of the lease. Plaintiff cross-moved for summary judgment and moved to amend the complaint to assert an additional claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in

[Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). The parties in this action cross-moved for summary judgment; no genuine issues of material fact exist, and the court decides the issues as a matter of law.

II. Reitenbaugh Dealership Liability

A lessor is subject to liability if a lease violates the CLA, 15 U.S.C. § 1667d; the CLA defines the lessor as "a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease." 15 U.S.C. § 1667(3). Reitenbaugh Dealership signed the leases as lessor, and immediately assigned them to NMAC; it contends it did not write the 1994 or 1997 leases or control the language of the leases.

The only involvement of Reitenbaugh Dealership with the leases was presenting them to Applebaum for signing.

A dealer acting as an authorized agent for the financier was held liable under the CLA in Dwyer v. Barco Auto Leasing Corp., 903 F. Supp. 205 (D. Mass. 1995). The Dwyer court held the dealership liable despite the fact that it had not entered into a lease with the consumer. See id. at 210. A "dealer who essentially acts as the financier's authorized agent, completing and forwarding the lease agreement for execution" arranges leases under the CLA. Id. Here, Reitenbaugh Dealership engaged in the consumer transaction by presenting the lease to Applebaum, completing it, signing it, and forwarding it to NMAC; Reitenbaugh Dealership cannot avoid joint and several liability merely because it did not actually write the lease language.²

III. Violation of the CLA

The Consumer Leasing Act ("CLA"), an amendment to the Truth in Lending Act ("TILA"), states in relevant part:

Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease:

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the

² Reitenbaugh Dealership's motion for summary judgment nevertheless will be granted, as this court finds the lease does not violate the CLA as a matter of law.

amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a. This provision was in effect at the time both the 1994 and the 1997 leases were signed by the parties.

The TILA "was passed primarily to aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing." Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 248 (3d Cir. 1980). Plaintiff need not prove he was injured by a failure to meet the disclosure requirements of the Act; injury is presumed from the violation. Id. at 250 (quoting Dzadovsky v. Lyons Ford Sales, Inc., 593 F.2d 538, 539 (3d Cir. 1979)). The TILA "should be construed liberally in favor of the consumer." Ramadan v. The Chase Manhattan Corp., 156 F.3d 499, 502 (3d Cir. 1998), but deference must be given to interpretations of the Federal Reserve Board, to whom Congress has granted "expansive authority" to promulgate regulations. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 557 & 560 (1980).

Plaintiff asserts defendants' leases have violated the CLA because: 1) the formula to calculate the Early Termination Charge does not comply with the disclosure requirements; and 2) the Early Termination Charge clause fails to define the term "residual value."

A. The Early Termination Charge

In interpreting a statutory provision, a court first

considers the language of the statute and whether it clearly expresses the intent of Congress. See Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). The CLA is ambiguous regarding whether a closed-end lease must explain or define the "constant yield method." Therefore, we look next to any regulations of an agency to whom Congress expressly delegated authority.

In 1996, Congress granted the Federal Reserve Board ("FRB") power to promulgate regulations under the CLA. See 15 U.S.C. § 1667f. Regulation M, 12 C.F.R. §213.4, addresses disclosure requirements. This formal regulation, as of the date the leases at issue were signed, stated:

(g) Specific disclosure requirements. In any lease subject to this section, the following items, as applicable, shall be disclosed:

(12) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination.

12 C.F.R. § 213.4(g)(12) (1994 & 1995). These "disclosures shall be made clearly, conspicuously, [and] in meaningful sequence." Id. at § 213.4(a)(1).

Even when administrative agency interpretations are not formally stated, informal interpretations are given some deference if made "in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge." Cleary v. Waldman, 167 F.3d 801, 807-08 (3d Cir. 1999)(quoting Skidmore v. Swift & Co., 323

U.S. 134, 140 (1944). These interpretations are not controlling, but provide "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

Skidmore, 323 U.S. at 140. The interpretation must also be reasonable and "consistent with other agency pronouncements and [in furtherance of] the purposes of the Act." Cleary, 167 F.3d at 808.

The 1994 official staff commentary states that "clearly, conspicuously, and in meaningful sequence" means "that disclosures be in a reasonably understandable form," explaining that "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, Supp. I-C1-1. This requires clarity and full presentation of terms, not full presentation of the details or formulation of a mathematical equation. For the early termination clause to be "clearly, conspicuously, and in meaningful sequence," it must be visible to the lessee and in a readable format; it need not be simple enough for the lessee to do the mathematical calculations of the exact amount.

"[I]f the statute is silent or ambiguous," the court decides "whether the agency's answer is based on a permissible construction of the statute." Id. at 843. Regulations promulgated by an agency to whom Congress has expressly delegated authority "are given controlling weight unless they are

arbitrary, capricious, or manifestly contrary to the statute." Id. at 844.

The parties do not argue that the regulations of the FRB "are arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844. They are consistent with the CLA and its purpose to protect consumers. Regulation M and the official staff commentary are entitled to deference by this court.

Addressing an identical issue, Channell v. Citicorp. Nat'l Serv., Inc., 89 F.3d 379, 383 (7th Cir. 1996), held that the CLA and Regulation M "permit a lessor to name a method [of calculation] without providing an elaboration of the method's operation." In Channell, the lease referred to use of "the Sum-of-the-Digits method," or "Rule of 78s," to calculate the early termination charge. Plaintiffs argued the CLA required the lease to disclose the calculation by the Sum-of-the-Digits method. The court first considered the plain language of the CLA; a lessor must disclose "the amount or method of determining any penalty or other charge." 15 U.S.C. § 1667a(11); see also 12 C.F.R. § 213.4(g)(11)(disclosure of "the amount or method of determining the amount of any penalty or other charge"). The court then balanced the need for disclosure to consumers with the desire to avoid "information overload." Channell, 89 F.3d at 382 (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568(1980)). Finding reference to a method without further explanation of the

mathematical calculation permitted the consumer to comparison shop for lease terms, the court concluded that the lease "may disclose either the amount or the method of getting to an amount." Channell, 89 F.3d at 382. It held Regulation M required no explanation of the application of the method.³ Id.

The term "clear and conspicuous" is not defined either in the CLA or Regulation M, so the Channell court adopted a Uniform Commercial Code § 1-201(10) definition: "so written that a reasonable person against whom it is to operate ought to have noticed it." The court concluded that "clear and conspicuous" means visible or noticeable, not simple or easy to apply. Channell, 89 F.3d at 382.

In Lundquist v. Security Pacific Automotive Financial Servs. Corp. 993 F.2d 11, 13 (2d Cir. 1993), the court considered the following lease provision:

16. EARLY TERMINATION LIABILITY

At any time after I [the lessee] sign this lease, you [Security Pacific] may terminate it if any of the conditions described in Item 22 occur or this lease is in default as described in Item 23.

I agree that my payment liability upon early termination will be the sum of:

- (a) A termination fee of \$250; plus
- (b) Any monthly lease payments already due you which are unpaid and any other amounts arising from my failure to keep my promises under this lease; plus
- (c) The amount, if any, by which the sum of the

³ The staff commentary to Regulation M now specifically permits the lessor to refer to "a generally accepted method," like the "constant yield method." See 12 C.F.R. Pt. 213, Supp. I. This provision is not retroactive so it does not apply to the present action. Channell, 89 F.3d at 383.

Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15; plus

(d) Any official fees and taxes imposed in connection with lease termination (for example, sales/use taxes due on a deficiency balance under (c)).

In interpreting this provision, the Lundquist court, after quoting the applicable provisions of the CLA, Regulation M, and the staff commentary, concluded:

[The] lease disclosures are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer.

Id. at 15.

The provision interpreted in Lundquist is distinguishable from the one this court is asked to interpret. That provision involved more steps and more complicated calculations, not a method of calculation such as the "constant yield method." The Lundquist court, in granting summary judgment for plaintiff, did not consider whether the CLA requires the lessor to explain a named method. See Channell, 89 F.3d at 383. To the extent tension does exist between Lundquist and Channell, Channell seems a better interpretation of the CLA requirements.

The 1994 and 1997 leases were not required to define "constant yield method" because the lessor elected to give the method of calculation rather than an exact amount. The calculation of the Early Termination Charge was stated "clearly,

conspicuously, and in meaningful sequence."⁴

The lease provision states each step in the calculation of the early termination charge. Reading the provision, the lessee can easily gather the following formula, or method of calculating the charge:

1. (Monthly payments + residual value)(discounted to present value using the "constant yield method") = Adjusted Lease Balance (ALB)

2. ALB - Realized Value (proceeds the lessor receives for the vehicle) = Early Termination Charge.

The consumer may not understand the meaning of "constant yield method," but the clause is otherwise decipherable.

Explaining the "constant yield method," a method well known in the industry, rather than merely naming it would cause more confusion than it resolved. As NMAC stated at oral argument, the mathematical formula is "imbedded in ... computer software." The purpose of this method under the lease is to discount to present value; this requires complex calculations involving the time value of money. See 60 F.R. 48752, 48756. Calculating the time value of money mandates some prediction of future events and reliance upon actuarial formulae involving complex mathematics. See Casualty Society of Actuaries, What is an Actuary? (visited April 19, 1999) <<http://www.casact.org/career/what.htm>>. The CLA does not require the lessor to explain complex mathematics in the lease; stating the method used satisfies the disclosure

⁴ Plaintiff also objects that the lease requires "numerous unnecessary calculations." The CLA and Regulation M do not prohibit unnecessary calculations, nor does plaintiff identify any.

requirement.⁵

B. Defining "Residual Value"

At the time of the 1994 lease, neither the CLA nor Regulation M expressly required that key terms be defined in the lease. After January, 1997, the FRB revised Regulation M to require a lessor to define "residual value" when used in calculating the periodic payment, but not in relation to the early termination penalty. Compare 12 C.F.R. § 213.4(f)(4) with 12 C.F.R. § 213.4(g)(4).

Prior to amendment, the regulation specifically required definition of "residual value" in an open-end lease, 12 C.F.R. § 213.4(g)(15), but not in a closed-end lease, at issue here. The FRB was aware of the use of the term "residual value" in leases when it required the definition in open-end leases but not in closed-end leases.

But legislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

Milhollin, 444 U.S. at 565.

⁵ As of October 1, 1997, if the lessor names a method of calculation in the lease, a lessor must "provide a written explanation of that method if requested by the consumer". See 12 C.F.R. Pt. 213, Supp. I. As of the date of the transactions at issue, this provision was not in effect.

Plaintiff cites Anderson v. Ford Motor Credit Corp., 593 A.3d 678 (Md. 1991) to support his argument that a closed-end lease must define "residual value." In Anderson, a state court allowed lack of disclosure of the term "residual value" in a default clause as a defense when the lessor sued for default payments. The term "residual value" was used to state the method by which the early termination charge, necessary to determine the default charge, was calculated. In interpreting the CLA, the Anderson court considered a Senate report requiring full disclosure of charges, Regulation M, and a treatise on the TILA and concluded that "the method or amount in determining the charge must be furnished." See id. at 681 (quoting S. Rep. No. 590, 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 435; 12 C.F.R. § 213.4(g)(12)); K. Keest & E. Sarason, Truth in Lending, § 9.3.6.12, at 339 (1989).

The Anderson court required the lessor to disclose the actual calculated amount of the residual value, not a mathematical explanation or definition of the term. Quoting a treatise on the TILA, the court found that "[w]henver a key number in the early termination formula is left blank or not discussed anywhere in the contract, this is a certain disclosure violation." Id. (quoting Keest & Sarason, Truth in Lending, § 9.3.6.12, at 339). The court then mandated disclosure of the actual residual value amount in case of default because "[s]imply

telling the lessees that their liability would be predicated upon the residual value, without disclosing that predetermined value in writing, does not satisfy the requirements of § 1667a."

Anderson, 593 A.2d at 681.

Neither the CLA nor Regulation M require that every "key number" used in calculating a charge be disclosed. See 15 U.S.C. § 1667a(11); 12 C.F.R. § 213.4(g)(12). In light of the regulation's silence regarding "residual value," a concept familiar to the FRB, this court is unwilling to interpret the regulation as broadly as plaintiff argues and Anderson holds.

Plaintiff fears that if defendants are not required to define the term "residual value" and disclose the amount, defendants may arbitrarily select a value. But Regulation M requires that charges be reasonable, 12 C.F.R. § 213.4(g)(1); an Early Termination Charge cannot be reasonable if the values by which it is calculated are unreasonable. Plaintiff does not contend here that the residual value used was unreasonable. The term "residual value" is not void of meaning to the average consumer; it means whatever value remains in the vehicle when the lease terminates. The CLA and Regulation M do not require further definition.

IV. Amendment of the Complaint

Plaintiff moves to amend his complaint to add a claim for violation of the Pennsylvania Unfair Trade Practices and Consumer

Protection Law ("UTCPL"), 73 Pa. Con. Stat. Ann. § 202-1 - 202-8. Because this court will grant summary judgment in favor of defendants, it declines exercising supplemental jurisdiction under 28 U.S.C. § 1367(c). Plaintiff's motion to amend the complaint will be denied without prejudice.

CONCLUSION

Reitenbaugh Dealership is liable under the CLA as the lessor and an arranger of the lease; it is regularly engaged in leasing. However, the CLA, as interpreted by Regulation M, does not require that defendants explain the "constant yield method" used in the 1994 and 1997 leases signed by Applebaum, nor does the statute require the lessor to define the term "residual value" in a closed-end lease.

This court declines to exercise supplemental jurisdiction over an UTCPL claim.

An appropriate Order follows.

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

LEONARD APPLEBAUM : CIVIL ACTION
: :
v. : :
: :
NISSAN MOTOR ACCEPTANCE CORP. & : :
REITENBAUGH ENTERPRISES, INC. : NO. 97-7256

ORDER

AND NOW, this 21st day of April, 1999, upon consideration of plaintiff's and defendants' cross-motions for summary judgment, all responses thereto, and after a hearing during which counsel for both sides were heard, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. The motion for summary judgment of defendant Nissan Motor Acceptance Corp. is **GRANTED**.

2. The motion for summary judgment of Defendant Reitenbaugh Enterprises, Inc. is **GRANTED**.

2. Plaintiff's motion for summary judgment is **DENIED**.

3. Judgment is entered in favor of defendant and against plaintiff.

4. Plaintiff's motion to amend his complaint is **DENIED** without prejudice to any action filed in state court.

5. The Clerk is directed to mark this action **CLOSED**.

Shapiro, S.J.