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

NORAH T. STRANG and ROBERT J. STRANG Plaintiffs, vs. WELLS FARGO BANK, N.A., WELLS FARGO HOME MORTGAGE, INC., OLD GUARD MORTGAGE AND FINANCIAL SERVICES, INC., and CHELSEA SETTLEMENT SERVICES, INC. Defendants	:	CIVIL ACTION NO. 04-CV-2865

MEMORANDUM AND ORDER

JOYNER, J. **July 13, 2005**

This case is now before the Court for resolution of the Motion for Summary Judgment of Defendants Wells Fargo Home Mortgage, Inc. and Wells Fargo Bank, N.A. ("Wells Fargo"), regarding Plaintiff's Amended Complaint. For the reasons which follow, the Motion is granted.

Factual Background

On June 26, 2002, Plaintiffs in this action, Norah and Robert Strang, filed a Chapter 13 bankruptcy petition in the Bankruptcy Court for the Eastern District of Pennsylvania. (Docket for case #02-19285-BIF). At the time of their bankruptcy, the Strangs had an adjustable rate mortgage loan with Ameriquest. (Exhibit D to Defendants' Motion). During the course of their bankruptcy proceeding, the Strangs approached Tom Dodson of Affinity Mortgage to act as their broker in obtaining a loan to refinance their loan with Ameriquest.[1] (R. Strang Depo. at 25:10-23); (N. Strang Depo. at 6:19-7:6). Mr. Strang also consulted his present counsel, David A. Scholl, concerning the refinancing process. (R. Strang Depo. at 29:9-30:14, 31:10-19, 34:10-24). As the Strangs' bankruptcy counsel, Scholl also had various communications with Dodson concerning the refinancing process. (Scholl Depo. at 10:9-15, 19:12-21:24).

On September 11, 2003, Dodson brought a Uniform Residential Loan Application to the Strangs' home, which included a two-year adjustable interest rate mortgage in the amount of $184,000 with an initial interest rate of 8.49%. (Exhibit G to Defendants' Motion). Mr. Strang reviewed the application while Dodson was present. (R. Strang Depo. at 38:16-22). Mr. Strang then signed the application. (Exhibit G to Defendants' Motion). Also on September 11, 2003, the Strangs received and signed both a Good Faith Estimate approximating closing costs of $5,820 and a Truth in Lending Disclosure Statement. (R. Strang Depo. at 93:2-16, 96:10-97:8); (Exhibits H and I to Defendants' Motion). Shortly thereafter, Dodson submitted the September 11, 2003 application to Wells Fargo. (Exhibit J to Defendants' Motion). Wells Fargo

[1] In September 2003, Dodson told Mr. Strang that he had left Affinity Mortgage and had joined Defendant Old Guard Mortgage. (R. Strang Depo. at 40:1-25). Mr. Strang then signed a letter stating that Mr. Dodson would continue to be the Strangs' representative. (R. Strang Depo. at 87:6-24); (Exhibit D to Defendants' Motion).

approved the loan as submitted, except with a lower initial interest rate and lower closing costs. (Exhibits K and L to Defendants' Motion). Specifically, Wells Fargo approved a thirty year adjustable rate mortgage in the amount of $184,000 with an initial interest rate of 7.875% and closing costs of $5,344. (Id.).

On November 20, 2003, Chelsea Settlement Services conducted the loan closing at the Strangs' home. (R. Strang Depo. at 45:10-22). At the closing, the Strangs received and signed the Settlement Statement, Notice of Right to Cancel, Truth in Lending Disclosure Statement, an Adjustable Rate Two Year/Six Month ARM, and a Uniform Residential Loan Application. (R. Strang Depo. at 50,51,61-63,67,69,90). The Strangs were also provided with a document titled "Hazard Insurance Requirements." (Exhibit M to Defendants' Motion). Indeed, Mr. Strang admits that he chose not to read any documents at closing before signing them. (R. Strang Depo. at 63:17-25,67:13-25). In fact, Mr. Strang admits that he did not review the documents until several months after closing. (R. Strang Depo. at 64:6-65:16,66:6-13).

On December 11, 2003, the Strangs filed a motion seeking the bankruptcy court's approval of the loan, including its interest rate and variable nature. (Exhibit P to Defendants' Motion). The Strangs' Motion also attached the Truth in Lending Disclosure Statement and Settlement Sheet, setting forth the terms of the loan. (Id.). On February 9, 2004, the Strangs again went to the bankruptcy court and filed a Motion of Debtors Seeking Confirmation of Their Loan and Amendment of Their Confirmed Plan. (Exhibit Q to Defendants' Motion). On March 23, 2004, the bankruptcy court held a hearing and approved the terms of the Wells Fargo loan and the Amended Plan of Reorganization. (Exhibit A to Defendants' Motion).

On March 29, 2004, six days after the hearing in bankruptcy court, the Strangs' counsel sent a letter purporting to rescind the Wells Fargo loan. (Amended Complaint, ¶ 14). The Strangs commenced the present lawsuit on June 30, 2004. An Amended Complaint was filed on December 30, 2004. In Count I, the Strangs allege that Wells Fargo failed to provide pre-settlement disclosures concerning their variable rate mortgage, in violation of the federal Truth-in-Lending Act, 15 U.S.C. §1601 et seq., ("TILA"). (Amended Complaint, ¶¶ 17-19). The Strangs argue in Count II that Wells Fargo further violated TILA by failing to disclose various costs that should have been included in the Finance Charge listed on the Truth in Lending Disclosure Statement. (Id. at ¶¶ 20-22). In Count III, the Strangs allege that Wells Fargo substituted less favorable terms into the loan agreement before closing, in violation of the federal Equal Credit Opportunity Act, 15 U.S.C. §1691 et seq., ("ECOA"). (Id. at ¶¶ 23-24). In Count IV, the Strangs contend that Wells Fargo is derivatively liable for Defendants Old Guard Mortgage and Chelsea Settlement Services’ alleged violations of the Pennsylvania Credit Services Act, 73 P.S. §2181 et seq., (“CSA”). (Id. at ¶¶ 25-28). Finally, in Count V the Strangs allege that Wells Fargo’s TILA, ECOA, and CSA violations are also per se violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 et seq., (“UTPCPL”). (Id. at ¶¶ 29-30). On June 16, 2005, Wells Fargo filed a Motion for Summary Judgment as to all Counts contained in Plaintiff’s Amended Complaint.

Standards Governing Summary Judgment Motions

In deciding a motion for summary judgment under Fed.R.Civ.P. 56(c), a court must determine “whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Indeed, Rule 56(c) provides that summary judgment is properly rendered:

> [I]f 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Stated more succinctly, summary judgment is appropriate only when it is demonstrated 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. Celotex Corp. v. Catrett, 477 U.S. 317, 322-32 (1986).

In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the non-moving party. Troy Chemical Corp. v. Teamsters Union Local No. 408, 37 F.3d 123, 125-26 (3d Cir. 1994); Oritani Savings & Loan Assn. v. Fidelity & Deposit Co. of Md., 989 F.2d 635, 638 (3d Cir. 1993). An issue of material fact is said to be genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex Corp. v. Catrett, supra, the Supreme Court articulated the allocation of burdens between a moving and nonmoving party in a motion for summary judgment. Specifically, the Court in that case held that the movant had the initial burden of showing the court the absence of a genuine issue of material fact, but that this did not require the movant to support the motion with affidavits or other materials that negated the opponent's claim. Celotex, 477 U.S. at 323. The Court also held that Rule 56(e) requires the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting Fed.R.Civ.P. 56(e)). This does not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose its own witnesses. Rather, Rule 56(e) permits a summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the required showing that a genuine issue of material fact exists. Id. See, also, Morgan v. Havir Mfg. Co., 887 F. Supp. 759 (E.D. Pa. 1994); McGrath v. City of Phila., 864 F. Supp. 466, 472-73 (E.D. Pa. 1994).

Discussion

I. Count I: Variable Rate Disclosures Under TILA

The Strangs allege that Wells Fargo failed to provide pre-settlement disclosures concerning their variable rate mortgage, in violation of TILA. (Amended Complaint, ¶¶ 17-19). Specifically, Section 129 of TILA provides:

> The creditor shall disclose . . . [t]he "finance charge" not itemized, using that term [and]. . . [t]he finance charge expressed as an "annual percentage rate," using that term.

15 U.S.C. §1638(a)(3) and (a)(4). However, TILA also creates a rebuttable presumption that disclosure occurred where there is "written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom such information,

forms, and a statement is required to be given." 15 U.S.C. §1635(c). The Strangs admit that they signed a Truth in Lending Disclosure Statement which explicitly stated that they had previously received disclosures about the variable rate feature of the loan. (R. Strang Depo. at 61-63). Although the Third Circuit Court of Appeals has not explicitly addressed this issue, other Circuits have found that a borrower's testimony that disclosures were not provided, without more, is insufficient to rebut the presumption that disclosure occurred where there is written acknowledgment of receipt. See, e.g., McCarthy v. Option One Mortgage Corp., 362 F.3d 1008, 1011 (7th Cir. 2004)(finding mere assertion of non-receipt insufficient to rebut written evidence that disclosures were provided); Gaona v. Town & Country Credit, 324 F.3d 1050, 1054 (8th Cir. 2003)(finding allegations that disclosures were not provided insufficient to rebut presumption).

In addition to legal authority stating that a borrower's testimony alone is insufficient to rebut the presumption of disclosure, the facts of this case likewise indicate that the Strangs' testimony is inadequate to rebut the presumption. Specifically, the Strangs filed a motion with the bankruptcy court explicitly seeking approval of the Wells Fargo loan, including its interest rate and variable nature. (Exhibit P to Defendants' Motion). Indeed, the Strangs' motion attached both the Truth in Lending Disclosure Statement and the Settlement Sheet setting forth the terms of the loan. (Id.). In fact, the Strangs filed a second motion with the bankruptcy court seeking confirmation of the terms of the Wells Fargo loan. (Exhibit Q to Defendants' Motion). At no point did the Strangs or their counsel alert the bankruptcy court that they intended to rescind the loan or that the loan should not be approved. Indeed, a bankruptcy court will not approve a loan unless the debtor proves that the specific terms of the loan are fair, reasonable, and adequate. In re Crouse Group, Inc., 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987). Just as the Strangs' repeated submission of the loan terms to the bankruptcy court bolsters the presumption of disclosure, the Strangs' attempt to rescind the loan a mere six days after receiving the bankruptcy court's approval likewise supports the presumption. Specifically, it is highly unlikely that the Strangs did not realize the variable nature of their loan throughout the bankruptcy proceedings, yet discovered the variable rate within six days of receiving the bankruptcy court's approval. Accordingly, by applying the relevant legal standards to the particular facts of this case, this Court finds no TILA violation as outlined in Count I of Plaintiffs' Amended Complaint.

II. Count II: TILA Claims Relating to Finance Charges

The Strangs further contend that Wells Fargo violated TILA by failing to disclose various charges that should have been included in the Finance Charge listed on the Truth in Lending Disclosure Statement. (Amended Complaint, ¶¶ 20-22). Thus, the Strangs allege that the finance charge was under-disclosed. (Id.). The applicable law set forth in TILA Section 107 provides:

> In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance charge (1) shall be treated as being accurate for purposes of this subchapter if the amount disclosed as the finance charge (A) does not vary from the actual finance charge by more than $100; or (B) is greater than the amount required to be disclosed under this subchapter.

15 U.S.C. §1605(f). The Code of Federal Regulations, which expands upon and clarifies rules relating to the timing and content of disclosures under TILA, likewise explains that a TILA violation is not found where the estimated finance charge is greater than the final finance charge. 12 C.F.R. §226.18(d)(1). Contrary to Plaintiffs' allegations, the estimated finance charge was actually overestimated by $126. (Exhibit O to Defendants' Motion). Specifically, the Truth in Lending Disclosure Statement initially listed a finance charge of $347,473.40, whereas the final finance charge was only $347,347.43. (Id.). Because the estimated finance charge was greater than the amount required to be disclosed, no TILA violation exists regarding Count II of Plaintiffs' Amended Complaint.

Although Plaintiffs allege that the title insurance charged by Chelsea Settlement Services should have been disclosed as part of the finance charge, TILA explicitly exempts the cost of title insurance from the computation of the finance charge. See, 15 U.S.C. §1605(e). Likewise, Plaintiffs' contention that the $35 cost of a credit report should have been included in the finance charge is directly invalidated by TILA's explicit exemption of the cost of a credit report from the computation of the finance charge. See, 15 U.S.C. §1605(e). Moreover, Plaintiffs' allegation that the $1,038 cost of hazard insurance should have been included in the finance charge is without merit, as property insurance premiums are excluded from the finance charge if disclosure is made as to the cost of insurance and the right of the consumer to pick his or her own insurer. See, 12 C.F.R. §226.4(d)(2). Here, the Truth in Lending Disclosure Statement provided "Hazard insurance is required and may be obtained through any company of your choice that is acceptable to the Lender." (Exhibit J to Defendants' Motion). Furthermore, the cost of insurance was disclosed in the settlement documents, and Plaintiffs received a document titled "Hazard Insurance Requirements" which reiterated "**NOTICE TO BORROWERS: YOU ARE REQUIRED TO PURCHASE PROPERTY INSURANCE AS A CONDITION OF RECEIVING THE LOAN. PROPERTY INSURANCE MAY BE SECURED FROM AN INSURANCE COMPANY OR AGENT OF YOUR CHOOSING.**" (Exhibits L and M to Defendants' Motion)(bold and capitalization in original).

Plaintiffs further allege that the $5,700 payment to the Chapter 13 Trustee contemplated a double payment to Ameriquest. Plaintiffs, however, provide no factual basis for their assertion. Specifically, the Settlement Sheet indicates that these funds were divided between Plaintiffs and their unsecured creditors as specified in Plaintiffs' confirmed Chapter 13 bankruptcy plan. (Exhibit L to Defendants' Motion). Plaintiffs' allegation that the $5,700 payment should have been included in the finance charge likewise fails, as the Third Circuit has limited the scope of costs included in the finance charge to those listed in either TILA or the C.F.R. See, e.g., Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 906 (3d Cir. 1990). Finally, Plaintiffs allege that the yield spread premium should have been included in the finance charge. However, courts in the Eastern District of Pennsylvania have held that the yield spread premium is properly excluded. See, e.g., Stump v. WMC Mortgage Corp., 2005 U.S. Dist. LEXIS 4304 at *9-13 (E.D. Pa. 2005). Specifically, courts have found that the yield spread premium is already incorporated into the total finance charge as a higher interest rate and therefore should not be double-counted. Id. Accordingly, as Plaintiff fails to provide any evidence that Wells Fargo unlawfully underestimated the finance charge, this Court finds no TILA violation concerning Count II.

III. Count III: Substitution of Terms Under the ECOA

Plaintiffs claim that Wells Fargo "significantly changed the terms of the instant credit transaction and submitted different, less favorable terms without so advising [them], in violation of 15 U.S.C. §1691(d) of the ECOA." (Amended Complaint, ¶ 24). Section 702 of the ECOA provides:

> Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies such obligations by (A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or (B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained.

15 U.S.C. §1691(d). Although Plaintiffs assert that sometime prior to September 11, 2003 Mr. Dodson showed them the first page of an application containing a 7.5% interest rate, this allegation alone fails to present a genuine issue of material fact. Indeed, Plaintiffs fail to provide any evidence indicating that Wells Fargo "substituted different, less favorable terms." Specifically, Plaintiffs signed a Uniform Residential Loan Application on September 11, 2003 by which they applied for a thirty year adjustable rate mortgage in the amount of $184,000 with an initial interest rate of 8.49%. (Exhibit F to Defendants' Motion). This was the only application submitted by Mr. Dodson to Wells Fargo. (Exhibit J to Defendants' Motion).

Wells Fargo subsequently approved the adjustable rate mortgage in the amount of $184,000 with an initial interest rate of 7.875%. (Exhibits K and L to Defendants' Motion).

Thus, the only difference between the loan application and the loan ultimately provided was the interest rate. Importantly, the final interest rate was actually more favorable to the Strangs than the one they initially sought in the September 11th application. Accordingly, Plaintiffs fail to prove that Wells Fargo took an "adverse action" against them by lessening the initial interest rate. As Wells Fargo did not change the loan's terms to Plaintiffs' detriment, the ECOA violations alleged in Count III of Plaintiffs' Amended Complaint must fail.

IV. Count IV: Derivative Liability

Plaintiffs argue that Wells Fargo is derivatively liable for the activities of Old Guard Mortgage and Chelsea Settlement Services which allegedly violated the CSA. Specifically, Chapter 36 of the CSA provides:

> Any buyer or borrower injured by a violation of this act or by the credit services organization's or loan broker's breach of a contract subject to this act may bring an action for recovery of damages.

73 P.S. §2191. Thus, Wells Fargo may not be held derivatively liable unless the Plaintiffs prove that Old Guard Mortgage and/or Chelsea Settlement Services are loan brokers or credit services organizations. The CSA defines a loan broker as follows:

A person who: (i) For or in expectation of a consideration

> fee arranges or attempts to arrange or offers to fund a loan of money, a credit card or line of credit for personal, family or household purposes. (ii) For or in expectation of a consideration fee assists or advises a borrower in obtaining or attempting to obtain a loan of money, a credit card, a line of credit or related guarantee, enhancement or collateral of any kind or nature. (iii) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers. (iv) Holds himself out as a loan broker.

73 P.S. §2182. The CSA further provides the following definition of a credit services organization:

> A person who, with respect to the extension of credit by others, sells, provides or performs or represents that he or she can or will sell, provide or perform any of the following services in return for the payment of money or other valuable consideration: (i) Improving a buyer's credit record, history or rating. (ii) Obtaining an extension of credit for a buyer. (iii) Providing advice or assistance to a buyer with regard to either subparagraph (i) or (ii).

Id. Plaintiffs fail to provide any evidence indicating that Chelsea or Old Guard are loan brokers or credit services organizations as defined under the CSA. Indeed, Plaintiffs admit that Chelsea merely acted as the closing agent, handling the settlement for Wells Fargo. (R. Strang. Depo. at 45-46). Plaintiffs fail to produce any evidence showing that Chelsea provided advice or assistance to them regarding improving their credit rating or obtaining an extension of credit. Similarly, Plaintiffs are unable to supply any evidence demonstrating that Old Guard exercised any activities of a loan broker or credit services organization. Rather, Old Guard merely acted as Plaintiffs' agent. See, In re Barker, 251 B.R. 250, 259 (Bankr. E.D. Pa. 2000)(finding that a broker is only the agent of a debtor obtaining a loan to finance home improvements). Finally, Plaintiffs' Response provides no counter-arguments to Defendants' Motion for Summary Judgment as to the derivative liability claim. Thus, as Plaintiffs provided no evidence showing that Old Guard and Chelsea are entitles liable under the CSA, Plaintiffs' derivative liability claim against Wells Fargo must fail.

V. Count V: Alleged UTPCPL Violation

Plaintiffs assert that Wells Fargo's alleged TILA, ECOA, and CSA violations constitute "per se violations" of the UTPCPL. Specifically, Plaintiffs allege that Wells Fargo violated three provisions of the UTPCPL, which prohibit the following:

- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;
- Knowingly misrepresenting that services, replacements or repairs are needed if they are not needed;
- Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

73 P.S. §201-2(v),(xv), and (xxi). Plaintiffs, however, provide no evidence directly supporting the alleged UTPCPL violations. Rather, Plaintiffs merely contend that TILA, ECOA, and CSA violations are also UTPCPL violations. (Amended Complaint, ¶ 30). Furthermore, Plaintiffs' Response provides no counter-arguments to Defendants' Motion for Summary Judgment as to the UTPCPL claim. Accordingly, as Plaintiffs' evidence is insufficient to support their TILA, ECOA, and CSA claims, this

Court likewise finds no basis for their UTPCPL claim. Thus, Summary Judgment is granted on Count V of Plaintiffs’ Amended Complaint.

An order follows.

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

NORAH T. STRANG and ROBERT J. STRANG Plaintiffs, vs. WELLS FARGO BANK, N.A., WELLS FARGO HOME MORTGAGE, INC., OLD GUARD MORTGAGE AND FINANCIAL SERVICES, INC., and CHELSEA SETTLEMENT SERVICES, INC. Defendants	: : : : : : : : : : : :	 CIVIL ACTION NO. 04-CV-2865

ORDER

AND NOW, this 13th day of July, 2005, upon consideration of the Motion for Summary Judgment of Defendants Wells Fargo Home Mortgage, Inc. and Wells Fargo Bank, N.A. (Doc. No. 36), Plaintiffs' response (Doc. No. 37), and Defendants' response thereto (Doc. No. 39), it is hereby ORDERED that the Motion is GRANTED and Judgment as a matter of law is entered in favor of Defendant and against Plaintiff in no amount.

BY THE COURT:

s/J. Curtis Joyner

J. CURTIS

JOYNER, J.