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FROM THE COMMITTEE ON OPINIONS

JENNIFER WOO-PADVA, on behalf of herself and those similarly situated; Plaintiff, v. MIDLAND FUNDING LLC and JOHN DOES 1 to 10; Defendants.	**SUPERIOR COURT OF NEW JERSEY** LAW DIVISION – BERGEN COUNTY DOCKET NO. **BER-L-3625-17** Civil Action **OPINION**

Argued: January 7, 2022
Decided: January 21, 2022

THE HONORABLE ROBERT C. WILSON, J.S.C.

Yongmoon Kim, Esq. appearing on behalf of Plaintiff Jennifer Woo-Padva (from Kim Law Firm LLC)

Han Sheng Beh, Esq. appearing on behalf of Defendant Midland Funding LLC (from Hinshaw & Culbertson LLP)

FACTUAL BACKGROUND

THIS MATTER arises from an alleged unlawful purchase and assignment of an account that had been extended to Jennifer Woo-Padva ("Plaintiff") by HSBC ("HSBC Account or HSBC Debt"). Plaintiff was the account holder of a credit card account with Chase Bank (the "Chase Account"). Plaintiff subsequently defaulted on the credit card account. Midland Funding LLC ("Defendant") purchased Plaintiff's defaulted Chase Account. Defendant's attorney then filed a lawsuit against Plaintiff on March 29, 2011, to collect on the debt. Plaintiff was served with the complaint on April 12, 2011. The Court then entered a judgment against Plaintiff on June 3, 2011. Plaintiff made payments to Defendant pursuant to the judgment in that matter until Plaintiff satisfied the judgment. Plaintiff was also the account holder on an HSBC credit card. Plaintiff

incurred debt on the HSBC card. Plaintiff alleges that her accounts were not properly assigned to Defendant and therefore she suffered damages by paying Defendant.

Defendant purchases and takes assignment of defaulted credit agreements originally extended by other creditors, which it then enforces against borrowers through collection letters, lawsuits, and post-judgment collection efforts. Plaintiff claims that Defendant's enforcement of the HSBC Account was unauthorized and unlawful because Defendant did not have a license to engage in business as a "sales finance company" or a "consumer lender" pursuant to the CFLA, at N.J.S.A. 17:11C-3.

On May 24, 2017, Plaintiff filed her Class Action Complaint, including three counts: (1) declaratory judgment and injunctive relief; (2) violations of Consumer Fraud Act; and (3) unjust enrichment about HSBC and Chase Bank debts seeking relief for herself and the proposed class. On January 5, 2018, Plaintiff filed her First Amended Class Action Complaint including three counts: (1) declaratory judgment and injunctive relief for the Class; (2) Damages under the Consumer Fraud Act on behalf of Plaintiff and the Subclass; and (3) unjust enrichment and engorgement on behalf of Plaintiff and the Subclass. The proposed class was "All natural persons with addresses in the State of New Jersey who are listed as the borrower or purchaser in an account assigned to Midland Funding LLC at any time prior to January 6, 2015." The proposed Subclass was "All members of the class who paid any money to or from whom Midland Funding LLC collected any money on the Defendants in the six-year period preceding the filing of this Complaint."

On March 2, 2018, the case was dismissed based on the entire controversy doctrine. On April 16, 2018, Plaintiff appealed, and the Appellate Division entered a partial remand on August 5, 2019. On May 19, 2020, Defendant asked for this Court to reopen the case so that all remanded

issues may be litigated. On August 4, 2020, the Court entered an order granting Defendant's motion to strike the portion of Plaintiff's First Amended Complaint alleging class claims. Plaintiff requested that the Appellate Division grant Plaintiff leave to file an interlocutory appeal to review this Court's decision. The Appellate Division rejected Plaintiff's request on September 25, 2020. Thereafter, the parties engaged in discovery. All written discovery has been completed at this time. On June 2, 2021, this Court denied Plaintiff's Motion to Amend its complaint as to the class action claims. This Court held that Plaintiff's claims directly contradicted the August 2020 Opinion, which was the law of the case.

At this point, Plaintiff claims concern only the HSBC Account. After this Court previously dismissed the action, the dismissal was affirmed in part and reversed in part by the Appellate Division. The reversal related to the claims concerning the HSBC Account. Plaintiff Defendant responded by filing the Cross-Motion for Summary Judgment.

For the reasons below, Defendant's Cross-Motion for Summary Judgment is **GRANTED** in its entirety.

SUMMARY JUDGMENT STANDARD

The New Jersey procedural rules state that a court shall grant summary judgment "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a

directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of R. 4:46-2." Id. at 540.

RULE OF LAW AND DECISION

I. Defendant is Not a Consumer Lender

Plaintiff's theory of recovery is based on the incorrect premise that Defendant was obligated to obtain a consumer lending license under the New Jersey Consumer Finance Licensing Act (the "NJCFLA"). See N.J.S.A. §17:11C-3. The NJCFLA states that no person shall engage in business as a "consumer lender" without first obtaining a license. N.J.S.A. §17:11C-3. Defendant does not provide loans and is not a consumer lender and therefore does not require a license.

A "consumer lender" is defined as any person who is licensed, or should be licensed, to engage in the "consumer loan business." N.J.S.A §17:11C-2. The NJCFLA defines "consumer loan business" as, "the business of making loans . . . or in the business of buying, discounting or endorsing notes[.]" N.J.S.A. §17:11C-2. In determining the meaning of a statutory provision "courts first turn to the plain language of the statute in question." In re Young, 202 N.J. 50, 63 (2010). The interpretation process is complete when the plain language leads to a clear and unambiguous result. Id. Where the plain meaning does not point to such result the court looks to extrinsic evidence. Id.

Defendant is not a consumer lender under the NJCFLA. Defendant is a debt buyer that purchased Plaintiff's defaulted and charged-off HSBC credit card account. Defendant does not

provide loans, nor does it extend credit. Defendant buys debts and, at times, as in the present case, it retains debt collectors to collect on the debts purchased.

Plaintiff argues that the NJCFLA covers a debt buyer since it includes any person buying debts of less than $50,000.00 under the statute. However, the NJCFLA does not define a consumer lender as one that buys debts. Rather, the plain words only include within its definition those "in the business of buying, discounting or endorsing notes." N.J.S.A. §17:11C-2. Courts have long considered the distinction between "notes" and "debts." See Smith v. Palisades Collection, LLC, 2007 U.S. Dist. LEXIS 28348, *15 (N.D. Ohio April 3, 2007) (plaintiff's claim "is based upon the flawed premise that a credit card agreement is equivalent to a promissory note."); Cavalry SPV I, LLC v. Krantz, 2012 Ohio App . LEXIS 1941, at *6 (Ohio App. May 17, 2012); Lemke v. Barclays Bank Delaware, 2015 U.S. Dist. LEXIS 69598, at *12 (E.D. Mich. Mar. 31, 2015). New Jersey statutes establish a distinction between a "note" and the credit card debt at issue in this case. N.J.S.A. §12A:3-118 explicitly provides the statute of limitations for "an action to enforce the obligation of a party to pay a note . . ." while N.J.S.A. §2A:14-1, a separate and distinct section of New Jersey law, provides the statute of limitations to enforce claims based on a breach of contract that generally apply to credit card debts. Plaintiff uses the word "buying" to aid in her claims. However, the NJCFLA uses the word "buying" to modify the word "notes." N.J.S.A. §17:11C-2. The NJCFLA therefore applies only when a party is buying "notes," not buying debts, and does not apply to Defendant.

II. Plaintiff's Consumer Fraud Act Claim Fails

Even assuming that Midland was required to have a license, Plaintiff's claims still fail. The Consumer Fraud Act ("CFA") applies only to conduct that rises to the level of deception, fraud, or misrepresentation in connection with the sale of merchandise or services. Castro v. NYT

Television, 370 N.J. Super. 282, 294 (N.J. Super. Ct. May 25, 2004). "To satisfy this requirement, the misrepresentation has to be one which is material to the transaction made to induce the buyer to make the purchase." Id.

Plaintiff's CFA theory focuses on two acts by Defendant: (1) purchasing Plaintiff's HSBC Account without a license, and (2) collecting on the HSBC Account. Neither constitute a sale of merchandise or of a service to support a claim under the CFA.

Defendant purchased Plaintiff's HSBC Account on December 14, 2010, pursuant to a private contractual agreement. Defendant did not offer to sell Plaintiff any services or merchandise and Plaintiff did not agree to purchase anything from Defendant. Therefore, Plaintiff's claims are not covered by the CFA. See DepoLink Court Reporting & Litigation Support Services v. Rochman, 430 N.J. Super. 325, 339 (App. Div. March 18, 2013).

Plaintiff's claim that Defendant's efforts to collect on the credit card debt violated the CFA also fail. The Appellate Division has expressly held that efforts to collect a debt are not "in connection with the sale of merchandise" and thus not governed by the CFA. Id. DepoLink held that the CFA was inapplicable because the collection agency did not offer to sell any merchandise to the debtor and the debtor did not buy anything from the collection agency Id. See also Hoffman v. Encore Capital Group, Inc., 2008 N.J. Super. Unpub. LEXIS 1627, at *7-8 (App. Div. Nov. 18, 2008), cert. denied, 2009 N.J. LEXIS 296 (2009) ("in this case, after purchasing existing debts at a discount from commercial lenders, [defendant] initiated collection activities. Consequently, Judge Anzaldi correctly concluded that plaintiff's complaint failed to state a cause of action under the CFA because: (1) [Defendant] did not induce any person to incur an obligation as defined by the CFA; and (2) [Defendant] did not offer to sell 'anything to any consumers.'"). Therefore, since

there is no sale of merchandise or services, the efforts to collect on a credit card debt do not violate the CFA.

Plaintiff's CFA claims fails for another reason, namely, that there is no ascertainable loss. The CFA "imposes a standard of proof in consumer fraud actions by private plaintiffs that is higher than the standard that applies to enforcement proceedings by the Attorney General . . . [A] private plaintiff must show that he . . . suffered an 'ascertainable loss . . .as the result of' the unlawful conduct." Hoffman v. Macy's, Inc., N.J. Super. Unpub. LEXIS 1412, *5 (N.J. App. Div. Jun. 28, 2010); N.J.S.A. §56:8-19. The New Jersey Supreme Court has held that to meet the ascertainable loss requirement, a plaintiff "must proffer evidence of loss that is not hypothetical or illusory. It must be presented with some certainty demonstrating that it is capable of calculation . . . The certainty implicit in the concept of an 'ascertainable' loss is that it is quantifiable or measurable." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248-51 (2005).

In Browne v. Nat'l Collegiate Student Loan Trust, No. 21-11871, Doc. 38 (D.N.J. Dec. 22, 2021), the District Court of New Jersey analyzed a similar issue. The District Court held that plaintiff's claims for a declaratory judgment, violations of the CFA, and unjust enrichment based on the premise that the defendant lacked a consumer lending license failed because the NJCFLA did not provide the plaintiff with a private right of action. Id. Moreover, the Browne court also held that plaintiff's theory, even if proven, would not have resulted in any cognizable harm to the plaintiff.

The reasoning in Browne is analogous to the present matter as it establishes the lack of any ascertainable loss under the CFA. Plaintiff does not discuss any ascertainable loss that the Plaintiff supposedly suffered. The record establishes that the money paid to the collection agency, Pressler & Pressler, LLP ("Pressler"), was the exact amount she admits she owed on the credit card account.

The record is clear that neither Defendant nor Pressler collected anything more than the amount Plaintiff owed to HSBC Bank for the credit card account. Plaintiff, thus, has not suffered any loss. To the extent Plaintiff argues that she suffered a loss when she paid Defendant as opposed to HSBC Bank, a loss would only exist if the correct entity later seeks payment. Plaintiff, however, admits that after the HSBC Account was sold to Defendant, HSBC Bank did not seek payment of the credit card account. Thus, the record establishes that Plaintiff has not suffered any harm. Without an ascertainable loss, Plaintiff's CFA claim fails.

CONCLUSION

As such, and for the reasons set forth in this decision, Defendant's Cross-Motion for Summary Judgment is **GRANTED**.