SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: March 9, 2018

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: TROY LEE ROGERS and MARSHALL L ROGERS	**CASE NO. 16-00984-KMS**
	CHAPTER 13
DEBTORS	
SOUTHERN FINANCE LLC, Successor in Interest to Pikco Finance, Inc.	**PLAINTIFF/ COUNTERDEFENDANT**
V.	**ADV. NO. 16-00053-KMS**
TROY LEE ROGERS	**DEFENDANT/ COUNTERPLAINTIFF**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON MOTION AND CROSS-MOTION
FOR SUMMARY JUDGMENT ON COUNTERCLAIM

Before the Court are the parties' motions for summary judgment on the Counterclaim: a motion for partial summary judgment ("Motion") (Adv. Dkt. No. 39)[1] by Troy Lee Rogers, joint Debtor in the underlying chapter 13 case, and a cross-motion for summary judgment ("Cross-Motion") (Adv. Dkt. No. 54) by creditor Southern Finance LLC ("Southern Finance"). Because the Counterclaim is a non-core proceeding in which the bankruptcy court may not enter final orders

[1] "Adv. Dkt. No. ___" indicates a citation to the docket in this adversary proceeding.

or a judgment without the parties' consent and because Southern Finance does not consent (Adv. Dkt. No. 74), the Court submits the following proposed findings of fact and conclusions of law for consideration by the district court. *See* 28 U.S.C. § 157(c)(1)-(2). The Court recommends that the Motion be denied, the Cross-Motion be granted, and judgment be entered for Southern Finance.

BACKGROUND

Southern Finance filed this adversary proceeding seeking to except from discharge a debt for $3510.58, which it alleges Rogers owes under a Disclosure Statement, Promissory Agreement, and Security Agreement ("Agreement") with its predecessor in interest, Pikco Finance Inc. ("Pikco"). Rogers filed an answer and counterclaim, the current version of which is the Third Amended Answer and Counterclaim (Adv. Dkt. No. 27-1). In the Counterclaim, Rogers seeks damages against Southern Finance for alleged violations of the disclosure requirements under the federal Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-67, and its implementing regulation, Regulation Z, 12 C.F.R. Pt. 226; and for fraud under Mississippi law.

At issue is the $180.00 Pikco included in the Agreement as a fee for membership ("Fee") in an auto club, Liberty Motor Club ("Liberty"). Count I of the Counterclaim, "Fraud as to Liberty Motor Club Charge," alleges that the inclusion of the Fee was a representation of membership in Liberty with some benefit to Rogers, when, in fact, the only benefit was to Pikco, which kept all but $27.00 of the Fee, did not provide a membership to Rogers, and included the entire $180.00 in the calculation of loan interest. (*Id.* ¶¶ 5-8.) Rogers further alleges that the Fee was material to the Agreement because its amount was more than what he himself received in "new monetary benefit" and that he relied on the information in the Agreement in deciding whether to take out the loan. (*Id.* ¶ 6.) Count II alleges violation of TILA under two theories: (1) Pikco did not disclose that it kept part of the Fee; and (2) Pikco's failure to disclose that it kept part of the Fee meant that the

finance charge, the annual percentage rate (APR), and the amount financed as disclosed on the Agreement were all incorrect. (*Id.* ¶¶ 11-12.)

THE MOTIONS FOR SUMMARY JUDGMENT

I. Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* Fed. R. Bankr. P. 7056 (applying Rule 56 of the Federal Rules of Civil Procedure to adversary proceedings). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. An issue is 'genuine' if the evidence is sufficient for a reasonable [fact-finder] to return a verdict for the non-moving party." *Ginsberg 1985 Real Estate P'ship v. Cadle Co.*, 39 F.3d 528, 531 (5th Cir. 1994) (citations omitted). A party asserting that a fact either is or cannot be genuinely disputed must support that assertion either by record citations to "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials"; or by showing that the cited materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B).

The moving party bears the initial responsibility of apprising the court of the basis for its motion and the parts of the record that indicate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Once the moving party presents the . . . court with a properly supported summary judgment motion, the burden shifts to the nonmoving party to show that summary judgment is inappropriate." *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). But "conclusory allegations," "unsubstantiated assertions," "metaphysical doubt as to the material facts," or "only a scintilla of evidence" do not satisfy the nonmovant's burden. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (internal quotation marks and citations omitted). If the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," the court must render summary judgment. *Celotex*, 477 U.S. at 322.

On cross-motions for summary judgment, each movant must establish the absence of a genuine issue of material fact and the movant's entitlement to judgment as a matter of law. *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 539 (5th Cir. 2004). "If there is no genuine issue and one of the parties is entitled to prevail as a matter of law, the court may render summary judgment." *Id.*

II. Undisputed Material Facts

1. On September 26, 2015, Rogers signed the Agreement for a $3938.32 loan from Pikco. (Agreement, Adv. Dkt. No. 39 at 6-7; Rogers Dep. 17:19-21, Adv. Dkt. No. 53-1 at 7.)

2. After subtracting the amounts of various fees and insurance products and the $2836.72 that Rogers owed on his pre-existing account, Rogers received $152.78. (Adv. Dkt. No. 39 at 6.)

3. The section of the Agreement titled "Amount Paid to Others on My Behalf" disclosed a payment of $180.00 to "Liberty Motor Club." (*Id.*)

4. Of the $180.00 shown on the Agreement as a payment to Liberty, Pikco kept $153.00 as a commission and sent $27.00 to Liberty. (Southern Financial's Answers to Interrogs., Adv. Dkt. No. 39 at 8-10; Southern Financial's Resp. to Reqs. for Admiss., Adv. Dkt. No. 39 at 11.)

5. Pikco did not disclose to Rogers that Pikco would keep part of the Liberty charge. (Adv. Dkt. No. 39 at 11.)

6. Rogers did not read all the loan documents before he signed them. (Rogers Dep. 39:11-13, Adv. Dkt. No. 65-1 at 2.)

7. Liberty's records include documentation of Rogers's membership, including member number, member benefits, and membership expiration date. (Liberty Docs. Produced in Resp. to Subpoena, Adv. Dkt. No. 53-7.)

III. Conclusions of Law

A. Southern Finance Is Entitled to Summary Judgment on the TILA Count.

One purpose of TILA is to promote the informed use of consumer credit by enabling consumers to more easily compare their credit options. 15 U.S.C. § 1601(a). Toward that end, TILA and the implementing provisions in Regulation Z require creditors to make certain disclosures about credit terms and cost. *Id.*; 12 C.F.R. § 226.1(b). Consistent with TILA's purpose as a consumer protection statute, courts require creditors' strict compliance with TILA and with Regulation Z and liberally construe the statutory and regulatory requirements in favor of the consumer. *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir. 1995). For an individual harmed by a creditor's violation, TILA's civil liability section provides for two forms of compensation: actual damages in § 1640(a)(1) and statutory damages in § 1640(a)(2)(A).

Rogers alleges under his first theory of liability that Pikco violated TILA in the Agreement's itemization of the amount financed by not accurately disclosing "each amount that is or will be paid to third persons by the creditor on the consumer's behalf." 15 U.S.C. § 1638(a)(2)(B)(iii); *see also* 12 C.F.R. § 1026.18(c)(1)(iii) (requiring disclosure of "[a]ny amounts paid to other persons by the creditor on the consumer's behalf"). Whereas the Agreement shows that Liberty received $180.00, Pikco sent Liberty only $27.00 and kept the $153.00 difference as a commission.

Pikco did indeed violate TILA, whether by failing to disclose the exact amount it paid Liberty or by failing to disclose more generally that it was retaining some of the $180.00 with such language as "we may be retaining a portion of this amount," *see* 12 C.F.R. Pt. 226, Supp. I § 226.18

¶ 18(c)(1)(iii)(2). The form of disclosure TILA would have required here is immaterial, however; statutory damages are unavailable for a violation of § 1638(a)(2)(B)(iii), and Rogers has not put forth the evidence required to prove actual damages.

1. Statutory Damages Are Unavailable.

Not all TILA violations entitle the plaintiff to statutory damages. Specifically as to violations under § 1638(a)(2), the paragraph at issue here, statutory damages are available "only for failing to comply with the requirements of . . . paragraph (2) (insofar as it requires a disclosure of the 'amount financed')." 15 U.S.C. § 1640(a)(4).

The overwhelming majority of courts from multiple jurisdictions have held that this provision makes statutory damages unavailable when the plaintiff alleges inaccurate disclosure of the amount the creditor paid to other persons under § 1638(a)(2)(B)(iii). *See, e.g., Peters v. Jim Lupient Oldsmobile Co.*, 220 F.3d 915 (8th Cir. 2000) (fee for credit life and disability insurance included undisclosed commission later repaid to car dealer); *Nevarez v. O'Connor Chevrolet, Inc.*, 303 F. Supp. 2d 927 (N.D. Ill. 2004) (fee for service contract included undisclosed amount that car dealer retained); *Haun v. Don Mealy Imports, Inc.*, 285 F. Supp. 2d 1297 (M.D. Fla. 2003) (car dealer's failure to properly disclose recipients of "GAP" and "VCP" payments); *Martin v. Equity One Consumer Discount Co.*, 194 F. Supp. 2d 469 (W.D. Va. 2002) (fee for credit life insurance included undisclosed commission that car dealer retained); *Rugumbwa v. Betten Motor Sales*, 200 F.R.D. 358 (W.D. Mich. 2001) (fee for extended warranty included car dealer's undisclosed "upcharge"); *but see Cannon v. Cherry Hill Toyota, Inc.*, 161 F. Supp. 2d 362 (D.N.J. 2001) (statutory damages available when fee for extended warranty included car dealer's undisclosed commission); *Peters v. Cars To Go, Inc.*, 184 F.R.D. 270 (W.D. Mich. 1998) (class certification

for statutory damages appropriate on claims that car dealer violated TILA by failing to disclose retention of part of fee for vehicle service contract).

Rogers argues that the Fifth Circuit Court of Appeals has stated that "[t]he basis of § 1640(a) liability is the failure to disclose information required to be disclosed." (Adv. Dkt. No. 62 at 6, quoting *McGowan v. King, Inc.*, 569 F. 2d 845, 849 (5th Cir. 1978)). But reliance on *McGowan* is misplaced. First, what the creditor in *McGowan* failed to disclose is not what Pikco failed to disclose. The creditor in *McGowan* failed to include the term "deferred payment price" in a retail installment contract. 569 F.2d at 848. Second, *McGowan* was decided before Congress added the provision limiting creditor liability under § 1638(a)(2) to nondisclosure of the "amount financed." *See* Truth in Lending Simplification and Reform Act, Pub. L. 96-221, 94 Stat. 132. 168 (1980). So even if the nondisclosure in *McGowan* could be analogized to the nondisclosure here, its holding could not apply because of the intervening change in the controlling law.

Rogers's argument for statutory damages also fails under his second theory, that Pikco's undisclosed retention of $153.00 affected the accuracy of other required disclosures, thereby creating other violations for which statutory damages would be available. In support, Rogers cites one case from a Washington state appeals court, *Bell v. Muller*, 118 P.3d 405 (Wash. Ct. App. 2005), and one from the Seventh Circuit Court of Appeals, *Balderos v. City Chevrolet*, 214 F.3d 849 (7th Cir. 2000), neither of which actually supports his argument. Both courts found no TILA violation and therefore did not reach the question of statutory damages.

Courts have in fact conclusively rejected the theory of "derivative" violations in a line of cases beginning with *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000). There, as here, the plaintiffs argued that violations of subsections that were not on the list for statutory damages created violations of other subsections that were on the list. *Id.* at 991. The court

emphatically disagreed, pointing to the statute's use of the word "only" as "conclusive against the plaintiffs":

> What sense would it make to omit [specific subsections and paragraphs] from the candidates for statutory damages if they came in through the back door on the theory that all formal shortcomings infect the disclosures of the items that *are* on the list? Congress included some and excluded others; plaintiffs want us to turn this into universal inclusion, which would rewrite rather than interpret § 1640(a).

Id.; *see also Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 871 (6th Cir. 2003) (holding that violation of form and timing requirements of § 1638(b)(1) did not entitle plaintiffs to statutory damages for violation of § 1638(a)); *Price v. Berman's Auto., Inc.*, No. 14-763-JMC, 2015 WL 5720429, at *2 (D. Md. Sept. 28, 2015) (same); *Kelen v. World Fin. Network Nat'l Bank*, 763 F. Supp. 2d 391, 394 (S.D.N.Y. 2011) (alleged violation of Regulation Z provision corresponding to more-conspicuous-disclosure requirement of § 1632(a) could not support recovery of statutory damages under § 1637(a)); *Stevens v. Brookdale Dodge, Inc.*, No. 00-2632 JELJGL, 2002 WL 31941158, at *5 (D. Minn. Dec. 27, 2002) (rejecting argument that violation of form and timing requirements of § 1638(b)(1) necessarily resulted in violation of § 1638(a)(3)-(6)).

This Court joins the others that have adopted the 7th Circuit's reasoning in *Brown*. Accordingly, Rogers is not entitled to statutory damages under either of his theories.

2. Rogers Cannot Prove Actual Damages.

Actual damages under TILA are available only for the plaintiff who shows that "(1) he read the TILA disclosure statement; (2) he understood the charges being disclosed; (3) had the disclosure statement been accurate, he would have sought a lower price; and (4) he would have obtained a lower price." *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 437 (5th Cir. 2000). Here, Rogers cannot satisfy the first element of the test, that he actually read the disclosure of the amount paid to Liberty. When asked if he read all the loan documents before signing them,

Rogers answered, "No." (Rogers Dep. 39:11-13, Adv. Dkt. No. 65-1 at 2.) He submitted no evidence that the Agreement, which included the disclosure, was among the documents he did read, if any. Consequently, Rogers cannot recover actual damages under TILA.

Because statutory damages are not available for the TILA provision that Pikco violated and because Rogers cannot prove actual damages, Rogers cannot recover under TILA. As a result, Southern Finance is entitled to summary judgment on the TILA count.

B. Southern Finance Is Entitled to Summary Judgment on the Fraud Count.

Rogers alleges that the Agreement contained two misrepresentations: that Rogers would receive a Liberty membership entitling him to membership benefits (Adv. Dkt. No. 27-1 ¶¶ 5-6) and that the entire Fee would be paid to Liberty (*id.* ¶ 7). To survive summary judgment, Rogers must show as to at least one of those representations that he can establish the existence of each of the nine elements of fraud:

> (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

Dorman v. Power, 203 So. 3d 33, 37-38 (Miss. Ct. App. 2016). Rogers has failed to meet his burden as to either representation.

Concerning the membership and its benefits, it is undisputed that Liberty's records include documents showing that Rogers received a membership. And Rogers has submitted no evidence that he requested and was denied any of the services that Liberty's records list as member benefits. Rogers thus cannot prove that the Agreement's representation of membership and benefits was false.

Concerning the amount of the Fee paid to Liberty, it is undisputed that of the $180.00 disclosed in the Agreement, Pikco actually paid Liberty only $27.00. Rogers has thus shown that the representation in the Agreement was false. He also asserts that the representation was material, based on the fact that Pikco retained more in commission than the $152.78 Rogers received in net loan proceeds. But whether or not the representation was material, Rogers cannot prove that he relied on its truth in deciding to take out the loan. Rogers admitted that he did not read all the loan documents. He did not show that he read the Agreement. If he did not read the Agreement, he could not have relied on its representations. Southern Finance is therefore entitled to summary judgment on the fraud count.

CONCLUSION

For the reasons stated above, the Court recommends that the Motion be denied, the Cross-Motion be granted, and judgment be entered for Southern Finance.

##END##