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JACQUELINE PEPE, on behalf of herself : SUPERIOR COURT OF NEW JERSEY
and all others similarly situated, : LAW DIVISION: MONMOUTH COUNTY
: DOCKET NO. MON-L-089-05
Plaintiffs, :
: Civil Action
v. :
: :
TRUST COMPANY OF NEW JERSEY, :
NORTH FORK BANK, MAZDA :
AMERICAN CREDIT, FORD CREDIT, :
JOHN DOE CORP. 1-50 (The names :
being fictitious) and ABC Corp 1-50 :
(The names being fictitious), :
Defendants. :
-----X

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT
NORTH FORK BANK'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

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PRELIMINARY STATEMENT

Defendant North Fork Bank (“North Fork”), as successor-by-merger to defendant The Trust Company of New Jersey (“Trust Company”), respectfully submits this reply memorandum of law in further support of its motion pursuant to Rule 4:6-2(e) to dismiss the First Amended Complaint for failure to state any claim upon which relief can be granted.

Plaintiff’s opposition brief is, in a word, baffling. Instead of squarely addressing the federal preemption issue at the heart of this application, plaintiff refers to defendants “Island Honda” and “AHFC” rather than North Fork and Trust Company; discusses some unidentified litigation other than this action; cites to testimony having no relationship whatsoever to this dispute in which no testimony has even been taken; and opposes a summary judgment motion apparently filed in a different action rather than the dismissal motion now before the Court. If the Court was looking to those papers to clarify the First Amended Complaint and the nature of plaintiff’s claims, it will find no illumination there.

In the end, the opposition brief is most significant for plaintiff’s concession that the Consumer Fraud Act (“CFA”) as she would have it applied to assignees of retail installment contracts is in direct and irreconcilable conflict with the federal Truth in Lending Act (“TILA”). This admission is fully in line with North Fork’s position that, given such a conflict, the federal preemption doctrine dictates that TILA trumps the Holder Rule and thus leaves plaintiff with no means of imposing vicarious liability upon these two defendants under the CFA. Specifically, at page 16 of the opposition brief, plaintiff states:

[E]ven if . . . TILA does not impose a duty on assignees to investigate if any of the TILA disclosures on the [retail installment contract] are inaccurate, the CFA does. TILA only requires an assignee to investigate those disclosures that are incomplete and inaccurate on the face of the disclosure or a disclosure which does not use the

terms required under TILA . . . [T]he CFA does in fact require an assignee to investigate whether disclosures on the [retail installment contract] are accurate even though TILA does not.

There, in plaintiff's own words, is the reason why her CFA claim implicates and is doomed by the federal preemption doctrine. Application of either the New Jersey Holder Rule or Federal Holder Rule as the basis for imposing "derivative" liability under the CFA upon these two assignees for the disclosure violations of Richard's Imports of Freehold, Inc. ("Richard's Mazda") would expose them to greater liability than that which is permitted under TILA. Plaintiff apparently maintains that North Fork and Trust Company are liable under the CFA for failing to inquire into the veracity of the disclosures made by Richard's Mazda. As discussed in North Fork's opening brief, TILA clearly imposes no such duty to investigate. TILA strictly limits assignee liability to those violations which are apparent on the face of the assigned retail installment contract. Thus, the federal statute would shield North Fork and Trust Company from any such failure-to-investigate claim. The fact that these defendants simultaneously could be liable under the CFA and in the clear under TILA for precisely the same conduct is the very essence of the conflict preemption doctrine discussed in North Fork's opening brief. Given this conflict between the state and federal statutory schemes, TILA plainly prevails, the Holder Rule and CFA must give way and plaintiff's claim should be dismissed.

Unfortunately, the remainder of the opposition brief lacks the clarity -- and candor -- of plaintiff's critical concession regarding this federal-state law conflict which triggers the federal preemption doctrine here. Nevertheless, affording plaintiff's opposition the benefit of every doubt, she appears to advance three arguments.

First, plaintiff denies that she is asserting any claim for disclosure violations with respect to the underlying consumer credit transaction. As discussed below in Point I, this is

nonsense. The only claims plaintiff asserts in this case are based on the pivotal allegation that the true nature of certain fees and charges were not adequately disclosed when she purchased her vehicle from Richard's Mazda. Plaintiff now attempts to jettison that theory of liability because she knows full well that it implicates the limitation on assignee liability set forth in TILA and triggers the federal preemption doctrine. In essence, plaintiff attempts to use her opposition brief as a vehicle by which to amend her pleading now for the second time. That strategy is both improper and unavailing.

Second, plaintiff contends that the protection of TILA's limitation on assignee liability is unavailable to North Fork because she asserts no TILA claim here. As discussed below in Point II, this simplistic argument has no basis in law or logic. It not only is contrary to the plain language of TILA but it simply makes no sense. If plaintiffs were able to skirt the protections Congress plainly intended to afford the nation's lenders under TILA by simply pegging their disclosure violation claims to something other than TILA, those protections would be nullified. It is precisely this sort of maneuvering that the federal preemption doctrine is intended to address. For a number of sound public policy reasons discussed in North Fork's opening brief, Congress has strictly limited the assignee liability of lenders in the consumer credit arena. Under the federal preemption doctrine, neither state law nor the ingenuity of plaintiffs' lawyers in crafting their pleadings may undermine the protection Congress intended to extend to lenders as assignees of retail installment contracts.

Third, plaintiff contends that notwithstanding TILA's limitation upon assignee liability, North Fork is liable under the Consumer Fraud Act ("CFA") on one of three theories: (1) direct liability based on its own "wrongful conduct," (2) derivative liability under some

catch-all bag of “other theories,” and (3) derivative liability under the Holder Rule. As discussed below in Point III, these arguments fail.

As for the first theory of direct liability under the CFA, the fact remains that in the First Amended Complaint plaintiff never attributes any wrongful conduct directly to North Fork or Trust Company for which they possibly could be held directly liable under the CFA.

Plaintiff’s catch-all theory of derivative liability under CFA cannot stand given her concession that there is no general concept of vicarious liability under CFA. Plaintiff’s theory of derivative liability based on the Holder Rule inevitably points back to the federal preemption argument North Fork outlined in its opening brief. Plaintiff alleges that North Fork is vicariously liable under the CFA for the misconduct of Richard’s Mazda by operation of either the New Jersey Holder Rule (upon which she relies in the First Amended Complaint) or the Federal Holder Rule (to which she shifts her reliance in the opposition brief). It cannot credibly be disputed that application of either of these Holder Rules would expose North Fork to greater liability under the CFA than Congress deemed acceptable under TILA. Indeed, plaintiff in her brief acknowledges the significant conflict between TILA and the Holder Rule. As a result, TILA preempts both Holder Rules and plaintiff’s CFA claim necessarily fails as a matter of law.

Finally, as demonstrated below in Point IV, plaintiff’s analysis of relevant authorities is at best inaccurate and, in certain instances, patently disingenuous. In the end, her analysis of those decisions is entitled to no weight whatsoever.

ARGUMENT

POINT I.

PLAINTIFF IMPROPERLY ATTEMPTS TO SALVAGE THE COMPLAINT BY COMPLETELY RECASTING THE NATURE OF HER CLAIMS

One of the most striking aspects of the opposition brief is that its description of plaintiff's claims bears no resemblance whatsoever to the claims actually asserted in the First Amended Complaint. This, of course, is consistent with the time-honored but improper strategy of opposing a motion to dismiss by attempting to amend the pleading under attack through argument of counsel. On this motion, the First Amended Complaint must stand or fall on its own. Plaintiff's effort to use her opposition papers to amend that pleading is not only improper but reflects her acknowledgment that fundamental pleading defects are fatal to the First Amended Complaint.

In her brief, plaintiff repeatedly asserts that she is not asserting claims based on disclosure violations with respect to the retail installment contract through which she purchased her automobile from Richard's Mazda. The Court need only review the allegations of the First Amended Complaint (as North Fork does at pages 4-7 of its initial brief) to see that this simply is not the case. The First Amended Complaint is based solely on the theory that (1) Richard's Mazda failed to disclose the nature of certain fees in connection with that transaction, and (2) North Fork and Trust Company as assignees are liable for those non-disclosures. There is no other way to read the First Amended Complaint. Indeed, in the very first line of her opposition brief, plaintiff concedes that North Fork has correctly summarized the nature of her claims in the Statement of Facts portion of its initial brief.

The reason for plaintiff's eleventh-hour attempt to recast her theory of liability is clear. As plaintiff herself concedes at page 3 of her brief, North Fork's analysis of why federal

