/s/ Robert A. Burnside, Jr.
Circuit Court Judge
Ref. Code: 20RE1BWG

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CC-41-2015-C-770
Raleigh County Circuit Clerk
Paul H. Flanagan

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

RONALD J. STOVER and
PATTI A. STOVER
Plaintiffs

v.

Civil Action 15-C-770-B
Judge Robert A. Burnside, Jr.

SPECIALIZED LOAN SERVICING LLC
Defendant

ORDER
Refusing Defendant's motion for summary judgment as to Count II; Granting Plaintiffs' motion for summary judgment as to Count II on the issue of liability

PROCEDURAL HISTORY

By order entered August 2, 2019, this court granted Defendant's motion for summary judgment on all counts in the complaint except Count II and refused Plaintiff's motion for summary judgment on all counts.

Count II alleges that "Defendant refused to credit payments to Plaintiff's account upon receipt in violation of *W.Va. Code* § 46A-2-115. The order of August 2, 2019, was grounded in the provisions of *W.Va. Code* § 46A-2-115(c) and (b)(3).

In summary, the court concluded that the general requirement in § 46A-2-115(c) that all payments must be credited is subject to the exceptions stated in subsection (c). The motion and cross motion as to this count were refused because the court did not have the information necessary to determine whether the subsection (b)(3) exception applies.

On April 28, 2020, Defendant filed "DEFENDANT SPECIALIZED LOAN SERVICING LLC'S SECOND STIPULATED FACTS." Paragraphs 6(a) and 6(b) of the stipulation provided information as to the originator of the loan.

On July 31, 2020, Defendant filed its "SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT" and its memorandum in support thereof. By order entered August 12, 2020, a briefing schedule was established and a hearing date was scheduled (later rescheduled to November 2, 2020).

On September 4, 2020, the parties filed their "...SECOND SET OF JOINT STIPULATED FACTS" which identified the origination, holder, insurer and guarantor of the loan. Also on that date, Plaintiffs filed their response to the Defendant's supplemental motion for summary judgment to which Defendant filed its reply on September 15, 2020.

The hearing was conducted as scheduled on November 2, 2020, and the issue was taken under advisement.

FACTUAL BASIS

The following points are stipulated and undisputed:

1. Prior to the entry of the above-referenced order of August 2, 2019, the parties stipulated that the Defendant had refused to accept and apply certain payments tendered by or on behalf of Plaintiff.

2. Some of the Plaintiff's rejected payments were offered before the 2017 amendments to the statue and some were offered after the 2017 amendments took effect.

3. The Defendant's stipulation filed April 28, 2020, stated in paragraph 6 thereof:

    a. The subject loan was originated by PinnFund, USA, a California Corporation.

    b. PinnFund USA, a California Corporation, is not a bank or savings and loan association or affiliate.

2. The parties' second joint stipulation filed September 4, 2020, added the following:

    a. The subject loan is held by a private trust, and not by a federal home loan bank, the federal national mortgage association, the federal home loan mortgage corporation, the government national mortgage association or the West Virginia housing development fund."

b. The subject loan is not insured or guaranteed by the farmers home administration, the veteran's administration, department of housing and urban development [*sic* as to capitalization and punctuation]."

CONCLUSIONS OF LAW

1. Payments offered before the 2017 amendment

It is undisputed that some payments were offered by or on behalf of plaintiff during 2015 before the 2017 amendments to the statute took effect.

Subsection (c) of the statute operative in 2015 states the general rule that the creditor must credit all payments in "*any* consumer credit sale or consumer loan…" The first exception to this rule immediately follows: "Provided, That amounts received and *applied* during a cure period will not result in a duty to provide a new notice of right to cure (capitalization as in original; italics added)."

This exception contemplates the receipt *and application* of a payment and speaks only of the duty to provide a new notice of right to cure. This exception does not operate in the present matter because (1) it is undisputed that the received payment was not applied, and (2) the present issue is about the duty to credit payments and not a notice of a right to cure.

The second exception in subsection (c) is the one that is of interest in the present matter:

> "and provided further that partial amounts received during the *reinstatement period set forth in subsection (b)*… do not create an automatic duty to reinstate and *may be returned by the creditor* (italics added)."

The only "reinstatement period set forth in subsection (b)" is found in (b)(3):

> "insured or guaranteed by the Farmers Home Administration, the Veteran's Administration, Department of Housing and Urban Development, which includes in the loan agreement a reinstatement period beginning with the trustee notice of foreclosure and ending prior to foreclosure sale…"

To qualify for the exception stated in subsection (b)(3), the Defendant must satisfy both criteria: (1) that the loan is insured or guaranteed by one of the designated entities, and (2) that it contains in the loan agreement a reinstatement period. This court's order of

August 2, 2019, refused Defendant's motion for summary judgment because no factual material had been submitted as to whether the subject loan was insured or guaranteed by the entities identified in subsection (b)(3).

The parties "Second Set of Joint Stipulated Facts," filed September 20, 2020, stipulated that the loan was not insured or guaranteed by any of those entities. Upon that stipulation, it is now undisputed that Defendant cannot satisfy that criterion of subsection (b)(3). This renders irrelevant the question whether the loan agreement contains a reinstatement period because both of the subsection (b)(3) criteria must be satisfied to come within this exception to the general subsection (c) rule that all payments be credited.

This court held in its order of August 2, 2019, as it does now, that the Defendant must demonstrate that it comes within this exception to the subsection (c) requirement to credit all payments. Defendant relies on the argument that the fact that a "cure period" was in progress was all that was necessary to come within this exception.

If the Legislature had intended that this exception to subsection (c) [pre 2017 amendments] was to be measured simply by reference to a cure period, it would have said so. It chose, rather, to identify this exception by reference to "the reinstatement period set forth in subsection (b)..." Inasmuch as the only reinstatement period found in all of subsection (b) is in (b)(3), the language chosen by the Legislature signals that all of subsection (b)(3) must be satisfied for this exception to operate.

Defendant confirms in Section II of its memorandum in support of its supplemental motion that the Plaintiffs' 2015 payment was rejected "because the payment occurred after the trustee's notice of foreclosure..."

The Defendant's reliance on this exception to subsection (c) requires that it satisfy all the criteria stated in subsection (b)(3). The point that the payment was rejected because it occurred after the notice of foreclosure addresses only one of the criteria necessary to qualify for the (b)(3) exception. The stipulation that the loan is "not insured or guaranteed by the Farmers Home Administration, the Veteran's Administration, Department of Housing and Urban Development," requires the finding that requirements of this exception are not satisfied under the version of the statute in effect in 2015.

2. Payments offered after the 2017 amendment

Defendant argues at page 5 of its memorandum that in each version of the statute the "consumer loan" definitions contained in subsection (b) should not apply to the subject loan. Defendant opines that "[t]he rule in subsection (c) aims to cast as wide a net as possible, involving "*any* consumer credit sale or consumer loan (emphasis in original)."

This argument is not supported by the text of either version of the statute. Both versions employ a structure found in many statutes whereby a general principle is stated followed by exceptions to that general principle. As noted above, the exception to the general principle stated in subsection (c) is articulated by reference to language found in subsection (b). This structure does not signal an intention to "cast as wide a net as possible." If it is a "net" that is cast, it is only as wide or as narrow as the Legislature intended by the language it chose.

Defendant argues in Section III of its memorandum that it "properly rejected Plaintiff's 2017 partial reinstatement payments under *W.Va. Code* §46A-2-115(c) because the payments occurred after the cure period."

Defendant is correct that the 2017 partial payments are governed by the 2017 amendments to § 46A-2-115(c). The amended subsection (c) requires crediting of payments "made in accordance with the terms of any consumer credit sale or *consumer loan*...(italics added)." In the 2017 amendment, as in the version operative in 2015, the relevant exception is identified by reference to subsection (b)(3):

> "... Provided, however, That partial amounts received during *the period set forth* in subdivision (3) subsection (b) of this action do not create an automatic duty to reinstate and may be returned by the creditor (italics added)."

The only "period set forth" in subsection (b)(3) of the 2017 amended statute is:

> "(C)...after the last day allowed for cure of the consumer's default...and before the consumer reinstates *the consumer loan* or otherwise cures the default (*italics added*)."

The opening phrase of subsection (b) in the 2017 amendment provides a definition of "consumer loan" that is specific to subsection (b):

> (b) With respect to this subsection:
> (1) The phrase "consumer loan" shall mean a consumer loan secured by real property:
> (A) Originated by a bank or savings and loan association, or an affiliate, not solicited by an unaffiliated broker;
> (B) held by a federal home loan bank, the federal National Mortgage Association, the federal Home Loan Mortgage Corporation,

> the Government National Mortgage Association, the West Virginia Housing Development Fund; or
>
> (C) insured or guaranteed by the Farmers Home Administration, the Veterans Administration or the Department of Housing and Urban Development. *W.Va. Code* § 46A-2-115(b), 2017 amendment.

The structure of the 2017 amendment to §46A-2-115 is similar to the pre-2017 version in that the 2017 version of subsection (c) states a general rule with specific exceptions and the reader is referred to subsection (b)(3) to understand the scope of the exception.

Although subsection (b)(3) was restructured in 2017, the practical effect is equivalent to the version operative in 2015. The special definition of "consumer loan" in the 2017 version of subsection (b) limits the term "consumer loan" by reference to (A) origination, (B) the holder, and (C) the insurer or guarantor. If the loan does not fall within that specialized definition, none of subsection (b)(3) can apply to that loan.

Subsection (c) does not have a specialized definition of "consumer loan" and so the general WVCPA definition of "consumer loan" would presumably apply to issues governed by subsection (c). However, since subsection (b)(3) determines the scope of the exception we are bound by the definition of "consumer loan" specific to subsection (b). If the loan in question does not qualify as a "consumer loan" as defined in subsection (b)(1), this exception to the subsection (c) requirement to credit all payments does not apply.

In the 2017 amendment the reinstatement period found in subsection (b) is found in (b)(3)(C):

> (C) each charge is actually incurred after the last day allowed for cure of the consumer's default pursuant to section one hundred six of this article and before the consumer *reinstates* the *consumer loan* or otherwise cures the default (italics added);

Upon examination of the parties' stipulations as to the origin, holder, and insurer or guarantor of the loan and the definition of "consumer loan" which applies to this question, the court concludes that the Defendant does not come within the relevant exception to the subsection (c) requirement to credit all payments under the 2017 amendment to the statute.

Defendant cited to *Kesling v. Countrywide Home Loans*, 2011 W.L 227637 (unreported in F.Supp 2d) in support of its argument that the consumer loan definitions in subsection (b) do not apply. In *Kesling* the court found that the lender could not rely on the

exception to the subsection (c) exemption because the payments were "apparently returned before the onset of the reinstatement period..." As noted above, qualification for the exception stated in subsection (b)(3) requires the satisfaction of both criteria: (1) that the loan is insured or guaranteed by one of the designated entities, and (2) that it contains in the loan agreement a reinstatement period. In *Kesling* it was the second criterion of the subsection (b)(3) exception that failed and so it was not necessary to address the first. *Kesling* does not support the Defendant's argument that the court should disregard the first criterion.

Defendant cited to *Long v. Morningstar Mortgage*, 2018 WL 1247479, (S.D. West Virginia 2018). *Long*, as did *Kesling*, analyzed the question by reference only to the reinstatement period. The (b)(3) criteria as to the origination, holder, or guarantor of the loan are not referenced in the opinion. The point that an issue is not mentioned in an opinion does not tell us why it was not mentioned, although one might speculate that an issue on that point might not have been presented. *Long* does not support the Defendant's argument that the points not addressed in *Long* can be omitted from the analysis of the present issue.

Upon these considerations, the Defendant's motion for summary judgment as to Count II should be and it is hereby refused and the Plaintiff's cross motion for summary judgment as to Count II is granted on the issue of liability.

The Circuit Clerk is directed to transmit copies of this order to counsel of record in accordance with the protocols of that office.

ENTER: November 24, 2020

/s/Robert A. Burnside, Jr.
Circuit Judge