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No. 355268

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

BAKER BOYER NATIONAL BANK,

Respondent/Plaintiff.

v.

JAMES PATTERSON FOUST, JR.,

Appellant/Defendant,

Appealed from Walla Walla County Superior Court
Cause No. 16-2-00829-2

BAKER BOYER NATIONAL BANK'S RESPONSE BRIEF

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I. INTRODUCTION

This appeal concerns Baker Boyer National Bank's effort to recover on a personal guaranty obtained from Appellant James Foust as part of a loan to Foust's company, JPF Enterprises, LLC ("JPF" or "JPFE"). In 2013, JPF borrowed over \$1 million from the bank to support JPF's venture into the housing market created by the Bakken oil boom in North Dakota. JPF used the money to buy 30 trailers designed to house oil field workers. JPF leased the trailers to Greenflex Housing, who ran the housing venture. Unfortunately, the oil market collapsed, the demand for housing dried up, and JPF defaulted. The bank sued Mr. Foust on his personal guaranty. Foust refused to pay and counterclaimed for fraudulent inducement and negligent misrepresentation based on the bank's alleged failure to inform him of what it (supposedly) learned about Greenflex during its underwriting process. The trial court rejected Foust's claims and defenses, and granted the bank's motion for summary judgment.

Two primary issues are on appeal. First, whether the bank had a duty to inform Foust of what it learned. There is no duty to disclose unless the arm's-length relationship between a bank and its customer has been transformed into a "special relationship." The existence of a duty to disclose is a question of law. *Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 731 (1993). Such transformation can occur only if the

customer is vulnerable, or if the bank either controls the customer's project or engaged in conduct other than normal banking functions.

Second, whether the trial court erred in dismissing Foust's claim that the bank violated the federal Equal Opportunity Credit Act. A borrower has a claim under the Act only if he or she has suffered a discriminatory "adverse action" for which there was no valid "statement of reasons" provided. 15 U.S.C. §1691(a). JPF got the loan for which it applied and Foust does not allege discrimination. Foust did not raise this argument until his Motion to Reconsider. The denial of a motion to reconsider is reviewed for abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn. 2d, 674, 685 (2002).

II. STATEMENT OF THE CASE

A. **Procedural history**

Baker Boyer sued on the personal guaranty in December 2016. CP 1. Mr. Foust did not timely appear or answer, so the bank moved for Default or in the Alternative for Summary Judgment. CP 350. Mr. Foust answered before the hearing, so the bank withdrew its motion. CP 17. Baker Boyer then deposed Foust and moved for summary judgment on all claims and counterclaims. CP 31, 123. The trial court granted the bank's motion in June 2017. CP 295. Foust moved to reconsider. CP 299. The court denied the motion and entered judgment on July 20, 2017. CP 336.

The court then entered a stipulated order awarding Baker Boyer its attorneys' fees and costs. CP 604. Foust then appealed.

B. Factual background

James Foust is a sophisticated and experienced businessman. He testified to having been a CEO of various companies for approximately 42 years and to having experience as a housing investor. CP 135/line 5; CP 138, 139. Foust also testified that he is a computer scientist and the designer of technology used "in every computer in the world today." CP 129, 130. When negotiating with Baker Boyer, Foust flew his own airplane to Walla Walla and presented the bank with a personal financial statement showing assets over \$10 million. CP 61, 140.

1. Foust worked closely with Greenflex for months before the loan.

In May 2013, Mr. Foust was exploring housing investment opportunities arising from the Bakken oil boom. CP 95. Specifically, a gentleman named Cameron Jones introduced Foust to John Eakin and Chris Cassidy, who were the CEO and CFO at Greenflex Housing, LLC, and to Dr. Jason Sundseth. CP 150-152. Greenflex Inc. manufactured the trailers and Greenflex Housing leased them from owners for placement in North Dakota. CP 110. Eakin, Jones, and Sundseth (from whom JPF would ultimately buy 30 trailers) were all friends. CP 262/line 21. Jones had no connection to Baker Boyer. CP 57/line 14, CP 90/line 7.

Over the spring and summer of 2013, Foust worked directly with Greenflex to learn about its business in North Dakota. Specifically, Eakin provided Foust with detailed information about Greenflex in May 2013, including rent rolls and advice from CFO Cassidy about vacancy rates and why they were higher in particular Greenflex locations. CP 96. Foust then signed a June 1, 2013 lease agreement with Greenflex that also contained detailed information about financial and business issues Foust could expect in a deal with Greenflex. CP 103. This occurred over four months before the loan from Baker Boyer closed. See CP 66.

In a June 9, 2013 email to Foust, Eakin described Greenflex's financial model and how the business works. CP 110. Eakin described Greenflex as providing "portable worker housing" for workers in "hard to reach places." *Id.* Eakin explained that the housing consists of trailers manufactured by Greenflex, Inc., which sells them to "unit owners" like Foust. *Id.* The unit owners then leased them to Greenflex Housing. *Id.* While Eakin did not name Badlands Housing as its local property manager, Eakin told Foust that Greenflex hired local property managers who it pays to "manage, clean, repair and provide tenants in the areas we place the units." *Id.*

The idea, apparently first introduced by Cameron Jones, was that Foust would buy 30 units from Eakin's friend, Jason Sundseth. CP 152.

Sundseth's company, Vindans LLC, was a Baker Boyer customer. CP 254, 255. On June 26, 2013 and at Eakin's request, Cassidy sent Foust the rent rolls for Dr. Sundseth's particular trailer units. CP 111.

Mr. Foust knew the risks presented by his attempt to capitalize on the Bakken oil boom. Specifically, he knew Bakken was thought to be a big opportunity back in 1985, but that "turned out to be a flash in the pan." CP 173/line 14. He testified that before signing the personal guaranty he had "people in North Dakota independently tell me about the Bakken Reserve and also the reservoir underneath that." CP 173/line 8. Foust also investigated whether there was in fact a demand for housing in North Dakota. CP 174, 175. Foust also researched the engineering of the trailer units themselves (CP 197) and took a pre-loan trip to Texas to investigate trailers that were similar to those he was considering buying from Dr. Sundseth. CP 185/line 9-16; CP 113.

Foust continued his discussion with Greenflex personnel throughout the summer. On August 13, 2013, he received an email from Zach Strachan entitled "Badlands lease assignment." CP 116. According to Foust, Strachan is a "co-inventor of Greenflex." CP 186/line 18. In the email, Eakin and others discussed a dispute Greenflex was having with Badlands Housing. CP 116. Foust testified in his deposition he asked no

one any questions about the dispute or the email despite being included on the email. CP 187/line 9.

Foust negotiated with Dr. Sundseth regarding buying Sundseth's units. CP 27/line 19; CP 272/line 15; *see* CP 117. CP 27/line 19; CP 272/line 15; *see* CP 117. Foust testified that he found Sundseth "impossible to deal with" and he told the bank "I'm out of the deal." CP 188/line 20. Foust testified that his difficulty with Sundseth led the bank to send Foust a letter stating that the loan "is no longer a viable possibility." CP 188/line 11-22. Just six days later, however, the bank told Foust that some unspecified "things" had occurred that allowed the bank to again consider making the loan, and that the bank had been in discussions with Greenflex's John Eakin. CP 258. The bank told Mr. Foust to work directly with Sundseth and Eakin going forward. *Id.*, *see also* CP 256 (advising Foust to consult Eakin about North Dakota).

2. Baker Boyer performed a routine underwriting investigation to decide whether the borrower was likely to be able to repay the loan.

While Foust was doing his due diligence regarding Greenflex's venture, Baker Boyer was engaged in the underwriting process required to determine whether a loan made financial sense for the bank. Foust does not dispute this. See Brief of Appellant, p. 6. As the bank's Chris Sentz stated, the bank would not move forward unless it believed in the financial

viability of Greenflex Housing. CP 246. Baker Boyer's process, commonly called "underwriting," included extensive email with Foust about Greenflex's involvement. For instance, on June 4, 2013, over four months before the loan closed, Foust emailed to the bank a list of his "expectations" regarding the terms of a loan. CP 107-109 (pages are out of order in Clerks Papers). Foust's first stated "expectation" was that he would have a contract with Greenflex. CP 109, 108. Sentez responded by laying out financing terms that assumed a contract with Eakin (*i.e.* Greenflex). CP 107.

The bank continued its underwriting process into the summer. On July 2nd, Sentez asked Greenflex's CFO for an updated rent roll for Sundseth's units because "I am working on refinancing his units for a new buyer and I am curious how many of his units are set up and rented." CP 254. Sentez also asked for Greenflex's financial statements. *Id.*

On July 12th, Sentez asked Greenflex for a copy of the proposed purchase and sale agreement for Sundseth's particular units because, "I need to know how much Jim will be paying for the units." CP247.

On July 29th, Sentez emailed Foust to tell him he had spoken with John Eakin and encouraged Foust to get his own assurances that unspecified "details back in North Dakota" had been ironed out:

“I spoke with John a couple of times over the last week and it sounds as if he has been ironing out some details back in North Dakota. I would like to verify those details have been taken care of before proceeding with your loan. I assume you too will want the same assurances the Bank does before proceeding forward. I am also still waiting for some financial information related to Greenflex from John.”

CP 256. Foust admitted he should have asked Eakin more questions. CP 196/line 15; CP 202/line 20; CP 196/line 15; CP 202/line 20.

On August 20, 2013, Sentz emailed Cassidy and Eakin, asking about Foust’s potential involvement with Greenflex and telling them the bank would not loan money to Foust unless it was persuaded Greenflex was financially viable. CP 246. The bank moved forward with the loan, indicating that it was satisfied with the underwriting investigation. By Asset Purchase Agreement dated September 24, 2013, Foust’s company, JPF, agreed to buy 30 trailers from Sundseth’s company, Vindans, LLC. CP 117. Baker Boyer provided the financing. CP 66, 69, 73. Foust had never done business with Baker Boyer. CP 140/line 12. In fact, he had never even heard of Baker Boyer before the loan. CP 151.

The loan closed on October 17, 2013. CP 141, 66, 69, 73. Before closing, Foust consulted his CPA about the loan, the guaranty and his planned “exit strategy.” CP 142-145.

Over time, the demand for JPF’s trailers dropped. According to Foust, “the major factor was that the drilling pretty much ceased to operate

because there was no economical way to transport oil from North Dakota to the refineries in the south.” CP 168. “When they stopped drilling, their people go home.” CP 169. The boom ended. Foust admitted JPF did not pay off the note and that he personally did not make the payments. CP 142. The bank declared a default and accelerated the debt. CP 239.

III. ARGUMENT

A. **Summary**

The trial court properly granted summary judgment on the fraudulent inducement and negligent misrepresentation counterclaims because Baker Boyer did not owe Foust a duty to inform him about what it may have learned during its underwriting investigation. Foust agreed in writing that the bank owed him no such duty. The trial court rightly refused to impose such a duty after the fact. Further, the parties had no “special relationship” that could give rise to a duty because Foust was an experienced businessman; he did due diligence and consulted his CPA before the loan; Foust and the bank had no prior relationship; the bank did nothing other than normal underwriting; and all the information about which Foust complains was available to him directly from Greenflex and Sundseth. Nothing occurred to transform the presumptive arm’s-length relationship between lender and customer into a “special relationship.”

Regarding Foust's argument that the bank forced him to contract with Greenflex, the bank did not introduce Foust to Greenflex or to the housing venture. Foust worked directly with Greenflex for months before the loan and he knew he would be entering the venture with Greenflex. He received detailed business and operational information about Greenflex and could have backed out at any time. The bank advised him on at least two occasions to consult his co-venturers directly about the details of the venture. Foust was not forced to contract with Greenflex, but even if he was, such a requirement would have been a reasonable condition of the loan because Greenflex was the source of revenue to pay back the loan. Foust also admitted that the loan went into default because the oil market collapsed, which has nothing to do with Greenflex.

The second issue is whether the trial court abused its discretion in rejecting Mr. Foust's claim of a violation of 15 U.S.C. §1691, the Equal Credit Opportunity Act. The trial court properly rejected Foust's argument because JPF got the loan it applied for, meaning there was no "adverse action," and Foust provided no evidence of discrimination. Mr. Foust also admitted in his deposition the reason the bank initially said the loan was "no longer viable" was because Foust's negotiations with Sundseth broke down and Foust told the bank he was not going forward with the loan. Nor

does Foust explain how he personally would have a claim under the Act when the borrower was JPF, not him. Foust lacks standing under the Act.

The trial court should be affirmed and the bank should be awarded its attorneys' fees and costs on appeal under RAP 18 and Washington law.

B. Legal analysis

Summary judgment is available on a claim for breach of a personal guaranty when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692 (1998); *Union Bank v. Blanchard*, 194 Wn. App. 340, 352 (2016); *Frontier Bank v. Bingo Invs., LLC*, 191 Wn. App. 43, 52 (2015), *review denied*, 185 Wn.2d 1027 (2016). The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact, but once that burden is met the burden shifts to the non-moving party. *Frontier Bank*, 191 Wn. App. at 52. Of particular importance here, the responding party cannot rely on the allegations, but must instead "set forth specific facts showing there is a genuine issue for trial." *Id.*; Civil Rule 56(e). Speculation will not defeat an otherwise well-taken motion for summary judgment. *Frontier Bank*, 191 Wn. App. at 52.

Mr. Foust admits he signed the personal guaranty, that borrower JPF failed to make loan payments, and that he did not cover those

payments. CP 142. He does not dispute those facts on appeal, so the Court should affirm summary judgment on the bank's breach of contract claim.

1. Foust's fraudulent inducement claim fails because the parties had no "special relationship" and the bank had no duty to disclose.
 - a. Foust agreed the bank did not need to inform him of what it learned in underwriting.

The guaranty contains important terms. First, it is absolute and unconditional. CP 69. Such guarantees are fully enforceable according to their terms. *Frontier Bank*, 191 Wn. App. 43, 54. Foust's guaranty, like the one in *Frontier Bank*, guaranteed payment "without set-off or deduction or counterclaim." CP 69. "Just as guaranties may be absolute and unconditional, so may they waive claims and defenses." *Union Bank*, 194 Wn. App. 340, 352 (affirming summary judgment enforcement of guaranty and rejection of fraudulent inducement claim).

Here, Mr. Foust expressly waived any "defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." CP 69. Waiver provisions are "uniformly upheld and enforced by Washington courts, including on summary judgment." *Union Bank*, 194 Wn. App. at 352, *citations omitted*. In *Union Bank*, the Court affirmed summary judgment for Union Bank on guaranty language identical to that agreed to by Mr. Foust. Foust cannot overcome these

waivers because he has not presented sufficient facts to show he was fraudulently induced to sign the guaranty.

The second important provision is in the “Guarantor’s Representations and Warranties” section where Foust agreed Baker Boyer need not inform him of what it learned (“...absent a request for information, Lender shall have no obligation to disclose to Guarantor any information or documents acquired by Lender in the course of its relationship with Borrower.”) CP 70.

A personal guaranty is to be enforced “as the parties meant it to be enforced, with full effect given to its contents, and without reading into it terms and conditions on which it is completely silent.” *Union Bank*, 194 Wn. App. 340, *citations omitted*. Foust’s only response to the text of the guaranty is that it somehow violates public policy. The Court should reject his argument because he did not raise it below and because the argument pertains to waiver. Foust was not waiving anything by agreeing the bank need not inform him. Rather, he was affirmatively representing to the bank that it need not share information with him. The Court should refuse to impose a duty the parties agreed does not exist.

The Court of Appeals did exactly that in *Tokarz v. Frontier Sav. & Loan Ass’n*, 33 Wn. App. 456 (1982). There, the Court affirmed summary

judgment against the plaintiff in part because he offered no evidence that the parties agreed to impose on the bank a duty to disclose:

“The parties did not contractually agree to impose on Frontier an additional duty to disclose financial information regarding the builder, nor does Frontier’s conduct impliedly create such a duty. To hold otherwise would impose an awesome burden on lenders to notify all of their customers whenever a contractor had difficulties.”

Id. at 462 – 463. Foust’s argument is even weaker than Mr.

Tokarz’s because, while the *Tokarz* agreement was silent on duty, the Foust agreement affirmatively and expressly stated Baker Boyer had no such duty. Without a duty to disclose, claims for fraudulent inducement and negligent misrepresentation fail.

b. There is no duty without a “special relationship.”

Mr. Foust seeks to avoid liability on his guaranty by claiming the bank fraudulently induced him into signing it by failing to provide him information—what Foust called “the sin of omission.” CP 129. Foust is not claiming the bank fraudulently induced him by making affirmative misrepresentations. CP 190/line 13; CP 203/line 16.

Fraud requires proof of each of the nine elements by clear, cogent and convincing evidence. *Tokarz*, 33 Wn. App. 456, 463. An action for fraud may be predicated on concealment only if there is a duty to disclose. *Id.* Ordinarily, the duty to disclose a material fact exists only where there

is a fiduciary relationship and not where the parties are dealing at arm's length. *Id.* at 459. Arm's-length relationships do not give rise to extra contractual duties. *Id.* at 459; *Annechino v. Worthy*, 175 Wn. 2d 630, 636 (2012). The general rule is that a lender is not a fiduciary of its borrower; a special relationship must develop between a lender and a borrower before a fiduciary duty exists. *Tokarz*, at 458-59; *Liebergesell v. Evans*, 93 Wn. 2d 881, 889-91 (1980); *Hutson v. Wenatchee Fed. Sav. & Loan Ass'n*, 22 Wn. App. 91 (1978), *rev. den'd*, 92 Wn. 2d 1002 (1979).

- c. There is no evidence the bank provided services other than normal financing and underwriting.

In *Tokarz*, the Court analyzed whether there was a special relationship between the bank and its borrower such that a duty to disclose arose. The court considered various factors, including the parties' relative knowledge and experience. *Tokarz*, 33 Wn. App. at 460. Here, it is undisputed that Foust was an experienced businessman with investment experience, a high net worth, and a months-long working relationship with Greenflex and Mr. Sundseth before the bank funded the loan.

The *Tokarz* Court also considered whether the bank took on any extra services on behalf of its customer other than providing financing. *Tokarz* at 462. The Court set out factors to consider in determining whether a special relationship arose, all of which focus on whether the

bank stepped out of its traditional banking role as a provider of financing for a customer's project: whether the bank (1) took on any extra services other than furnishing the money; (2) received any greater economic benefit from the transaction other than the normal mortgage; (3) exercised extensive control of the project; or (4) was asked by the customer if there were any lien actions pending. *Id.*, at 462, emphasis added.

Here, the trial court properly found no special relationship. There was no evidence Baker Boyer did anything *other than* the normal functions of a lender. In fact, Foust admitted Baker Boyer provided no services other than "regular banking business," including providing him a loan, a certificate of deposit, and a bank account. CP 148/line14-25. The Chris Sentz email cited above further demonstrates that all the bank was doing was an underwriting investigation to determine whether to make the loan. *See* CP 107-109, 246, 247, 254, 256. There is no evidence Baker Boyer took control of Foust's "project," the point of which was to make money providing housing for oilfield workers.

One of Mr. Foust's main arguments is that the bank required him to contract with Greenflex. Brief of Appellant, p. 5. But Foust admitted that was part of the bank's process for deciding whether to provide financing, which is obvious from the email in the record: "The bank required that I obtain for JPFE a management contract with Greenflex

Housing to manage the houses before the bank would commit to financing this endeavor.” CP 242/line 4, emphasis added. The bank obviously wanted to understand the finances of Foust’s venture before it loaned over a million dollars, and Greenflex was directly involved in remitting JPFE’s payments to the bank. Understandably, as Foust puts it, “If the bank did not believe in the financial viability of Greenflex Housing, JPFE would not have gotten the loan.” CP 242/line 7. Foust urges the court to treat Baker Boyer as a joint venturer with Foust, or a guarantor of Greenflex’s financial strength, but in truth the bank was only engaged in the traditional underwriting process. There is no evidence to the contrary.

Moreover, under Foust’s argument a “special relationship” would arise every time a lender required a borrower to have agreements in place to provide cash flow for repayment of a loan. Such requirements exist in nearly every agricultural and commercial loan, where banks often require farmers to convey a security interest in crop proceeds to help ensure loans are repaid. Banks also often require developers to pre-lease commercial space as a condition to loan approval. Imposing such conditions is part of underwriting in an arm’s-length transaction.

- d. There is no evidence the bank knew about the Badlands v. Greenflex lawsuit, and Foust could have found out about it from Greenflex.

Foust testified in his deposition that the only information the bank should have given him related to a North Dakota lawsuit against Greenflex Housing (the entity to whom Foust leased his trailers) brought by its property manager, Badlands Housing, LLC. CP 190, 191:

Q: What is it that you now know that you think the bank failed to tell you that you think they had a duty to tell you?

A: Baker Boyer Bank knew about the Badlands situation. They knew that the Badlands situation was absolutely principally the reason for the failure of Greenflex Housing and their obligations to the lessees of these units.

* * *

Q: But is there any other subject or thing that the bank failed to tell you that you contend the bank had a duty to tell you?

A: No.

Q: Okay. So with regard to the Badlands situation – as I think you called it – what is it exactly that the bank knew that it was supposed to tell you?

A: The bank knew of the lawsuit between Badlands and Greenflex Housing.

Q: Okay.

A: The Badlands [sic] knew about the claims that Greenflex made about withholding rents. The bank knew about the overcharging and the fallacious charging for the repair of units.

CP 190, 191.

Foust did not and cannot present any evidence that the bank even knew the lawsuit existed. The bank employees involved in the Foust loan (John Blackmon and Chris Sentz) had no memory of having known about it. CP 53, 90. When placed under oath, Foust conceded he was guessing that the bank knew about the lawsuit:

Q: How do you – what leads you to believe that they knew?

A: Can't possibly have been any other way. Logic.

Q: Okay, so –

A: **Occam's razor, my friend.** Occam's razor.

Q: I don't know what that is. What's Occam's razor?

A: Of all the things that are improbable, the least improbable must be the truth, the 16th Century philosopher, Occam.

Q: And, is that the only basis for you thinking that Chris and John Blackmon knew about the Badlands lawsuit?

A: I think that's sufficient for this, yes.

Q: Is there anything else?

A: Not at this time. I haven't looked at the – at the documentation we need to see.

CP 193/line 8-24, emphasis added.

When pressed for evidence that the bank knew Badlands was (supposedly) withholding rent from Greenflex, Foust again admitted he was "just guessing."

Q: And if there are no such board minutes, do you have any other idea of how the bank would have known about Badlands withholding rent or being a bad actor?

A: I have some idea.

Q: What is it?

A: More than likely that somebody – involved in Greenflex Housing, or the Badlands, more than likely the housing, would have relayed that information to – starting with Chris Sentz, and Blackmon, and up.

Q: **Aren't you just guessing that that's true?**

A: **Yes, of course I am.** Of course I am.

CP 201/line 8-19, emphasis added.

The bank's board meeting minutes contained no reference to Badlands. CP 83-84, 86-87. Foust could not present "specific facts" to the contrary.

Foust has no evidence the bank knew about Badland's suit, but he also admitted he could have learned about it from Greenflex Housing's CEO, John Eakin, who Foust agreed would have known all about the Badlands case. CP 182/line 5. He also admitted he should have asked Eakin whether Greenflex was involved in any litigation, and admitted he did not do so. CP 196/line 15; CP 202/line 20. If Foust truly did not discuss the case with Eakin, that was his own choice, for which he bears the responsibility.

When asked whether he did any internet search to determine whether Greenflex Housing was involved in any litigation, Foust testified that he did not do so because it "didn't occur to me. I didn't know the existence of Greenflex Housing." CP 198/line 5-11. But in truth, Foust had

been working with Greenflex for months before he signed the guaranty. In any case, the *Tokarz* Court faulted Mr. Tokarz for not doing his own search for publically filed information (construction liens). *Tokarz*, 33 Wn. App. at 463. Foust founded and ran a company whose purpose was to perform background checks. CP 132/line 19. He was more than capable of asking questions and doing his homework. Foust does not want to take responsibility for his own failure to ask questions.

Nor does he want to blame Eakin or Greenflex for not informing him. A likely reason is that Foust is now the Chairman of Greenflex, Inc. CP 161/line 6. Eakin, who is now Foust's personal friend, is a founder of Greenflex, Inc., a major shareholder, and a board member. CP 161, 162.

It is also noteworthy that on June 23, 2015 – even after learning about the *Badlands v. Greenflex* case and after being in business with Greenflex for at least 20 months—Foust emailed Baker Boyer saying “I have not had the opportunity to communicate with you but let me say that it will be a pleasure, continuing my association with you and BBB.” CP 215. Foust must have decided to blame the bank *after* sending that email.

Foust also claimed under oath not to have known about Badlands Housing when in fact he had seen the name “Badlands” in his correspondence with Greenflex's John Eakin. Specifically, on August 13, 2013, Eakin sent Foust an email entitled “Badlands lease assignment” in

which Eakin discussed billing Badlands and releasing Badlands from a debt to Greenflex. CP 116. In his deposition, Foust tried to excuse his failure to inquire about Badlands by arguing that the reference to “Badlands” could have been a reference to the Badlands region of North Dakota that he’d heard about “since I’ve been a child in geography.” CP 205/line 11-18. When challenged about that testimony, he switched his theory to “Badlands might have been the water company.” CP 206/line 10.

But even if the bank knew about the lawsuit, and even if Foust can be excused from his own supposed failure to inquire, the publically available court record in the *Badland v. Greenflex* case shows the case was dismissed on August 9, 2013, over two months *before* Foust signed the loan and guaranty. CP 213. Foust cannot establish a duty to inform him, much less a breach of duty. A “complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Union Bank*, 194 Wn. App. 340, 351, *citing Young v. Key Pharm., Inc.*, 112 Wn. 2d 216, 255 (1989), *citations omitted*.

- e. There is no evidence the bank realized an “economic benefit” other than that associated with normal banking functions.

Foust has argued that a special relationship arose because the bank stood to realize an economic benefit from replacing the Sundseth/Vindans loan with a loan to JPF/Foust. *See* Brief of Appellant, p. 7. But whether

the bank would have benefited is not relevant to the creation of a special relationship or duty. Every bank tries to make a profit from providing financing for its customers' projects. Doing so is not outside the regular role of a bank. As *Tokarz* makes clear, courts instead look at whether a lender provided extra services "other than furnishing money" and whether it received economic benefit "other than the normal mortgage." Unless something other than normal banking occurs, the relationship remains arm's length and there is no duty.

The *Tokarz* case provides an example. There, the bank loaned money to Mr. Tokarz for a construction project. *Id.* 33 Wn. App. 456, 458. Tokarz's builder was also a bank customer. That builder had a history of financial weakness, including numerous liens. The builder failed to perform and, like Foust here, Mr. Tokarz blamed the bank for not telling him about the builder's financial weakness. Like Foust, Mr. Tokarz offered no evidence to support the above factors. Because there was no special relationship, the Court affirmed summary judgment for the bank.

Foust also suggests that Baker Boyer benefited by not continuing its relationship with Sundseth/Vindans. Brief of Appellant, p. 18. Foust has no evidence to support his contentions that Sundseth was behind in his loan payments, or that Vindans was on the verge of default. Brief of Appellant, p. 7; CP 272/line 8-14. Nor does he provide competent

evidence to support his contention that Sundseth “wanted out because the investment was not economically viable.” CP 275/line 10. Unfounded speculation cannot defeat summary judgment. *Frontier Bank*, 191 Wn. App. 43, 52; Civil Rule 56(e).

All Foust cites is a hearsay statement in Exhibit 14 to the John Eakin Declaration. Brief of Appellant, p. 18, *citing* CP 269. Eakin states Sundseth “wants out” and “has a drop dead delinquency date of Aug. 15 before his bank loan is considered in default. The bank has offered him an extension but he refuses to sign it for some reason.” There is no evidence any of that is true, but even if it is, all it demonstrates is that for unknown reasons Sundseth wanted out of the Bakken venture, that his loan was actually not in default, and that the bank was trying to keep the loan in place by offering an extension. As argued below, the Court should discount the hearsay portions of Eakin’s email, but even if the Sundseth loan was in trouble, finding a replacement borrower is a normal bank function, so there is still no “special relationship.”

- f. There is no evidence of fraud even if the bank required Foust to contract with Greenflex.

Unlike his summary judgment briefing, Foust devotes most of his appeal brief to the theory that the bank is liable because it required him to contract with Greenflex. That allegation alone does not appear to raise a

“failure to disclose” issue, but Foust contends that “the key facts for this appeal focus on bank’s requirement that Foust/JPFE contract with GFH to manage the subject rental units when bank knew GFH was not able to perform its contract with JPFE.” Brief of Appellant, p. 5. While hindsight tells us the Bakken oil boom (and Foust’s venture there) went bust, there is no evidence the bank required Foust to contract with Greenflex, no evidence Greenflex could not perform, and no evidence the bank knew that before making the loan.

The email on which Foust relies to argue the bank required the contract is the bank’s response to an email from Foust. *See* CP 109. In that email, sent June 4, 2013, Foust set forth “my expectations.” *Id.* The first of those expectations was that the “Lease contract with Greenflex is changed to 4 years with 2 years extension.” *Id.* It was only after receiving Foust’s expectations that the bank sent the email on which Foust now relies. Moreover, Foust was introduced to Greenflex by Cameron Jones, not the bank. CP 150, CP 264. And Foust signed a lease with Greenflex four days before the email on which he relies. CP 103. This all shows that Foust brought Greenflex with him to the bank and that he knew, expected and wanted Greenflex involved. There is no evidence the bank forced Greenflex on Foust.

Nor is there evidence Foust lacked the time or ability to get information directly from Greenflex. Foust spent from May to October 2013 working directly with Greenflex, including gathering detailed information from it about its operation and finances. *See* CP 95, 103, 111, 113, 116, and 252. This includes rent rolls, a description of the business, and considerable email with Greenflex’s CEO and CFO. He also admits to having been in negotiations with Dr. Sundseth. CP 27/line 19; CP 272/line 15; *see* CP 117. Foust had plenty of time to discuss the venture with him before buying the trailers and taking the loan. The bank actually told Foust in July and August 2013, months before the loan, that he needed to consult Eakin and Sundseth to get financial information and “assurances” about “ironing out some details back in North Dakota.” CP 256, 258. Foust knew the bank was communicating with Greenflex about finances and could have asked for details.

Foust not only had direct access to information about Greenflex, but he cannot explain how having a contract with Greenflex was wrongful, particularly at the time of the transaction (before the oil and housing markets crashed). He claims with no support that Greenflex could not perform and that the bank knew it. This is unfounded speculation. While it may have turned out that Greenflex could not perform (there are no such facts in the record), the bank had no crystal ball and did not guaranty that

Foust's venture would succeed. In fact, Foust admitted the venture failed due to the price of oil and the inability to transport oil out of North Dakota. CP 168-169. In other words, Foust admits that Greenflex's lack of financial strength was not the reason the venture failed.

Foust also admitted it made sense for him to align with Greenflex Housing given its experience with the trailers and the market in North Dakota, and he admitted he did not object to a lease with Greenflex. CP 172. Further, his relationship with Greenflex began at least in May 2013, five months before the loan, so Foust had plenty of time to investigate Greenflex and walk away from the loan if he did not like what he found.

But more to the point, Mr. Foust cannot show that the bank had a duty to disclose any information it knew about Badlands or Greenflex. The guaranty states that no such duty exists and to impose such a duty would impose an "awesome burden" on lenders to notify all of their customers whenever another customer had difficulties. *See Tokarz* at 463.

If Foust's argument about the supposed requirement of a contract with Greenflex is something other than a failure to disclose claim, he has not pleaded that. In any case, Foust knew about Greenflex for months and no one forced him to agree to the loan or a lease to Greenflex. The bank owed no duty.

C. Foust’s negligent misrepresentation claim fails because the parties had no “special relationship” and the bank had no duty to disclose.

Mr. Foust gives no attention to the dismissal of his negligent misrepresentation counterclaim, but he refers repeatedly to his “counterclaims,” so the bank will address the claim here.

To establish a claim for negligent misrepresentation, a plaintiff must prove each of the following six elements by clear, cogent, and convincing evidence: (1) that the defendant supplied information for the guidance of others in their business transactions that was false; and (2) that the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; and (3) that the defendant was negligent in obtaining or communicating false information; and (4) that the plaintiff relied on the false information supplied by the defendant; and (5) that the plaintiff's reliance on the false information supplied by the defendant was justified (that is, that reliance was reasonable under the surrounding circumstances); and (6) that the false information was the proximate cause of damages. *Van Dinter v. Orr*, 157 Wn. 2d 329, 333 (2006) (reinstating summary judgment on negligent misrepresentation claim based on an alleged failure to disclose), *citing Lawyers Title Ins. Corp. v. Baik*, 147 Wn. 2d 536, 545 (2002).

Mr. Foust admitted the bank made no affirmative misrepresentation to him. He complains only of “the sin of omission.” CP 190, 203. Generally, “an omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation.” *Austin v. Ettl*, 171 Wn. App. 82, 88 (2012), *citations omitted*, (no duty to disclose not-yet-extant encumbrances).

The only time an omission can constitute a negligent misrepresentation is when the party owes a duty to disclose. *Van Dinter*, 157 Wn. 2d 329, 333. The existence of a duty to disclose is a question of law. *Colonial Imports*, 121 Wn. 2d 726, 731. A duty can arise when: (1) there is a quasi-fiduciary relationship, (2) a special relationship of trust and confidence has developed between the parties, (3) one party relies on the superior specialized knowledge and experience of the other, or (4) one party has knowledge of a material fact not easily discoverable to the other party. *Id.*, at 732. In *Colonial Imports*, the court also considered whether the parties were “experienced and independent businesspersons.” *Id.* at 733. In summary, Washington law provides that “some type of special relationship must exist before the duty will arise.” *Id.* at 732.

The facts recounted above in relation to the fraudulent inducement claim establish that summary judgment was also proper on the negligent misrepresentation claim. The bank’s actions were nothing other than

routine underwriting associated with providing financing for a loan. The parties had never done business together and Foust concedes the bank was engaged solely in the “regular banking business.” CP 140/line 12; CP 148/line 23. Foust alleges no incomplete statement that misled him, and alleges no affirmative misstatement of any kind. The bank had no “specialized knowledge” that was unavailable to Foust. Mr. Foust is a very capable man. He did his own due diligence before signing the guaranty. CP 173-175.

In *Colonial Imports*, our Supreme Court affirmed summary judgment on claims for negligent misrepresentation and estoppel under similar facts. *Colonial Imports*, 121 Wn. 2d. at 733. There, the parties had no prior relationship and were both experienced businesspeople.

Further, the duty to disclose only arises “when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other.” *Van Dinter*, 157 Wn.2d 329, 334, quoting *Colonial Imports*, 121 Wn.2d 726, 732. Foust admits he could have acquired this information about Badlands from Eakin, but did not ask. CP 182, 196, 202. Eakin and Foust were in discussions about their North Dakota venture since at least May 2013. CP 96. They were the ones who should have discussed issues like Badlands because they were going to be doing

business together going forward. Baker Boyer merely provided financing. The *Badlands v. Greenflex* lawsuit was a public record available to Foust.

Nor does Foust claim he ever asked Baker Boyer whether it knew anything about Badlands or troubles Greenflex might be having. Under *Tokarz*, failing to ask is a factor in finding no special relationship. *Tokarz*, p. 462. As a result, there was no special relationship and no duty.

D. No violation of Equal Opportunity Credit Act.

Foust's Assignment of Error No. 4 and Issue Nos. 4, 5 and 6 relate in whole or in part to the argument that even when a loan is actually made, there can nevertheless be an "adverse action" under the Equal Opportunity Credit Act such that the lender must send a "statement of reasons" letter. The trial court properly rejected Foust's argument for several reasons.

First, Mr. Foust did not make the argument until his Motion to Reconsider. Because it was a new theory and argued facts not previously argued, the trial court was right to reject it. *See Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234 (2005) (rejecting attempt to switch from a mutual mistake theory to a fraud, undue influence theory on reconsideration). A decision to deny a motion to reconsider is reviewed for an abuse of discretion. *Rivers*, 145 Wn. 2d, 674, 685.

Second, while 15 U.S.C. § 1691(d)(2) of the Act provides that, "each applicant against whom adverse action is taken shall be entitled to a

statement of reasons for such action from the creditor,” there is no notice requirement unless there is an adverse action. *See, e.g., Diaz v. Va. Housing Dev. Auth.*, 117 F.Supp.2d 500, 504 (E.D. Va. 2000) (accepted counteroffer is not an “adverse action”). The Act defines an “adverse action” as:

“ . . . a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.”

15 U.S.C. § 1691(d)(6) (emphasis added).

Here, JPF got the loan. It was not denied credit. Foust provided the trial court no evidence that JPF had its credit revoked, and neither it nor Foust had an existing credit arrangement. There was no adverse action, so a statement of reasons was not required.

In a similar case, the court found no adverse action when a car dealer initially could not arrange financing, but continued working with the customer and eventually offered a loan. *Madrigal v. Kline Oldsmobile, Inc.*, 423 F.3d 819, 820-21 (8th Cir. 2005). Unlike Mr. Foust, the *Madrigal* customer actually rejected the loan. He then sued. Like Foust, he argued that the temporary denial of a loan was an adverse action that

triggered the requirement of a “statement of reasons.” *Id.* at 822. The court dismissed the claim, finding no adverse action. *Id.* Here, six days after the email on which Foust stakes his argument (CP 257), the bank emailed Foust that the deal was back on the table. CP 258.

Third, even if Foust or JPF were entitled to notification of an adverse action, Foust does not claim discrimination. The Act proscribes discrimination only with respect to credit transactions. 15 U.S.C. §1691(a)-(c); *see, e.g., Floyd-Keith v. Homecomings Fin., LLC*, 2010 WL 3927596, at *5 (M.D. Ala. 2010) (“The ECOA is not a general, catch-all, prophylactic remedy allowing any disgruntled debtor to sue a creditor for any slight, real or imagined; rather, the conduct it proscribes is the discriminatory administration of a credit transaction”). JPF’s acceptance of the loan precludes any remedy under the Act. *See, e.g., Kamara v. Columbia Home Loans, LLC*, 654 F. Supp. 2d 259, 267 (E.D. Pa. 2009) (finding no claim because defendant “did not refuse to grant the plaintiff credit.”); *Rowe v. Union Planters*, 289 F.3d 533 (8th Cir. 2002) (summary judgment affirmed where plaintiff presented no evidence of discrimination); Public Law 93-495, Oct. 28, 1974 (purpose of Act is to insure that financial institutions engaged in the extension of credit do so “without discrimination on the basis of sex or marital status.”)

Finally, relying solely on speculation, Foust misleadingly suggests that a “statement of reasons” would have informed him about Greenflex’s finances. *See* Brief of Appellant, p.8. Foust not only had independent access to Greenflex’s information, but he admitted in his deposition that the reason the bank told him the loan was “no longer a viable possibility” had nothing to do with Greenflex. Foust testified the real reason was “because Jason [Sundseth] was absolutely impossible to deal with, and I had other things in my life to do, and I told Chris [Senz], ‘I’m out of the deal.’” CP 188, emphasis added. Foust admits the bank’s initial decision had nothing to do with Greenflex. Foust wanted out of the deal.

E. Motion to reconsider properly denied.

Mr. Foust appeals the trial court’s denial of his Motion to Reconsider. Brief of Appellant, p. 17. Foust’s motion raised the Equal Opportunity Credit Act issue, which the bank addressed above.

Foust also argues the trial court erred in finding his arguments to be speculative conspiracy theories. It is not clear the trial court actually made that determination, but it certainly could have. Much of what Foust argued below (and here) had no citation or support, or cited only to his own self-serving declaration. He makes argumentative assertions as to what is “obvious,” or what “must be.” *See e.g.* Brief of Appellant, pgs. 7-8, 18. Such speculation is insufficient under Civil Rule 56. Foust’s

“conspiracy theory” is that for some reason the bank wanted to make a bad loan it knew would fail due to Greenflex’s known financial weakness. He has no evidence to support this, which was pointed out to the trial court. Further, Foust’s own testimony contradicts his theory that the bank knew Greenflex could not perform. He testified the “major factor” leading the venture to fail was the collapse of the oil market. CP 168/line 17. He also testified that “If the bank did not believe in the financial viability of Greenflex Housing, JPFE would not have gotten the loan.” CP 242/line 7. JPFE got the loan and Foust’s arguments are inconsistent.

Foust also contends the trial court abused its discretion in refusing to allow him to retract his admission that he was acting for his marital community. Foust did not raise this issue until his Motion to Reconsider, making it inappropriate. Moreover, the bank relied on Foust’s personal financial statement when deciding to make the loan. CP 53, 90. Foust stated on the financial statement he was married. CP 61.

The Complaint named Foust and his marital community. In his Answer, Foust admitted he was acting for that community when he signed the guaranty. CP 1, 17. Foust’s answer is a sworn admission that the Commercial Guaranty was signed on behalf of his marital community. But he did not raise the marital community argument until after he had been deposed, submitted at least two sworn statements, and, importantly, had

summary judgment entered against him. He provided no legal standard or analysis supporting his request to turn a sworn admission into a sworn denial, nor did he move for leave to amend his Answer. All he based his request on was three unsigned, undated, non-consecutive pages from a document he claimed to be his “court approved settlement” with his wife. But those pages contain no court signature or file stamp. There was no indication on them that the pages were what Mr. Foust said they were. The trial court did not abuse its discretion in denying the motion.

After all, for over a hundred years, our courts have held litigants to their sworn admissions, absent good cause. *See e.g. Stone v. Insurance Co. of North America*, 56 Wn. 427, 429 (1909) (rejecting attempt to convert an admission to a denial); *see also Smith v. Saulsberry*, 157 Wn. 270 (1930). The doctrine of equitable estoppel also prevents parties from contradicting prior admissions. *See Brevick v. City of Seattle*, 139 Wn. App. 373, 378 (2007) (court estopped city from changing admission into a denial after months of litigation).

F. Attorneys’ fees and costs on appeal.

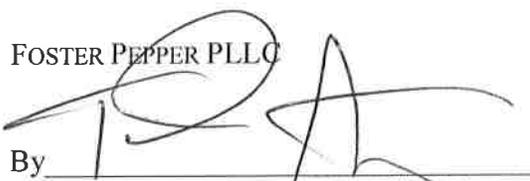
The parties’ Commercial Guaranty provides that the prevailing party is entitled to its attorneys’ fees and costs: “Guarantor agrees to pay upon demand all of Lenders’ cost and expenses, including Lender’s attorneys’ fees and lender’s legal expenses incurred in connection with the

enforcement of this Guaranty.” CP 12. The trial court entered judgment in favor of the bank and awarded it \$90,000 in attorneys’ fees and costs. CP 604. If Baker Boyer prevails on this appeal, the Court will have decided a dispute about the enforceability of the guaranty in favor of the bank, making the bank the prevailing party in a dispute regarding the enforcement of the Guaranty. *See* RCW 4.84.330. The bank is therefore entitled to its attorneys’ fees on appeal under RAP 18.1; *Marine Enterprises. v. Security Pacific Trading*, 50 Wn. App. 768, 774, review denied 111 Wn.2d 1013 (1988).

IV. CONCLUSION

Baker Boyer respectfully requests that this Court affirm the trial court in all respects and award the bank its attorneys’ fees and costs on appeal.

RESPECTFULLY SUBMITTED this 6th day of December, 2017.

FOSTER PEPPER PLLC

By _____
Thomas T. Bassett, WSBA #7244
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CERTIFICATE OF SERVICE

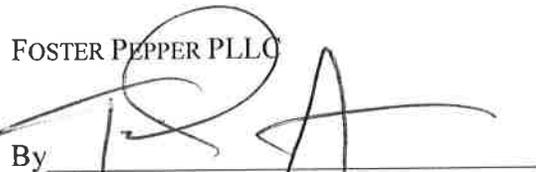
I hereby certify that on the 6th day of December, 2017, I caused to be served, a true and correct copy of the foregoing ***Baker Boyer National Bank's Response Brief*** upon the persons below stated via Email and U.S.

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Appendix

Foreign Cases and Statutes

Cases

1. Diaz v. Virginia Housing Development Authority
2. Rowe v. Union Planters Bank of Southeast Missouri
3. Floyd-Keith v. Homecomings Financial, LLC

Statutes

4. Public Law 93-495—Oct. 28, 1974, Title V.
5. 15 U.S.C. § 1691.

Appendix

Foreign Case

1. Diaz v. Virginia Housing Development Authority

KeyCite Yellow Flag - Negative Treatment
Distinguished by Cross v. Prospect Mortg., L.L.C., E.D.Va., November 27, 2013

117 F.Supp.2d 500
United States District Court,
E.D. Virginia,
Alexandria Division.

Teresa T. **DIAZ**, and Timothy J. Hall, Plaintiffs,
v.
 **VIRGINIA HOUSING DEVELOPMENT
 AUTHORITY**, and National City Mortgage Co.,
Defendants.

No. Civ.A. 00-637-A.
|
Oct. 12, 2000.

Credit applicants, who were denied mortgage loan sponsored by Federal **Housing** Authority (FHA) because of their status as an unmarried couple but who ultimately accepted mortgage lender’s counteroffer for another type of FHA loan that required greater down payment, filed suit alleging that lender violated the federal and the **Virginia** Equal Credit Opportunity Act (ECOA) schemes by failing to provide applicants with proper written notice of the credit denial on the original loan application. Lender moved for summary judgment. The District Court, Ellis, J. held that: (1) lender’s denial of original credit application, coupled with lender’s counteroffer for another loan, which borrowers ultimately accepted, was not an “adverse action” with the meaning of ECOA provisions requiring lenders to give notice to credit applicants of “adverse action” taken against applicants, and (2) Board of Governors of the Federal Reserve System’s (Board’s) interpretation of ECOA notice provisions was reasonable.

Motion granted.

West Headnotes (8)

¹¹¹ **Consumer Credit**
☞Particular businesses or transactions
Consumer Credit
☞Equal credit opportunity

Notice is an integral part of federal and **Virginia** Equal Credit Opportunity Act (ECOA) schemes to prevent discrimination with respect to any aspect of a credit transaction. Consumer Credit Protection Act, § 701(a), as amended, 15 U.S.C.A. § 1691(a); Va.Code 1950, § 59.1-21.21:1(a).

Cases that cite this headnote

¹²¹ **Consumer Credit**
☞Particular businesses or transactions
Consumer Credit
☞Equal credit opportunity

Federal and **Virginia** Equal Credit Opportunity Act (ECOA) schemes and implementing regulations mandate that creditor notify applicant of its action on credit application, within 30 days after receiving completed credit application, and provide that each applicant against whom adverse action is taken is entitled to written notification of both the action and the specific reasons for the adverse action taken. Consumer Credit Protection Act, § 701(d)(1-3), as amended, 15 U.S.C.A. § 1691(d)(1-3); Va.Code 1950, § 59.1-21.21:1(d)(1-3).

I Cases that cite this headnote

¹³¹ **Consumer Credit**
☞Particular businesses or transactions
Consumer Credit
☞Equal credit opportunity

Mortgage lender’s denial of credit application for mortgage loan sponsored by Federal **Housing** Authority (FHA), coupled with the lender’s counteroffer for another type of FHA loan requiring larger down payment, which the borrowers ultimately accepted, was not an “adverse action” within the meaning of federal and **Virginia** Equal Credit Opportunity Act (ECOA) provisions requiring lenders to give notice to borrowers of “adverse action” taken against them; thus, lender was not required to

give borrowers written notice of its denial of credit with regard to the first credit application. Consumer Credit Protection Act, § 701(d)(1-3), as amended, 15 U.S.C.A. § 1691(d)(1-3); Va.Code 1950, § 59.1-21.21:1(d)(1-3).

59.1-21.21:1(d)(1-3).

1 Cases that cite this headnote

7 Cases that cite this headnote

161

Consumer Credit

☞Equal credit opportunity

Board of Governors of the Federal Reserve System's (Board's) interpretation of notice provisions of Equal Credit Opportunity Act (ECOA) so as to exclude from definition of "adverse action" a denial of credit coupled with a counteroffer that is ultimately accepted by the credit applicant was reasonable; Board's determination is consistent with ECOA's goal of preventing discrimination in consumer credit transactions, in that applicant, by simply rejecting creditor's counteroffer, can express her disagreement with creditor's assessment and thereby require creditor to provide full explanation for initial denial of credit. Consumer Credit Protection Act, § 701(d)(1-3), as amended, 15 U.S.C.A. § 1691(d)(1-3).

7 Cases that cite this headnote

141

Consumer Credit

☞Particular businesses or transactions

Consumer Credit

☞Equal credit opportunity

Existence of specific provisions of the federal and Virginia Equal Credit Opportunity Act (ECOA) schemes that allow creditors to communicate orally with credit applicants did not give rise to implication that written notice was required in other circumstances involving denials of credit; those provisions constituted mere exceptions to the general rule that adverse actions require written notice and, therefore, did not address ECOA's notice requirements when the action taken by a creditor is not adverse. Consumer Credit Protection Act, § 701(d)(2)(B), (d)(5), as amended, 15 U.S.C.A. § 1691(d)(2)(B), (d)(5).

Cases that cite this headnote

171

Administrative Law and Procedure

☞Trade or business

Banks and Banking

☞Creation and Supervision

Considerable weight should be accorded to construction by Board of Governors of the Federal Reserve System of a statutory scheme it is entrusted to administer.

Cases that cite this headnote

151

Consumer Credit

☞Particular businesses or transactions

Consumer Credit

☞Equal credit opportunity

To determine whether creditor is required under the federal and Virginia Equal Credit Opportunity Act (ECOA) schemes to provide notice of adverse action taken by creditor, relevant inquiry is not whether the action taken was a denial of credit, but whether the action was an adverse action; denial of credit is not always an adverse action under ECOA, so not every denial of credit requires written notification. Consumer Credit Protection Act, § 701(d)(1-3), as amended, 15 U.S.C.A. § 1691(d)(1-3); Va.Code 1950, §

181

Banks and Banking

☞Federal Reserve Board

Courts must give decision by Board of Governors of the Federal Reserve System, which is entrusted to administer statutory

scheme, controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION

ELLIS, District Judge.

Plaintiffs Teresa T. Diaz and Timothy J. Hall brought this action under the federal Equal Credit Opportunity Act (“ECOA” or “Act”), 15 U.S.C. §§ 1691 *et seq.*, and its Virginia counterpart (“VA ECOA”),¹ Va.Code § 59.1–21.21:1, when they were denied a home loan because of their status as an unmarried couple. Specifically, plaintiffs claim that defendants National City Mortgage (“NCM”) and Virginia Housing Development Authority (“VHDA”) violated ECOA by denying plaintiffs credit based on their unmarried status and by failing to provide plaintiffs with proper written notice of the credit denial. The claims asserting the unlawfulness of the credit denial against VHDA were dismissed on a threshold motion. *See Diaz v. Virginia Housing Auth.*, 101 F.Supp.2d 415 (E.D.Va.2000) (“*Diaz I*”). Thereafter, the parties stipulated to a dismissal of plaintiffs’ claims for unlawful failure to provide notice of adverse action against VHDA. At *502 issue now on summary judgment² are the remaining claims concerning the statutory adequacy of NCM’s notice of denial of credit and the unlawfulness of its credit denial.

I.

The essential facts are not disputed. Plaintiffs Teresa Diaz and Timothy Hall are an unmarried couple who together sought to purchase a home in 1998. To that end, they applied for financing from NCM, a company that offers mortgage loans sponsored by both the Federal Housing Authority (“FHA”) and VHDA. A loan originating officer at NCM recommended that plaintiffs apply for the VHDA “FHA Plus” loan program for low and moderate income Virginia residents in need of down payment assistance. Plaintiffs accordingly completed and submitted a VHDA loan application and attended a VHDA-sponsored home ownership education program required to qualify for the FHA Plus loan program. Plaintiffs then found a suitable home and entered into an agreement for the purchase of that home, with a closing date scheduled for late April 1998.

Approximately two days before the scheduled closing, the NCM loan officer called plaintiffs and informed them that they did not qualify for the loan because VHDA regulations require recipients of FHA Plus loans to be married. Plaintiffs were told, however, that they qualified for an alternative FHA loan that required a greater down payment than the FHA Plus loan. On or about April 28, 1998, plaintiffs accepted and executed the requisite documents for the alternative loan. Plaintiffs were never provided with written notice of the denial of their FHA Plus application.³

In April of this year, plaintiffs filed suit against VHDA and NCM for unlawful denial of credit and for unlawful failure to provide notice of adverse action to each of them in violation of ECOA and VA ECOA, seeking compensatory and punitive damages, declaratory relief, and injunctive relief. *See* 15 U.S.C. § 1691e; Va.Code § 59.1–21.23. Specifically, the eight-count complaint included claims by each plaintiff against both NCM and VHDA for: (i) unlawful denial of credit in violation of federal ECOA (Counts I and II); (ii) unlawful failure to provide notice of adverse action in violation of federal ECOA (Counts III and IV); (iii) unlawful denial of credit in violation of VA ECOA (Counts V and VI); and (iv) unlawful failure to provide notice of adverse action in violation of VA ECOA (Counts VII and VIII).

VHDA previously moved to dismiss plaintiffs’ unlawful denial of credit claims pursuant to Rule 12, Fed.R.Civ.P, which motion was granted. *See Diaz I*. For the same reasons, plaintiffs’ unlawful denial of credit claims against NCM must fail. In addition, plaintiffs’ unlawful denial of notice claims against VHDA have been dismissed by stipulation. *See Diaz v. Virginia Hous. Dev. Auth.*, No. 00–637–A (Oct. 4, 2000) (order granting plaintiffs’ stipulated motion to dismiss with prejudice

Counts III, IV, VII, and VIII against VHDA). Thus, all that remains in this matter are plaintiffs' claims against NCM for unlawful failure to provide written notice of adverse action under federal ECOA and VA ECOA. NCM has moved for summary *503 judgment on these remaining counts—Counts III, IV VII, and VII—solely against NCM.

II.

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact” and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In deciding whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the nonmoving party, and all inferences must be drawn in that party's favor. See *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538; *Nguyen v. CNA Corp.*, 44 F.3d 234, 236–37 (4th Cir.1995); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985). Summary judgment is appropriate when a party “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.” Rule 56, Fed.R.Civ.P.; *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. These principles govern whether the current factual record is suitable for summary judgment.

III.

The parties' contentions as to notice are straightforward: Plaintiffs contend that NCM violated ECOA's notice requirement when it failed to provide plaintiffs with written notice that they were denied the VHDA “FHA Plus” loan on the basis of their unmarried status, and NCM counters by arguing that ECOA does not require written notice where, as here, an alternative loan is offered and accepted.⁴ As there is no controlling circuit authority, analysis must begin with a consideration of the pertinent statutory provisions and end with the application of those provisions, as properly construed, to the facts presented.

¹¹ ¹² Notice is an integral part of the ECOA scheme to prevent discrimination “with respect to any aspect of a credit transaction.” 15 U.S.C. § 1691(a); accord Va.Code § 59.1–21.21:1(a). To that end, ECOA and the implementing regulations mandate that a creditor “notify the applicant of its action on the application,” within thirty days after receiving a completed credit application,⁵ and provide that “[e]ach applicant against whom *adverse action* is taken” is entitled to written notification of both the action and “the specific reasons for the adverse action taken.”⁶ *504 This notice requirement serves as “a necessary adjunct to the anti-discrimination purpose of the legislation, for only if creditors know that they must explain their decisions will they effectively be discouraged from discriminatory practices.” *Jochum v. Pico Credit Corp.*, 730 F.2d 1041, 1043 (5th Cir.1984) (quotation omitted).

¹³ Significantly, ECOA's written-notice requirement is triggered only in the event a creditor takes “adverse action” with respect to an application for credit. This follows from the fact that ECOA's plain language requires written notice for “adverse actions,” but is otherwise silent as to other types of action—namely, “approval[s] of [and] counteroffer[s] to” applications for credit. 12 C.F.R. § 202.9(a)(1)(i). In these circumstances, it is well-settled under the doctrine of *expressio unius est exclusio alterius* that “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (quotation omitted); see also *Bates v. United States*, 522 U.S. 23, 30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quotation omitted). Therefore, whether ECOA required NCM to provide plaintiffs with written notice of NCM's action turns on whether NCM took “adverse action” on plaintiffs' application.

ECOA broadly defines “adverse action” to mean “a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.” 15 U.S.C. § 1691(d)(6); accord Va.Code § 59.1–21.20(e). But this broad definition is not the end of the matter, for the implementing regulations of the Board of Governors of the Federal Reserve System (the “Board”) refine and narrow the definition of “adverse action” by excluding from the set of such actions denials

of credit that are coupled with counteroffers that are accepted. In the words of the regulation, an “adverse action” occurs when there is “[a] refusal to grant credit in substantially the amount or on substantially the terms requested in an application *unless* the creditor makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered.” 12 C.F.R. § 202.2(c) (emphasis added). Moreover, these regulations recognize as distinct (i) “approval[s] of,” (ii) “counteroffer[s] to,” and (iii) “adverse action[s] on” loan applications. *Id.* § 202.9(a)(1)(i). It is clear, therefore, that the regulations exclude from the definition of “adverse action” any credit denials that are coupled with “counteroffers”—or a “grant [of] credit in a different amount or on other terms”—and, by logical extension, such denials coupled with counteroffers are also excluded from ECOA’s written-notice requirements, where the applicant accepts the counteroffer. Accordingly, plaintiffs’ argument that ECOA required written notice in this case because “counteroffers are, for all practical purposes, denials of credit under ECOA,” and because “[d]enials of credit, in turn, are included within ECOA’s definition of ‘adverse action’ ” is unpersuasive.

*505 The Board’s regulations, applied here, compel the conclusion that ECOA’s written-notice requirement was never triggered because no “adverse action” occurred. Thus, there is no dispute that although NCM denied plaintiffs’ application for the “VHA Plus” loan program, NCM, contemporaneously with oral notice of the denial, also offered plaintiffs a “straight” VHA loan that plaintiffs ultimately accepted. The “straight” VHA loan clearly was a counteroffer “to grant credit in a different amount or on other terms.” And, having made this counteroffer in conjunction with its denial of plaintiffs’ “VHA Plus” loan application, NCM was not required to notify plaintiffs in writing of the denial, because there was no “adverse action” under the regulations. *See Dorsey v. Citizens & South. Fin. Corp.*, 678 F.2d 137, 139 (11th Cir.1982) (per curiam) (“[T]he action of a creditor in rejecting a credit application ... when that rejection is coupled with a counteroffer that the applicant accepts is not adverse action and does not trigger the notification provision of section 701(d)(2).”), *withdrawn*, 687 F.2d 140, *reinstated* 706 F.2d 1203 (11th Cir.1983).

Seeking to avoid this result, plaintiffs present three arguments, none of which is persuasive. First, Plaintiffs argue that the Board’s issuance of a sample adverse action notice form—denominated “Form C-4”—to be used where a creditor denies an application for credit and instead extends a counteroffer, indicates the Board’s intent to require written adverse action notices for denials

of credit coupled with counteroffers. *See* 12 C.F.R. Pt. 202, App. C, Form C-4. Plaintiffs, however, misunderstand the purpose of Form C-4. Nowhere does the Board state that the form must be used for *all* denials coupled with counteroffers, or that all such actions are “adverse actions.” Rather, the regulations—and, indeed, common sense—make clear that the use of Form C-4 as an adverse action notice would be appropriate if, and only if, the action taken by the creditor—i.e., the denial of credit and the counteroffer—qualifies as an “adverse action,” as defined in the regulations. In fact, the Board has explained that “Forms C-1 through C-4 are intended for use in notifying an applicant that *adverse action* has been taken on an application or account under § 202.9(a)(1) and (2)(i) of this regulation.” Equal Credit Opportunity Business Credit, 12 C.F.R. Pt. 202. The dispositive inquiry, therefore, is whether a particular denial of credit—counteroffer combination constitutes an “adverse action” on an application. In this regard, it is important to recall that the regulations limit the circumstances in which a denial of credit coupled with counteroffer qualifies as an “adverse action.” These circumstances do not include situations where a creditor “makes a counteroffer (to grant credit in a different amount or on other terms) and the applicant uses or expressly accepts the credit offered.” *Id.* § 202.2(c) (emphasis added). Thus, plaintiffs’ reliance on Form C-4 is unpersuasive.*

¹⁴¹ ¹⁵¹ Plaintiffs, in their second argument, point to two ECOA provisions and *506 three regulations allowing a creditor to communicate orally with an applicant as necessarily implying that written notice is required in other circumstances involving denials of credit.⁹ This argument, too, must fail. These ECOA provisions and regulations constitute mere exceptions to the general rule that *adverse actions* require written notice and, therefore, do not address ECOA’s notice requirements when the action taken by a creditor is not “adverse.”¹⁰ Moreover, plaintiffs’ repeated characterization of these ECOA provisions and regulations as standing for the proposition that “denials of credit” generally require written notice does not change this conclusion, for plaintiffs’ focus on “denials of credit” misses the mark. The relevant inquiry is not whether the action taken by a creditor was a denial of credit; rather, the necessary determination for purposes of ECOA’s written-notice requirement is whether the action taken is an “adverse action.” This distinction matters, for a denial of credit is not always an “adverse action” under ECOA and the regulations; accordingly, not every denial of credit requires written notification. In this regard, the regulations carve out an exception to the definition of “adverse action” for a denial of credit coupled with a counteroffer that the applicant accepts.

The existence of other exceptions to the adverse-action notice requirement is, therefore, consistent with the exception for a denial of credit coupled with a counteroffer accepted by the applicant.¹¹

¹⁶¹ ¹⁷¹ ¹⁸¹ Plaintiffs' third argument is a challenge to the Board's authority to interpret "adverse action" for ECOA's purposes as excluding a denial of credit coupled with a counteroffer that is ultimately accepted by the applicant.¹² For, in the end, it is *507 clear that this interpretation applies to this case, and that NCR's duty to inform plaintiffs of its action in writing ultimately depends on whether this regulation is a legitimate exercise of the Board's regulatory authority under ECOA. In this regard, settled law teaches that "considerable weight should be accorded to [the Board's] construction of a statutory scheme it is entrusted to administer,"¹³ and that "courts must give [the Board's] decision controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" ¹⁴

ECOA contemplates—indeed, requires—the active involvement of the Board in the interpretation of its provisions and in the administration of its consumer protections. To that end, ECOA grants the Board broad authority to "provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes" of the Act. 15 U.S.C. § 1691b(a)(1); cf. *Ford Credit Co. v. Milhollin*, 444 U.S. 555, 559–60, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980) (noting, in a Truth in Lending Act case, that "Congress ... delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit"). Accordingly, deference and respect must be paid to ECOA's mandate and the lawmaking authority and expertise of the Board, "so long as [the Board's] lawmaking is not irrational" and is consistent with the congressional purpose. *Milhollin*, 444 U.S. at 568, 100 S.Ct. 790; see *Dorsey*, 678 F.2d at 139; *Besaw v. General Fin. Corp.*, 693 F.2d 1032, 1034 (11th Cir.1982). In this case, as in *Dorsey*, there is "no persuasive reason to find that the relevant portion of Regulation B is anything but a rational exercise of the Board's rulemaking authority," and "Section 202.2 obviously represents a well considered and reasonable interpretation of the notification requirements" of ECOA. *Dorsey*, 678 F.2d at 139. It is reasonable for the Board to determine, for example, that an applicant eliminates any adversity stemming from the original loan application denial by accepting a creditor's counteroffer for a different loan. This is so because an applicant's acceptance of a counteroffer may reasonably be taken to represent the applicant's agreement with the creditor's independent assessment of the applicant's credit

profile. As one commentator put it, it would be "pointless to designate the lender's action as adverse ... when the lender and the applicant ha[ve] agreed on a new arrangement."¹⁵ More importantly, the Board's determination in this regard is consistent with ECOA's goal of preventing discrimination in consumer credit transactions, for an applicant, by simply rejecting a creditor's counteroffer, can express her disagreement with the creditor's assessment and thereby require the creditor to provide a full explanation for an initial denial of credit. A creditor, facing the very real possibility that a rejected applicant would exercise this right to a written notice, has every incentive to ensure not only that its initial denial of credit is nondiscriminatory, but also that its counteroffer is an accurate assessment of the applicant's credit profile.

Thus, the Board's Regulation B, which exempts from the definition of "adverse action" under ECOA a creditor's denial of a credit application that is coupled with a counteroffer that the applicant accepts, is a reasonable and valid exercise of the *508 Board's authority and applies to this case. In this regard, plaintiffs have failed to show that the Board exceeded its authority under ECOA in promulgating the regulation, thereby "thwart[ing] the statutory mandate it was designed to implement." *Jochum*, 730 F.2d at 1047. Accordingly, NCM was not required to provide written notice of its denial of plaintiffs' "FHA Plus" loan application. It follows, therefore, that NCM's motion for summary judgment on plaintiffs' claims for unlawful failure to provide notice of adverse action under ECOA and VA ECOA must be granted.

IV.

For the foregoing reasons, defendant NCM's motion for summary judgment on plaintiffs' claims for unlawful failure to provide notice of adverse action under ECOA and VA ECOA (Counts III, IV, VII, and VIII) is **GRANTED**. In addition, NCM's motion for summary judgment on plaintiffs' unlawful denial of credit claims (Counts I, II, V, and VI) is **GRANTED**.

An appropriate Order shall issue.

All Citations

117 F.Supp.2d 500

Footnotes

- 1 As VA ECOA's language mirrors that of the federal ECOA, the term "ECOA" is used herein to refer to both statutes.
- 2 Although NCM initially moved for a judgment on the pleadings, the motion was converted to one for summary judgment on NCM's oral motion.
- 3 The documentary record is unclear as to whether the Uniform Residential Loan Application ("Application") that plaintiffs filled out on February 21, 1998, was an application for *both* an "FHA Plus" loan *and* a "straight" FHA loan or simply an application for the former. This lack of clarity on the matter is further compounded by the existence of a second Application, dated April 30, 1998, that plaintiffs claim they never saw, dated, or executed (although the April Application bears plaintiffs' signatures). At the hearing, NCM conceded that the February Application was limited to the "FHA Plus" loan, and that only after this application was denied were plaintiffs considered for the "straight" FHA loan. The analysis thus proceeds on this basis.
- 4 Initially, plaintiffs also argued that NCM failed to give plaintiffs *any* notice—whether written or otherwise—of its action on their "FHA Plus" loan application within thirty days after receiving a completed application, as required by ECOA. Plaintiffs abandoned this contention when discovery disclosed that their loan application was not completed until April 16, 1998, when they completed a mandatory educational program, and that less than two weeks later, on or about April 23, 1993, an NCM loan officer called plaintiffs to inform them that the FHA Plus application had been denied, but that they qualified instead for the "straight" FHA loan. In short, the parties dispute not the timeliness of notice, but only that it was provided orally rather than in writing.
- 5 15 U.S.C. § 1691(d)(1); accord Va.Code § 59.1–21.21:1(d)(1); see 12 C.F.R. § 202.9(a)(1).
- 6 15 U.S.C. §§ 1691(d)(2)–(3) (emphasis added); accord Va.Code § 59.1–21.21:1(d)(2)–(3); see 12 C.F.R. § 202.9(a)(2). A creditor may fulfill this requirement under ECOA 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. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.
15 U.S.C. § 1691(d)(2); see 12 C.F.R. § 202.9(2).
- 7 Under this broad definition, NCM's action on plaintiffs' application for the FHA Plus loan was arguably "adverse," for it is undisputed both that NCM denied plaintiffs' "FHA Plus" loan and that the "straight" FHA loan plaintiffs ultimately accepted is not a grant of credit "in substantially the amount or on substantially the terms requested."
- 8 Also unpersuasive is plaintiffs' reference to a staff interpretation that provides:
Counteroffer combined with adverse action notice. A creditor that gives the applicant a combined counteroffer and adverse action notice that complies with § 202.9(a)(2) need not send a second adverse action notice if the applicant does not accept the counteroffer. A sample of a combined notice is contained in form C–4 of Appendix C to the regulation.
12 C.F.R. Pt. 202, Supp. 1, Section 202.9—Notifications, Paragraph 9(a)(1), point number 6. The interpretation's reference to a "second adverse action notice" may, at first blush, suggest that there must be a preliminary "combined counteroffer and adverse action notice" to obviate the need for the second notice "if the applicant does not accept the counteroffer." Yet, a close reading of this interpretation reveals that it is limited to describing the duties of a creditor when the applicant rejects a counteroffer—exempting a creditor from providing an adverse action notice *if* it already had done so—and does not otherwise require the initial provision of an adverse action notice before a rejection.
- 9 The two ECOA provisions state that a creditor acting on fewer than one hundred and fifty applications during a calendar year preceding a denial of credit may provide oral notice of the denial, and that a creditor may orally communicate the "identity of the person or office" from which the applicant can obtain a written statement if certain conditions are met. See 15 U.S.C. §§ 1691(5), (d)(2)(B). The first regulation provides that, for business credit applications for businesses with gross revenues of one million dollars or less, "[t]he statement of the action taken

maybe given orally or in writing, when adverse action is taken." 12 C.F.R. § 202.9(a)(3)(A). The second allows oral notification of a denial of credit where the applicant is a business with gross revenues of over one million dollars. See *id.* § 202.9(a)(3)(ii)(A). Finally, plaintiffs point to a regulation allowing, "[a]t its option, a creditor [to] inform the applicant orally of the need for additional information," but providing that, "if the application remains incomplete the creditor shall send a notice in accordance with paragraph (c)(1) of this section." *Id.* § 202.9(c)(3).

10 Indeed, Regulation 202.9(c)(3), which allows a creditor to inform an applicant orally of the need for more information, does not even relate to any of the three actions a creditor may take on an application—namely, approval, denial, or counteroffer. See 12 C.F.R. § 202.9(c)(3).

11 Indeed, plaintiffs' argument proves too much, as neither ECOA nor any regulation expressly provides for oral notice of credit approvals, and such oral notice would also not be allowed under the rationale of plaintiffs' argument. Yet, plaintiffs themselves acknowledge that "notice of credit approval can be implicit by the granting of the requested credit." Plaintiffs' Memorandum in Opposition to National City Mortgage Company's Motion for Judgment on the Pleadings, at 5. An explicit exception for this universally acknowledged practice is not required because only an "adverse action" requires the provision of written notice under ECOA and the regulations.

12 VA ECOA charges the Virginia State Corporation Commission with "adopt[ing] regulations to effectuate the purposes of this chapter provided that such regulations conform to and are no broader in scope than regulations, and amendments thereto, adopted by the Board of Governors of the Federal Reserve System under the Consumer Credit Protection Act, Title VII." Va.Code § 59.1–21.24. The Commission, in turn, has "incorporated by reference and adopted for use in the Commonwealth of Virginia," Regulation B of the Board. 10 Va.Adm.Code 5–180–10. Thus, the discussion here concerning whether the Board's definition of "adverse action" exceeds the Board's statutory authority applies with equal force to whether the Commission's adoption of the Board's "adverse action" regulation is a valid exercise of its power under VA ECOA.

13 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

14 *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 325, 114 S.Ct. 835, 127 L.Ed.2d 152 (1994) (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778).

15 Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U.Mem.L.Rev. 37, 115 (1994).

Appendix

Foreign Case

2. Rowe v. Union Planters Bank of Southeast Missouri

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Kivel v. WealthSpring Mortg. Corp., D.Minn.,
November 2, 2005

289 F.3d 533
United States Court of Appeals,
Eighth Circuit.

Johnnie Mae ROWE, Appellant,
v.
UNION PLANTERS BANK OF SOUTHEAST
MISSOURI, Kevin Chambers, Patricia Robbins,
Appellees.

No. 01-3080.

Submitted: March 14, 2002.

Filed: May 9, 2002.

Rehearing and Rehearing En Banc Denied: June
25, 2002.

Loan applicant sued bank, alleging racial discrimination in violation of Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA). The United States District Court for the Eastern District of Missouri, Thomas C. Mummert, III, United States Magistrate Judge, entered summary judgment for bank. Applicant appealed. The Court of Appeals, McMillian, Circuit Judge, held that applicant failed to establish prima facie claim under FHA or ECOA.

Affirmed.

West Headnotes (3)

^[1] **Federal Courts**
Loans and financing; Dismissal

Because plaintiff was pro se litigant in her appeal of action under Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA), Court of Appeals would liberally construe allegations in her prior administrative complaints. Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; Consumer Credit Protection Act, § 701 et seq.,

as amended, 15 U.S.C.A. § 1691 et seq.

4 Cases that cite this headnote

^[2] **Civil Rights**
Loans and financing
Consumer Credit
Equal credit opportunity

To establish a prima facie claim under the Fair Housing Act (FHA) or the Equal Credit Opportunity Act (ECOA), a plaintiff must demonstrate that: (1) she was a member of a protected class; (2) she applied for and was qualified for a loan with a bank; (3) the loan was rejected despite her qualifications; and (4) the bank continued to approve loans for applicants with similar qualifications. Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; Consumer Credit Protection Act, § 701 et seq., as amended, 15 U.S.C.A. § 1691 et seq.

39 Cases that cite this headnote

^[3] **Civil Rights**
Loans and financing
Consumer Credit
Equal credit opportunity

Loan applicant failed to establish prima facie claim under Fair Housing Act (FHA) or Equal Credit Opportunity Act (ECOA), in that she was not qualified for either commercial loan or loan guaranteed by Farmers Home Administration (FmHA), and she did not substantiate her assertions that loan denials were racially motivated and that similar loans were approved for individuals of different race with similar qualifications. Civil Rights Act of 1968, § 801 et seq., as amended, 42 U.S.C.A. § 3601 et seq.; Consumer Credit Protection Act, § 710 et seq., as amended, 15 U.S.C.A. § 1691 et seq.

22 Cases that cite this headnote

Attorneys and Law Firms

*534 Stephen J. Nangle, St. Louis, MO, argued, for appellant.

Mark S. Johnson, Cape Girardeau, MO, argued, for appellee.

Before McMILLIAN, HEANEY and RILEY, Circuit Judges.

Opinion

MCMILLIAN, Circuit Judge.

Johnnie Mae Rowe appeals from a final order entered in United States District Court in the Eastern District of Missouri¹ granting summary judgment in favor of Union Planter's Bank of Southeast Missouri ("the Bank") and its individually-named employees, Kevin Chambers and Patricia Robbins, on Rowe's allegations of racial discrimination in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq.*, and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.* See *Rowe v. Union Planter's Bank of Southeast Missouri*, No. 1:00CV0062TCM (E.D.Mo. July 17, 2001) (memorandum and order). For reversal, Rowe argues that the magistrate judge erred in finding no genuine issues of material fact to establish a *prima facie* violation of either the FHA or the ECOA. We affirm.

Background

In October 1997, Rowe and her husband applied for a loan from the Bank to finance the purchase of a new church and parsonage. On the basis of a loan application prepared by the Bank's loan officer Kevin Chambers, the Rowes were denied both a loan guaranteed by the Farmers Home Administration ("FmHA") and a commercial loan from the Bank. The Rowes then prepared a more detailed loan application with the assistance of a financial consultant and were successful in obtaining a smaller loan from another bank.

The Rowes, an African-American couple, believed that Chambers' advice during the loan application process, his mishandling of the loan application and the Bank's subsequent denial of the loan applications were motivated by racial discrimination. *535 On April 21, 1998, Rowe filed a complaint with the Comptroller of the Currency,

who referred the complaint to the Department of Housing and Urban Development ("HUD"), Office of Fair Housing and Equal Opportunity. On June 7, 2000, HUD issued a determination of no probable cause and Rowe then filed a *pro se* complaint in district court on June 19, 2000.

The parties consented to transfer the case to a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). On July 17, 2001, following both parties' motions for summary judgment, the magistrate judge granted summary judgment in favor of appellees, reasoning that Rowe failed to establish the *prima facie* elements of either an FHA or an ECOA claim. On August 15, 2001, Rowe filed her *pro se* notice of appeal. On September 26, 2001, Rowe retained counsel. This appeal followed. Jurisdiction in the district court was proper based on 42 U.S.C. § 3601 and 15 U.S.C. § 1691. Jurisdiction in this court is proper based on 28 U.S.C. § 1291. The notice of appeal was timely filed pursuant to Fed. R.App. P. 4(a).

Discussion

¹¹ We review grants of summary judgment *de novo*, evaluating the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact. See Fed.R.Civ.P. 56(c); *Radecki v. Joura*, 114 F.3d 115 (8th Cir.1997). In addition, because Rowe was a *pro se* litigant until this appeal, we liberally construe the allegations in her prior complaints. See *Bracken v. Dormire*, 247 F.3d 699, 702-03 (8th Cir.2001).

¹² In order to establish a *prima facie* FHA or ECOA claim, Rowe must demonstrate that (1) she was a member of a protected class, (2) she applied for and was qualified for a loan with the Bank, (3) the loan was rejected despite her qualifications, and (4) the Bank continued to approve loans for applicants with similar qualifications. See *Noland v. Commerce Mortgage Co.*, 122 F.3d 551, 553 (8th Cir.1997) (outlining *prima facie* elements of FHA claim) (citing *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir.1993)); see also *Latimore v. Citibank*, 979 F.Supp. 662, 665 (N.D.Ill.1997) (applying the same *prima facie* requirements to ECOA claims as FHA claims).

Rowe argues that summary judgment was improper because the record contains controverted issues of material fact regarding these elements which necessitate a trial. Specifically, Rowe asserts that (1) she is an African-American, and thus a member of a protected

class; (2) she did produce evidence that she was qualified for the loan, because her subsequent verified loan application, which was prepared by a financial consultant with the same information available to Chambers, qualified her for a loan elsewhere; and (3) Chambers' discriminatory intent can be inferred from the Bank's rejection of her loan application.

¹³¹ We agree with the magistrate judge that Rowe did not satisfy each of the *prima facie* elements constituting an FHA or ECOA claim. The evidence presented by Rowe herself established that she was not qualified for either an FmHA-guaranteed loan or a commercial loan. Additionally, Rowe did not submit any evidence to substantiate her assertion that the loan denials were racially motivated or that similar loans were approved for individuals of a different race with similar qualifications. As a result, we affirm on the basis of the magistrate

Footnotes

¹ The Honorable Thomas C. Mummert, III, United States Magistrate Judge for the Eastern District of Missouri, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c)(1).

judge's well-reasoned opinion and hold that Rowe failed to establish a *prima facie* FHA or ECOA claim. See 8th Cir. Rule 47B.

*536 Conclusion

Accordingly, the order of the district court is affirmed.

All Citations

289 F.3d 533

Appendix

Foreign Case

3. Floyd-Keith v. Homecomings Financial, LLC

2010 WL 3927596
Only the Westlaw citation is currently available.
United States District Court,
M.D. Alabama,
Northern Division.

Sonja **FLOYD-KEITH**, Plaintiff,
v.
HOMEcomings FINANCIAL, LLC, et al.,
Defendants.

Civil Action No. 2:09cv769-WKW.
|
Sept. 17, 2010.

Attorneys and Law Firms

Sonja Floyd-Keith, Montgomery, AL, pro se.

Jon H. Patterson, Frederick Wendell Allen, Bradley Arant
Boult Cummings LLP, Birmingham, AL, for Defendants.

RECOMMENDATION OF THE MAGISTRATE JUDGE

CHARLES S. COODY, United States Magistrate Judge.

I. INTRODUCTION

*1 The pro se plaintiff, Sonja **Floyd-Keith** (“**Floyd-Keith**”), asserts violations of the Equal Credit Opportunity Act (“**ECOA**”), 15 U.S.C. § 1691; the Federal Fair Housing Act (“**FHA**”), 42 U.S.C. §§ 3601–3631; and the Fair Credit Reporting Act (“**FCRA**”), 15 U.S.C. §§ 1681 *et seq.* against defendants **Homecomings Financial, LLC** (“**Homecomings**”) and **GMAC Mortgage, LLC** (“**GMAC**”).¹ **Floyd-Keith** contends that the defendants applied their criteria for evaluating her application for a residential mortgage loan more stringently because she is African-American. The court has jurisdiction of these claims under 28 U.S.C. § 1331 pursuant to its federal question jurisdiction.

Now pending before the court is the defendants’ motion for summary judgment. (Doc. No. 67.) The court has

carefully reviewed the motions for summary judgment, the briefs filed in support of and in opposition to the motions, and the supporting and opposing evidentiary materials and concludes the defendants’ motion for summary judgment should be granted.

II. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” This standard can be met by the movant, in a case in which the ultimate burden of persuasion at trial rests on the nonmovant, either by submitting affirmative evidence negating an essential element of the nonmovant’s claim, or by demonstrating that the nonmovant’s evidence itself is insufficient to establish an essential element of his or her claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Jeffery v. Sarasota White Sox*, 64 F.3d 590, 593 (11th Cir.1995); *Edwards v. Wallace Cmty Coll.*, 49 F.3d 1517, 1521 (11th Cir.1995).

The burden then shifts to the nonmovant to make a showing sufficient to establish the existence of an essential element of his claims, and on which he bears the burden of proof at trial. *Id.* To satisfy this burden, the nonmovant cannot rest on the pleadings, but must, by affidavit or other means, set forth specific facts showing that there is a genuine issue for trial. FED.R.CIV.P. 56(e).

The court’s function in deciding a motion for summary judgment is to determine whether there exist genuine, material issues of fact to be tried; and if not, whether the movant is entitled to judgment as a matter of law. *See Dominick v. Dixie Nat’l Life Ins. Co.*, 809 F.2d 1559 (11th Cir.1987). It is substantive law that identifies those facts which are material on motions for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *See also De Long Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir.1989).

When the court considers a motion for summary judgment, it must refrain from deciding any material factual issues. All the evidence and the inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Earley v. Champion Int’l Corp.*, 907 F.2d 1077, 1080 (11th Cir.1990). *See*

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The movant bears “the exacting burden of demonstrating that there is no dispute as to any material fact in the case.” *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir.1983).

III. FACTS

*2 After renting a house on East Brookwood Drive in Montgomery, Alabama for over ten years, **Floyd-Keith** decided she wanted to purchase a home in a better neighborhood for herself and her children. Upon finding a house for sale on Andre Drive which met her specifications, **Floyd-Keith** began the mortgage application process. (Attach. to Doc. No. 69, Defs’ Ex. 1, Pl’s Dep., p. 59.) **Floyd-Keith** went to Superior Mortgage to secure a loan for her new house. (*Id.*, p. 109, 114.)

On July 26, 2006, Albert Taylor, a loan officer at Superior Mortgage, submitted **Floyd-Keith’s** loan information to **Homecomings**. (Attach. to Doc. No. 69, Defs’ Ex. 3, Flores’ Affid., p. 2.) On July 27, 2007, **Floyd-Keith** received a good faith estimate of settlement charges estimating the amount financed as \$82,796.95, an annual percentage rate of 11.1488%, finance charges of \$188,144.27, and total payments of \$270,941.22. (Defs’ Ex. 3, pp. 102–103.)

Shortly after **Floyd-Keith** received the good faith estimate from Superior Mortgage, an underwriter at **Homecomings** reviewed **Floyd-Keith’s** loan application and asked Jann Neely (“Neely”), the Senior Pre-funding Coordinator, to complete a pre-fund review of the documentation. (Defs’ Ex. 2, Neely’s Affid., p. 1.) Neely determined that the proposed loan was 100% combined loan to value and had a 63% debt-to-income ratio. (*Id.*) Neely also recalled that Superior Mortgage had been placed on a “watch list” by **Homecomings** because the mortgage company had submitted “altered and/or incorrect documentation” on other loan applications in the past. (*Id.*, pp. 1–2.)

On several occasions during the loan review process, Taylor, the loan officer at Superior Mortgage, contacted **Floyd-Keith** and advised her that the underwriters at **Homecomings** or GMAC needed more information. (Pl’s Dep., p. 86, 97, 120–21.) Taylor specifically requested that **Floyd-Keith** provide additional pay stubs and employment documentation. (*Id.*) Around this time, an assistant at the high school where **Floyd-Keith** was

employed told her that a person had called the school and asked her to verify **Floyd-Keith’s** employment. (*Id.*, pp. 98–99.) The assistant told **Floyd-Keith** that she asked the person to call back later. (*Id.*, p. 99.) The assistant also told the plaintiff that, when she answered the phone again later that day, someone hung up when they heard her voice and that the school’s caller identification system indicated the call was from someone at **Homecomings**. (*Id.*, p. 100.)

Upon determining that **Floyd-Keith’s** employment could not be verified,² that the loan application documents indicated a low income, that the loan was 100% combined loan to value with a 63% debt-to-income ratio, and that Superior Mortgage was on a “watch list,” Neely recommended that **Floyd-Keith’s** loan be denied and that **Homecomings** review its relationship with Superior Mortgage. (Neely’s Affid., p. 2.)

On August 22, 2007, **Homecomings** sent a letter to Superior Mortgage, along with a notice of adverse action, advising that **Floyd-Keith’s** application was denied and that Superior Mortgage was legally obligated to provide **Floyd-Keith** with the statutory notice. (*Id.*, p. 3.) **Floyd-Keith** did not receive the notice. (Pl’s Dep., p. 39.)

IV. DISCUSSION

A. The ECOA Claim

*3 **Floyd-Keith** asserts that the defendants violated the ECOA when they rejected her application for a home loan on the basis of her race as an African-American. Specifically, she asserts that the defendants subjected her to a more vigorous loan application process than white applicants and failed to provide her with notice of their reasons for the denial of her loan application.³ (Doc. No. 80, p. 9.)

1. The ECOA discrimination claim

“ ‘The ECOA is an anti-discrimination statute which prohibits creditors from discrimination in the extension of credit.... It was enacted to protect consumers from discrimination by financial institutions.’ “ *Nicholson v. Johanns*, No. 06–0635–WS–B, 2007 WL 3407045 (S.D.Ala.2007) (quoting *Brown v. Interbay Funding, LLC*, 417 F.Supp.2d 573, 578 (D.Del.2006)). The ECOA

creates a private right of action against a creditor who “discriminate[s] against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).” 15 U.S.C. § 1691(a)(1).

Courts have applied the analytical framework of Title VII of the Equal Employment Opportunity Act to discrimination claims under the ECOA. *See, e.g., Nicholson v. Johanns*, No. 06–0635–WS–B, 2007 WL 3407045, at *5 (S.D.Ala. Nov.13, 2007); *Cooley v. Sterling Bank*, 280 F.Supp.2d 1331, 1338 (M.D.Ala.2003). In a discrimination case, the plaintiff bears the ultimate burden of proving intentional discrimination. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). To defeat the defendants’ motion for summary judgment, **Floyd–Keith** must establish a prima facie case of discrimination by one of three generally accepted methods: (1) presenting direct evidence of discriminatory intent; (2) presenting evidence to satisfy the four-part circumstantial evidence test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); or (3) presenting statistical proof. *Carter v. Miami*, 870 F.2d 578, 581 (11th Cir.1989). **Floyd–Keith** has not presented any direct evidence of discrimination nor does she rely on statistical evidence to support her discrimination claims. Thus, the court will discuss whether **Floyd–Keith** has established circumstantial evidence of discrimination.

The Supreme Court in *McDonnell Douglas Corp., supra*, created the now familiar framework for the burden of production and order of presentation of proof to analyze circumstantial evidence of discrimination. *See Nix v. WLCY Radio/Rahall Commc’ns*, 738 F.2d 1181, 1184 (11th Cir.1984). To establish a prima facie case of discriminatory administration of a credit transaction, a plaintiff must demonstrate that (a) she is a member of a protected class, (b) she applied for and was qualified for an extension of credit, (c) despite her qualifications she was rejected, and (d) others of a similar credit stature were extended credit or were given more favorable treatment than the plaintiff. *See Nicholson*, 2007 WL 3407045, at *6. If **Floyd–Keith** can establish a prima facie case, then the burden shifts to the defendants to produce a legitimate, nondiscriminatory reason for the adverse credit action. *See McDonnell Douglas Corp.*, 411 U.S. at 802–04; *Nicholson, supra*. If the defendants meet their burden of production, then **Floyd–Keith** must present substantial evidence that the defendants’ justification for the adverse credit action is pretextual. *Id.* A plaintiff may establish pretext “either directly by

persuading the court that a discriminatory reason more likely motivated the [creditor] or indirectly by showing that the [creditor’s] proffered explanation is unworthy of credence.” *Nicholson, supra* (citing *Brooks v. County Com’n of Jefferson County, Ala.*, 446 F.3d 1160, 1163 (11th Cir.2006)).

*4 To the extent **Floyd–Keith** alleges that she was treated differently from other applicants by being subjected to a more vigorous application process, the court construes this as a disparate treatment claim. To establish a prima facie case of disparate treatment, the plaintiff must show that there were applicants not within her protected class, who were similarly situated, but who were treated more favorably. *See Nicholson, supra*. *See also Walker v. Mortham*, 158 F.3d 1177, 1193 (11th Cir.1998); *Holifield v. Reno*, 115 F.3d 1555, 1561 (11th Cir.1997). Proving a prima facie case is not onerous; it requires only that the plaintiff present sufficient evidence to permit an inference of discrimination. *Burdine*, 450 U.S. at 253–54. The defendants do not dispute that **Floyd–Keith** is an African–American woman and that she applied for a home loan through a mortgage broker at Superior Mortgage. They do disagree, however, as to whether similarly situated persons outside of the plaintiff’s protected class received more favorable treatment.

... In the ECOA context, courts have ... insisted on proof that similarly-situated persons outside the protected class were treated more favorably than the plaintiff. *See Visconti v. Veneman*, 2006 WL 3069214, *3 (3rd Cir. Oct.30, 2006) (“To establish a *prima facie* case of discrimination under the ECOA in these circumstances, the Viscontis must establish, inter alia, that others not in their protected class were treated more favorably.”); *Cooley [v. Sterling Bank]*, 280 F.Supp.2d [1331,] 1339–40 [(M.D.Ala.2003)] (characterizing fourth element of *prima facie* case in ECOA context as requiring proof “that the defendant continued to approve loans for applicants outside of the plaintiff’s protected class with similar qualifications,” and explaining that plaintiff must show that similarly situated nonminority applicants have been treated differently in order to satisfy the *prima facie* test).

Nicholson, 2007 WL 3407045, *7.

The plaintiff alleges that she is similarly situated to one white applicant—Judy Connell (“Connell”). (Pl’s Dep., p. 146.) Specifically, **Floyd–Keith** argues that Connell told her that “she’s been through ... [a] similar situation as far as the purchase. And she indicated in reference to the invoice and her circumstances, from the way she put it, was far worse and she had no problem.” (*Id.*, pp. 146–47.) The defendants assert that Connell is not a proper

comparator because there is no evidence that Connell submitted a loan application to them. During her deposition, **Floyd-Keith** indicated that she did not know who Connell's employer was at the time she applied for a loan or the duration of her employment, that she did not know the amount of her mortgage, and that she was uncertain whether she had submitted a loan application to the defendants. (*Id.*) The plaintiff has failed to present any evidence creating a genuine issue of material fact about whether she was similarly situated to a white applicant. **Floyd-Keith's** mere allegation with no attendant proof that Connell applied for and received a loan with an unknown mortgage company with "far worse" financial circumstances is insufficient to establish that both **Floyd-Keith** and Connell were similarly situated. Thus, Connell is not a proper comparator in this case.

*5 At best, **Floyd-Keith** presents nothing more than unsubstantiated allegations and conclusory statements in opposition to the defendant's motion for summary judgment with respect to her differential treatment claim. "[U]nsubstantiated assertions alone are not enough to withstand a motion for summary judgment." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir.1987). See, e.g., *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 642 (11th Cir.1998) (conclusory allegations without specific supporting facts have no probative value). See also *Broadway v. City of Montgomery, Ala.*, 530 F.2d 657, 660 (5th Cir.1976) (conclusory statements, unsubstantiated by facts in the record, will normally be insufficient to defeat a motion for summary judgment).⁴ "The ECOA is not a general, catch-all, prophylactic remedy allowing any disgruntled debtor to sue a creditor for any slight, real or imagined; rather, the conduct it proscribes is the discriminatory administration of a credit transaction." *Nicholson*, 2007 WL 3407045, * 5. Given that **Floyd-Keith** has failed to demonstrate that defendants treated similarly situated applicants outside her classification more favorably, this court concludes that **Floyd-Keith** has failed to demonstrate a prima facie case of racial discrimination.

Moreover, even if this court were to assume *arguendo* that **Floyd-Keith** established a prima facie case of discrimination, the defendants have proffered a legitimate nondiscriminatory reason for their decision to deny the application for credit, and **FloydKeith** has not demonstrated that the defendants' reasons were merely a pretext for discrimination. The defendants assert that **Floyd-Keith** was denied a loan because the paychecks submitted to **Homecomings** reflect that her net pay that did not support the income being used for the loan. (Defs' Ex. 3, Flores' Dep. P. 2.) Although **Floyd-Keith** submitted financial records indicating that she received a

net pay of \$ 412.10 from her employer on a weekly basis between May 31, 2007, and June 7, 2007, **Floyd-Keith's** subsequent paychecks indicate that she received less than \$400.00 each paycheck and that her net pay fluctuated. (Defs' Ex. 3, Attach. to Flores' Affid., pp. 179-186.) For example, **Floyd-Keith** received \$226.01 on July 11, 2007; \$329.88 on July 25, 2007; \$371.99 on August 1, 2007; and \$365.31 on August 8, 2007. (*Id.*, pp. 179-182.) The defendants assert that they denied **Floyd-Keith's** application due to the inconsistencies in her paychecks and pay stubs indicating that her income was insufficient for the amount of credit requested. (Flores' Affid., p. 3.) **Homecomings** also asserts that **Floyd-Keith's** application was denied "[b]ased on the low income reported in the loan application documents, the 100% [combined loan to value], the 63% [debt-to-income] ratio, the inability to verbally verify Ms. **Floyd-Keith's** current employment, and **Homecoming's** history with Ms. **Floyd-Keith's** mortgage broker." (Attach. to Doc. No. 69, Defs' Ex. 2, Jann Neely's Affid., p. 2.)

*6 **Floyd-Keith** argues that the defendants' reasons are pretextual because she was required to submit pay stubs, paychecks, and other employment information numerous times as part of the loan application process and that these requirements were not specified on the defendants' website. The court concludes that **Floyd-Keith's** arguments are unavailing. Requiring **Floyd-Keith** to submit additional pay stubs and other proof of employment is not evidence of pretext, especially in light of the inconsistencies of net pay between each paycheck and the defendants' reasonable concern that **Floyd-Keith's** income would be insufficient to meet loan payments. There is simply no evidence from which a reasonable jury could conclude that the defendants' actions were in any way motivated by an improper discriminatory bias. Consequently, the plaintiff's argument fails to establish that the defendants' proffered reasons were pretextual. This court therefore concludes that the defendants' motion for summary judgment with respect to **Floyd-Keith's** claim that the defendants violated the ECOA by subjecting her to racial discrimination claim should be granted.

2. Notice

In addition to the generalized prohibition of discrimination, the ECOA sets forth procedural requirements for extending credit and communicating with all applicants. See *Nicholson*, 2007 WL 3407045, *5 n. 9 (citing *Davis v. U.S. Bancorp*, 383 F.3d 761, 766 (8th Cir.2004)). The plaintiff asserts that the defendants violated the ECOA by failing to provide proper notice of the reasons for denying her loan application.

Title 15 U.S.C. § 1691 provides, in pertinent part:

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Board for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) 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 this obligation 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. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

*7 In addition, 12 C.F.R. § 202.9(g), which implements the ECOA, provides:

... If no credit is offered or if the applicant does not expressly accept or use the credit offered, each creditor taking adverse action must comply with this section, directly or through a third party. A notice given by a third party shall disclose the identity of each creditor on whose behalf the notice is given.

The defendants contend that they complied with §

1691(d)(2)(4) and 12 C.F.R. § 202.9 when they provided the statutory notice to Superior Mortgage. The evidence indicates that, on August 22, 2007, **Homecomings** sent a letter to the plaintiff's broker, Superior Mortgage, advising that "you must provide the applicant(s) with the attached Notice of Adverse Action as required by the Equal Credit Opportunity Act and the Fair Credit Reporting Act." (Defs' Ex. 3, p. 161, 341.) **Homecomings** attached to the letter a "Statement of Credit Denial, Termination, or Change" stating that the principal reason for the plaintiff's credit denial was due to the length of her employment. (Defs' Ex. 3, p. 163.)

Although **Floyd-Keith** asserts she did not receive the notice of adverse action, there is no evidence demonstrating that **Homecomings** did not send the notice to Superior Mortgage. Because **Homecomings** complied with the ECOA by delivering the notice to Superior Mortgage, as provided for in 12 C.F.R. § 202.9(g), this court concludes that **Floyd-Keith** cannot demonstrate a material issue of disputed fact with respect to her contention that the defendants failed to provide the proper statutory notice. Consequently, the defendants' motion for summary judgment with respect to **Floyd-Keith's** claim that the defendants violated the ECOA by failing to provide her the proper statutory notice should be denied.

B. The FHA Claim

In her amended complaint, the plaintiff alleges that the defendants discriminated against her by failing to disclose all terms, conditions, and other information related to her application and subsequent denial of a residential loan. Specifically, **Floyd-Keith** alleges that the defendants treated her differently from similarly situated white people during the lending process and denied her a loan based on her race.

Under the FHA, no person or business entity may discriminate against any person on the basis of race when engaging in "residential real estate-related transactions." 42 U.S.C. § 3605(a). A "residential real estate-related transaction" means the "making or purchasing of loans ... for purchasing ... or maintaining a dwelling; or secured by residential real estate." 42 U.S.C. § 3605(b). Prohibited practices under the FHA include "providing information which is inaccurate or different from that provided others, because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.120(b).

Under both the FHA and ECOA, a plaintiff "must show that 'race was a motivating consideration in the

[defendants'] decision' not to make the loan." *Latimore*, 979 F.Supp. at 664. To establish a prima facie case of loan application discrimination under 42 U.S.C. § 3605, a plaintiff must establish that (1) she is a member of a protected class, (2) she applied for and was qualified for a loan, (3) the loan was rejected despite her qualifications, and (4) the defendants continued to approve loans for applicants outside her class but otherwise similar to those of the plaintiff. *See, e.g., Boykin v. Bank of America Corp.*, 162 Fed. Appx. 837, 839 (11th Cir.2005); *Latimore v. Citibank, FSB*, 979 F.Supp. 662, 665 (N.D.Ill.1997); *Frison v. Ryan Homes*, No. Civ. A. AW-04-350, 2004 WL 3327904, * 5 (D.Md. Oct.29, 2004) (unpublished).

*8 As previously discussed, **Floyd-Keith** has failed to establish a prima facie case of discrimination because she has not demonstrated that similarly situated applicants were treated differently. The plaintiff's one comparator, Connell, is not similarly situated to **Floyd-Keith**, "as nothing is known about [Connell's] relevant financial background[] or the cost[] or amount[] of [her] loan." *Boykin*, 162 Fed. Appx. at 840. Moreover, the plaintiff has failed to demonstrate that the defendants' reasons for denying her application for a residential loan were pretextual. This court therefore concludes that the defendants' motion for summary judgment with respect to the FHA claim should be granted.

C. The FCRA Claim

Floyd-Keith asserts that the defendants violated the FCRA by failing to provide her with a notice of adverse action. Under the FCRA, if a person takes adverse action against a consumer based on information contained in the consumer's credit report, the person shall provide notice of the adverse action. 15 U.S.C. § 1681m(a). The defendants argue that there is no private cause of action under 15 U.S.C. § 1681m.⁵

Title 15 U.S.C. § 1681m(h)(8)(A) provides that civil liability for willful or negligent non-compliance "shall not apply to any failure by any person to comply with this section." The FCRA further provides that § 1681m "shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section." 15 U.S.C. § 1681m(h)(8)(B). Thus, there is no private right of action to enforce § 1681m. *See, e.g., Crowder v. PMI Mortgage Insurance Co.*, No. 2:06cv0114-VPM, 2006 WL 1528608, * 2 (M.D.Ala.2006); *Perry v. First Nat'l Bank*, 459 F.3d 816, 823 (7th Cir.2006) (holding "[t]he unambiguous language

of § 1681m (h)(8) demonstrates that Congress intended to preempt private causes of action to enforce § 1681m"); *Soroka v. JP Morgan Chase & Co.*, 500 F.Supp.2d 217 (S.D.N.Y.2007) (stating "The unambiguous plain language of the FCRA makes it clear that Congress intended for this section to be enforced only by Federal administrative agencies."). Thus, **Floyd-Keith** does not have a private right of action concerning her claim that she was not provided the Notice of Adverse Action under the FCRA. Consequently, the defendants' motion for summary judgment should be granted with respect to the plaintiff's FCRA claim.

VI. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the defendants' motion for summary judgment be GRANTED. (Doc. No. 67)

It is further

ORDERED that the parties are DIRECTED to file any objections to the **on or before October 1, 2010**. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

*9 Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3927596

Footnotes

- 1 The plaintiff specifically brings this lawsuit against "**Homecomings Financial, LLC** and **GMAC Mortgage, LLC** and their affiliates including but not limited to **GMAC Bank** and **Residential Funding Company, LLC.**" (Doc. No. 1, p. 1.) The defendants identify **Homecomings Financial, LLC**, **GMAC Mortgage, LLC**, **Residential Funding Company, LLC**, and **Ally Bank f/k/a GMAC Bank f/k/a GMAC Automotive Bank** as parties to this lawsuit. (Doc. No. 10.)
- 2 **Floyd-Keith** disputes that her employment could not be verified.
- 3 The defendants maintain that the plaintiff's ECOA claim is based entirely on the argument that **Floyd-Keith** was not provided with the statutorily required notification when her loan application was not approved. (Doc. No. 68, p. 19.) The defendants argue that the plaintiff's ECOA claim is not cognizable in this lawsuit because she acknowledged during her deposition that she did not "think that [she was] not provided that disclosure because of [her] race." (*Id.*, p. 20.) When reading the plaintiff's deposition testimony in its entirety, along with her amended complaint and response to the defendant's motion for summary judgment, the court concludes that the plaintiff has raised a claim that the defendants violated the ECOA by subjecting her to more vigorous requirements than white applicants and by failing to provide her notice. For example, after initially indicating that the failure to provide her the statutory notice was not based on race, **Floyd-Keith** further stated that she "cannot draw conclusions for things I don't know." (Defs' Ex. 1, Pl's Dep., R. 83.) Furthermore, the plaintiff asserts throughout her complaint and amendments thereto that the defendants discriminated against her by requiring her to provide proof of her income in several different forms and subjecting her to other more vigorous requirements than white applicants. Out of an abundance of caution, the court will discuss the plaintiff's allegations that she was not provided notice and was treated differently from white applicants when determining whether the defendants' motion for summary judgment with respect to the ECOA claim should be granted.
- 4 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.
- 5 The court notes that, on December 4, 2003, Congress enacted the Fair and Accurate Credit Transaction Act of 2003 ("FACTA"), 20 U.S.C. §§ 1681 *et seq.* Prior to the enactment of FACTA, persons failing to comply with § 1681m were subject to both administrative and private enforcement actions. See *Crowder v. PMI Mortgage Insurance Co.*, No. 2:06cv0114-VPM, 2006 WL 1528608, * 2 (M.D.Ala.2006) (unpublished) (citing 15 U.S.C. §§ 1681n). FACTA, however, amended § 1681m to eliminate private enforcement of certain provisions *id.*

Appendix

Statute

4. Public Law 93-495—Oct. 28, 1974, Title V.

§ 415. Grace period for consumers

Section 127 of the Truth in Lending Act (15 U.S.C. 1637) is amended—

(1) by amending subsection (a)(1) to read as follows:

“(1) The conditions under which a finance charge may be imposed, including the time period (if any) within which any credit extended may be repaid without incurring a finance charge, except that the creditor may, at his election and without disclosure, impose no such finance charge if payment is received after the termination of such time period.”; and

(2) by amending subsection (b)(10) to read as follows:

“(10) The date by which or the period (if any) within which, payment must be made to avoid additional finance charges, except that the creditor may, at his election and without disclosure, impose no such additional finance charge if payment is received after such date or the termination of such period.”

§ 416. Effective date

This title takes effect upon the date of its enactment, except that sections 409 and 411 take effect upon the expiration of one year after the date of its enactment.

15 USC 1665a
note.

TITLE V—EQUAL CREDIT OPPORTUNITY**§ 501. Short title**

This title may be cited as the “Equal Credit Opportunity Act”.

Equal Credit
Opportunity Act.

§ 502. Findings and purpose

The Congress finds that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all creditworthy customers without regard to sex or marital status.

15 USC 1691
note.
15 USC 1691
note.

§ 503. Amendment to the Consumer Credit Protection Act

The Consumer Credit Protection Act (Public Law 90-321), is amended by adding at the end thereof a new title VII:

15 USC 1601
note.

“TITLE VII—EQUAL CREDIT OPPORTUNITY

“Sec.

“701. Prohibited discrimination.

“702. Definitions.

“703. Regulations.

“704. Administrative enforcement.

“705. Relation to State laws.

“706. Civil liability.

“707. Effective date.

“§ 701. Prohibited discrimination

“(a) It shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.

“(b) An inquiry of marital status shall not constitute discrimination for purposes of this title if such inquiry is for the purpose of ascer-

15 USC 1691.

Appendix

Statute

5. 15 U.S.C. § 1691.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated

Title 15. Commerce and Trade

Chapter 41. Consumer Credit Protection (Refs & Annos)

Subchapter IV. Equal Credit Opportunity (Refs & Annos)

15 U.S.C.A. § 1691

§ 1691. Scope of prohibition

Effective: January 18, 2014

Currentness

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--

- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
- (2) because all or part of the applicant's income derives from any public assistance program; or
- (3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor--

- (1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;
- (2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Bureau;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or

(5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to--

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau;

if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) 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 this obligation 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. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.

(e) Copies furnished to applicants

(1) In general

Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.

(2) Waiver

The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

(3) Reimbursement

The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

(4) Free copy

Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

(5) Notification to applicants

At the time of application, the creditor shall notify an applicant in writing of the right to receive a copy of each written appraisal and valuation under this subsection.

(6) Valuation defined

For purposes of this subsection, the term “valuation” shall include any estimate of the value of a dwelling developed in connection with a creditor’s decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.

CREDIT(S)

(Pub.L. 90-321, Title VII, § 701, as added Pub.L. 93-495, Title V, § 503, Oct. 28, 1974, 88 Stat. 1521; amended Pub.L. 94-239, § 2, Mar. 23, 1976, 90 Stat. 251; Pub.L. 102-242, Title II, § 223(d), Dec. 19, 1991, 105 Stat. 2306; Pub.L. 111-203, Title X, §§ 1071(b), 1085(1), Title XIV, § 1474, July 21, 2010, 124 Stat. 2059, 2083, 2199.)

Notes of Decisions (180)

15 U.S.C.A. § 1691, 15 USCA § 1691
Current through P.L. 115-82

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