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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

11 1987

THOMAS
D. Summer
Clerk

NINA Y. CHUN

vs.

SANDY SPRINGS TOYOTA, INC.

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CIVIL NO. C86-1468

ORDER

This action claiming violations of the Truth in Leasing Act, 15 U.S.C. §1667, is now before the court on review of the Magistrate's Report and Recommendation. Defendant has filed objections.

On June 12, 1986, Plaintiff Chun leased an automobile from Defendant Sandy Spring Toyota. Paragraph 10 of the lease agreement provided: "LATE PAYMENT. If any payment is not paid within 10 days after it is due, you will pay a late charge of 5% of the late payment." On July 2, 1986, Chun filed this action alleging inter alia, that Defendant misrepresented to Plaintiff she was purchasing a car and hid the contract she was signing. Plaintiff then filed a motion for partial summary judgment seeking a determination that paragraph 10 of the lease failed to comply with 15 U.S.C. §1667a(11) which requires disclosure of the amount of method of any penalty or other charge for late payment.

In his Report and Recommendation, the Magistrate determined that paragraph 10 failed to comply with §1667a because

it was ambiguous. Specifically, paragraph 10 fails to disclose what charges Sandy Spring Toyota may levy on Plaintiff in the event she makes a partial payment. On the one hand, Plaintiff may be liable for 5% of the entire monthly payment and on the other hand, Plaintiff may only be liable for 5% of the unpaid portion.

The Magistrate relied on Whitley v. Southern Discount Company, 772 F.2d 815 (11th Cir. 1985) in which the court determined the following clause was ambiguous when applied to partial payments:

DEFAULT CHARGES: In the event any scheduled installment is not paid within five days from the date such payment is due, lender may charge and collect a late fee of 5% (5 cents for each one dollar) of the monthly payment. Such late charge may be collected only once on any payment regardless of the period during which it remains delinquent.

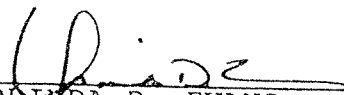
Whitley, 772 F.2d at 816. In so finding, the court relied on Watts v. Key Dodge Sales, Inc., 707 F.2d 847 (5th Cir. 1983) which stated the issue as whether a reasonable borrower understood that the creditor was entitled to impose a 5% delinquency charge on the entire installment amount or only on the unpaid balance of the scheduled payment. Watts, 707 F.2d at 852.

Defendant urges the court to reject the Magistrate's findings and rely on Perry v. M Ford Motor Credit Co., 575 F. Supp. 204 (S.D. Ohio 1983) which held that a clause similar to the one at bar was not ambiguous. The court declines this invitation. First, Defendant's assertion that the Perry court

was interpreting the Truth in Leasing Act rather than the Truth in Lending Act is simply erroneous. Second, Defendant presents no reason why the Magistrate should reject binding precedent of the Eleventh Circuit in favor of a foreign district court opinion. Third, the court in Perry was addressing the issue of late payments and the court in Whitley was addressing the issue of late partial payments, which is the issue at bar.

Accordingly, the recommendations of the Magistrate are hereby ADOPTED; Plaintiff's motion for partial summary judgment is hereby GRANTED.

SO ORDERED, this 11 day of March, 1987.


ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

DEC 08 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

By: *BTJ* RUTHER D. THOMAS, Clerk
Deputy Clerk

NINA Y. CHUN,	:	CIVIL ACTION
Plaintiff,	:	NO. C86-1468A
vs.	:	
SANDY SPRINGS TOYOTA, INC.	:	
Defendant.	:	

MAGISTRATE'S REPORT AND RECOMMENDATION

Presently before the court is the plaintiff's motion for partial summary judgment with respect to this truth in leasing claim.¹ The plaintiff, Nina Y. Chun, arranged to lease an automobile from the defendant, Sandy Springs Toyota, Inc., on June 12, 1986, for personal, family, and household purposes. The defendant, a Toyota dealer, is also a lessor who regularly engages in leasing, offering to lease, or arranging to lease under consumer leases. The lease agreement entered into is attached to the plaintiff's statement of undisputed facts as

¹Originally, the complaint as filed contained both a claim under the Truth in Leasing Act and a claim under the Georgia Fair Business Practices Act of 1975. Plaintiff amended her complaint July 17, 1986, striking the claim based upon the Georgia Fair Business Practices Act. The only claim remaining is the claim under the Truth in Leasing Act.

Exhibit A. The facts are undisputed.² The plaintiff contends that the defendant failed to disclose the late payment charges clearly in the lease agreement, thereby violating the Truth in Leasing Act. The pertinent provision of the Act provides in 15 U.S.C. Section 1667a as follows:

Section 1667a. Consumer lease disclosures

Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:

. . .

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

The lease provided in Paragraph 10: "LATE PAYMENT. If any payment is not paid within 10 days after it is due, you will pay a late charge of 5% of the late payment."

Plaintiff contends that this language is ambiguous as it can be read one of two ways. Plaintiff contends that the late payment charge of five percent may be calculated with respect to

²The defendant has stated that World Omni Leasing, Inc. is the lessor of the automobile in question and that Sandy Springs Toyota, Inc. is not the lessor. The defendant, however, does not dispute that the lease agreement provides that the lessor is World Omni Leasing, Inc. and Sandy Springs Toyota, Inc. and that the lease agreement specifically provides in the upper right hand corner that Sandy Springs Toyota "has arranged this lease and is a lessor for purposes of the Federal Consumer Leasing Act."

the payment amount due each month or the unpaid amount of the payment due each month. The court must decide whether the disclosure is clear with respect to partial payments.

The defendant argues that, "[T]he only practical reading of the Chun disclosure is that if a lessee does not make his lease payment within ten (10) days after it is due, he will pay a late charge of five (5%) percent of the portion of the payment which is late." Defendant cites in support of this contention the recent truth in leasing case of Parry v. Ford Motor Credit Co., 575 F.Supp. 204 (S.D.Ohio 1983). The late payment clause in Parry is similar to the late payment clause in the Sandy Springs lease. Paragraph 13 of the Parry lease provides: "Late Charge: The lessee will pay a late charge on each payment that is not made within ten days after it is due. The charge is 5% of the payment or \$10, whichever is less." Id. at 205.

The issue in Parry, however, was not the same issue as presented here. Parry involved a contention that the late payment notice was incorrect because Ohio state law limited late charges in lease transactions to three dollars. The court held that the violation of state law does not itself constitute a TILA violation unless TILA independently proscribes the activity. The court in Parry did not consider the arguments advanced in this case by the plaintiff, Chun.

Plaintiff's argument was adopted Whitley v. Southern Discount Co., 772 F.2d 815 (11th Cir. 1985). The late payment provision in Whitley provided: "DEFAULT CHARGES: In the event any scheduled installment payment is not paid within five days from the date such payment is due, Lender may charge and collect a late fee of 5% (5 cents for each one dollar) of the monthly payment." Id. at 816.

The court in Whitley held:

The delinquency provision clearly permits the imposition of a 5% late charge on the full amount of the installment payment due, even though only a partial payment is made by the borrower. Nevertheless, Southern Discount perversely maintains that the language authorizes it to levy a penalty only on the balance remaining after a partial payment. Despite the incongruity of the creditor's argument that it may impose less of a delinquent charge than that allowed by the contract terms, these divergent readings of the provision render the language ambiguous and therefore violative of TILA and Regulation Z.

Whitley, 772 F.2d at 817 (emphasis in the original).

The court in Watts v. Key Dodge Sales, Inc., 707 F.2d 847, 852 (5th Cir. 1983), which the Whitley court cites, found the following notice of delinquency charge to be ambiguous, thus violating the TILA or Regulation Z:

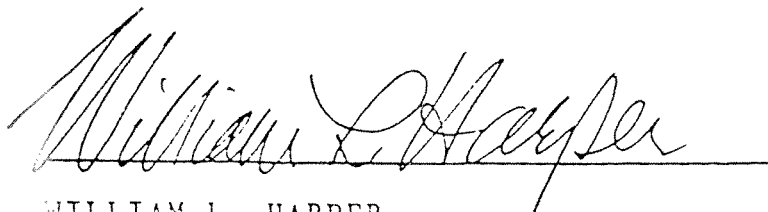
12) Delinquency Charges: Seller may collect, and Buyer hereby agrees to pay, a delinquency . . . charge on any installment which shall not have been paid within 10 days after the date on which it becomes due and payable in an amount not exceeding 5% of each such unpaid installment or \$5.00, whichever is less (emphasis added)

The court in Watts recommended that the following provision would satisfy the goals of the TILA and Regulation Z: "[A defaulting debtor shall pay] 5% of the unpaid amount of the installment in default, not to exceed \$5.00." Id.

MAGISTRATE'S RECOMMENDATION

The undersigned magistrate finds that the late payment disclosure in the lease provided by Sandy Springs Toyota is ambiguous for the reasons set forth in Whitley v. Southern Discount Co., supra. The ambiguous disclosures violate Title 15 Section 1667a(11) and, accordingly, it is recommended that the plaintiff's motion for partial summary judgment be granted.

SO REPORTED AND RECOMMENDED this 5th day of December, 1986.



WILLIAM L. HARPER

UNITED STATES MAGISTRATE