EMMA ROBINSON and LATANYA KEMP, Plaintiff, v. TOYOTA MOTOR CREDIT CORP., POINT ONE TOYOTA, EVANSTON and RIVER OAKS TOYOTA, Defendants.	)	No. 95 M3 3372

MEMORANDUM OF OPINION

This matter comes before the Court on the motions of defendants Toyota Motor Credit Corp., Point One Toyota, and River Oaks Toyota to dismiss the Complaint of Emma Robinson and Latanya Kemp pursuant to 735 ILCS 5/2-615.

I. Background

In June of 1993, LaTanya Kemp entered into a lease agreement with Point One Toyota. Pursuant to the lease, Kemp was to make 42 monthly payments of $319.26 for a total of $13,408.92. In August of 1993, Emma Robinson entered into a lease agreement with River Oaks Toyota. Pursuant to the lease, Robinson was to make 48 payments of $469.25 for a total of $22,525.00.

Plaintiffs brought an eight count Complaint against the three defendants alleging that the lease agreements violated both federal and state consumer protection statutes. Counts I, II and III allege violations of the Consumer Leasing Act ("CLA"). Count IV alleges a violation of the Illinois Consumer Fraud and Deceptive Practices Act. Count V alleges a violation of the Uniform Deceptive Trade Practices Act. Counts VI, VII, and VII

of the Complaint on behalf of those similarly situated. Defendants have moved to dismiss Counts I-V.

II. Standard of Review

On a motion to dismiss, all well pleaded facts must be taken as true. Reuben H. Donnelly Corp. v. Brauer, 275 Ill. App. 3d 300, 655 N.E.2d 1162 (1st Dist. 1995). The Court may grant the motion to dismiss only if it is apparent that no set of facts can be proven which will entitle plaintiff to relief. Moore v. Lumpkin, 258 Ill. App. 3d 980, 630 N.E.2d 982 (1st Dist. 1994)

III. Count I

In Count I, plaintiff's allege that the lease agreements violate 16 U.S.C Section 1667(a)(11) and 12 C.F.R. Sections 213.4(g)(10)&(12) by not allowing the plaintiffs to voluntarily terminate the lease early. Plaintiff's allege that a lessor must allow a voluntary early termination and that Paragraph 20 of the lease agreements prohibiting early termination is unreasonable. Further plaintiffs allege that they wish to terminate early but are apprehensive due to their uncertainty over the penalty which could be imposed. Plaintiff's also allege in Count I that the method of calculating the penalty for early termination is not properly disclosed.

Defendants contend that Count I fails to state a cause of action. Defendants argue that the CLA does not mandate that lessees be granted a right to terminate early voluntarily. As such, defendants argue that the disclosure in Paragraph 20 of the lease that there is no right to terminate early voluntarily

due not have standing to challenge the reasonableness of the default provisions as plaintiffs have not defaulted. Even if the plaintiffs did have standing, defendants argue that the default charges are reasonable.

The CLA requires that the lessor set out 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. 15 U.S.C. Section 1667a(11). The regulations further provide that a lease disclose "[a] statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination. Reg. M, 12 C.F.R. Section 213.4(g)(12). 15 U.S.C Section 1667(b)(b) also states that "[p]enalties or other charges for delinquency, default, or early termination may be specified in the lease but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the delinquency, default, or early termination ....

In order to determine legislative intent, a statute must be read as a whole. People v. Lewis, 158 Ill.2d 386, 634 N.E.2d 717 (1994). Each section of a statute must be examined in relation to every other section. Scadron v. City of Des Plaines, 153 Ill.2d 164, 606 N.E.2d 1154 (1992). In order to determine whether the CLA mandates that lessors allow lessees to terminate early voluntarily, the Court must attempt to glean the

accompanying regulations as a whole.

While no one provision of the CLA appears to mandate the right to terminate early voluntarily, when construed as a whole, the Court finds that lessors must allow for voluntary early termination. The Court notes that in addition to the provisions already cited which refer to early termination, two other sections of Regulation M also refer to early termination. Reg. M, 12 C.F.R. Sections 213.4(g)(13)&(14). Also, in contrast to the sections referring to early termination, the section referring to the lessee's option to purchase specifically states that the lease disclose a "statement of whether or not the lessee has the option to purchase the leased property .... Reg. M. 12 C.F.R. Section 213.4(g)(11).

The numerous references in the statute to early termination indicate that the legislature intended that lessees have the option to voluntarily terminate the lease early. This is further exemplified by the fact that Regulation M does not require a statement of whether or not a lessee can terminate early. Such a disclosure would not be necessary if the lessee had a right to terminate early. Construing the statute and accompanying regulations as a whole, the Court finds that the CLA mandates that lessees be granted a right to voluntarily terminate early.

The Court further finds that the plaintiffs have sufficiently stated a cause of action by alleging that the default provisions of the lease are unreasonable due to the fact that a lessee cannot terminate the lease voluntarily. A lessor must anticipate legitimate reasons for early termination and

allow for some mechanism short of default in these situations. The Court envisions situations involving death or military obligations which could bring about a default and cause a serious injustice because a lessee is not allowed to terminate early. Would a child be responsible for making payments for a deceased single parent out of the deceased parent's estate when the money would need to be used for the welfare of the child? Would a child or other family member be responsible for payments where a husband and wife were both called into active duty and had to go to the Persian Gulf during Dessert Storm? If the payments were not made by a family member, the husband and wife's credit would be severely damaged by a default which they could not control. The statute requires that the charges for early termination be reasonable. 15 U.S.C. Section 1667(b)(b). As the lease agreement in the present case does not anticipate or allow for any legitimate reasons for a voluntary early termination, the plaintiffs have stated a cause of action sufficient to withstand a Section 2-615 motion to dismiss.

Plaintiffs have standing to challenge the default provisions of the lease even though they have not terminated and subjected themselves to default. Plaintiffs have alleged that they desired to terminate early but were apprehensive due to the uncertainty associated with a default. See Highsmith v. Chrystler, 18 F.3d 434, 437 (7th Cir. 1994) (stating plaintiff had not even alleged that he now has, or will ever have, any desire whatsoever to terminate the lease). The plaintiffs should not have to put their credit in jeopardy in order to challenge the default provisions as unreasonable.

IV. Count II

In Count II of the Complaint, plaintiffs allege that defendants failed to disclose the sales, excess use or rental tax in three places on the lease in violation of 12 C.F.R. Section 213.4(g)(4). Specifically, plaintiffs point to Sections 3C, 4B, and 9B of the lease agreements in which defendants placed a notation "N/A" where the lease disclosed certain payments for sales, use and rental tax.

Defendants contend that Count II fails to state a cause of action. Defendants argue that Sections 3C, 4B, and 9B of the lease contain the notation "N/A" because the amount paid for these taxes had already been capitalized into Sections 3E, 4A, and 9C of the lease agreements. Further, defendants contend that the statute only requires that the lease disclose the total amount paid or payable by the lessee during the lease term for official fees and taxes. As Section 9C discloses the total of estimated fees and taxes, defendants argue that they complied with the statute.

Regulation M requires that a lease disclose "[t]he total amount paid or payable by the lessee during the lease term for official fees, registration, certificate of title, license fees, or taxes." 12 C.F.R. Section 213.4(g)(4). Section 9C of the lease discloses the total of estimated fees and taxes as required by the regulation. Plaintiffs have failed to state a cause of action in Count II.

The Court notes that plaintiffs attempted to raise an issue with regards to the tax disclosure which was not raised in

contained an incorrect total of estimated fees and taxes. Plaintiffs compare Kemp's lease which discloses $168.00 as the total of estimated fees and taxes with Robinson's lease which discloses this amount as $1,355.33. Plaintiffs argue that the disclosure on Kemp's lease must be incorrect. Regardless of the potential validity of this argument, plaintiffs have not alleged this in the complaint.

Accordingly, the Court dismisses Count II of the Complaint but grants plaintiffs 28 days to amend Count II consistent with the Court's opinion.

V. Count III

In Count III, plaintiffs raise numerous alleged disclosure violations in the lease agreements. Plaintiffs allege that the lease agreements fail to clearly disclose that lessees have the right to obtain an independent appraisal as to the fair market value of the automobile. Plaintiffs allege that the lease is not in a meaningful sequence due to the extensive use of cross-referencing in the lease. It is also alleged that Paragraph 21 of the lease does not clearly and conspicuously disclose that the consumer is liable for the difference between the estimated and the realized value of the automobile. Further it alleged that Paragraph 21 is not clear and too difficult for the average consumer to understand. Plaintiff's allege that it is unreasonable to determine the fair market value of the automobile by a forced sale. Plaintiffs allege that the lease does not clearly and conspicuously disclose what "other charges" a

alleged that paragraph 22 is not clear and conspicuous for the average consumer. Plaintiffs allege that defendants failed to identify all the warranties of the manufacturer. Lastly, plaintiff's allege that defendants failed to disclose all the payments due from plaintiff upon the inception of the lease.

A. Right to an appraisal

Plaintiffs have not alleged that defendants failed to disclose that lessees have a right to an independent appraisal, but only that it is not set out clearly enough. The regulation requires that the lease disclose that the lessee has a right to a professional appraisal of the value of the automobile which is binding on all parties. 12 C.F.R. Section 213.4(14). Paragraph 21 of defendants' lease provides, in relevant part,

> if you disagree with the Fair Market Value of the Vehicle, you may obtain at your own expense a professional appraisal of the wholesale value of the Vehicle .... If you choose this option, the appraisal value shall be considered the Fair Market Value. We may sell the vehicle at public or private sale with or without notice to you.

Although plaintiffs object to the last sentence of the disclosure, plaintiffs have not cited authority for the proposition that a lessee has the right to notice. Paragraph 21 discloses the right to an independent appraisal. Further, it specifically states that the appraised value shall be considered the fair market value. This clearly comports with the disclosure requirements and plaintiffs have not stated a cause of action as to this alleged disclosure violation.

B. Cross-Referencing

All disclosures must be clear and in a meaningful sequence.

Reg. M, 12 C.F.R. Section 213.4([illegible]). [illegible]

prevent the defendant from cross-referencing. The Commentary to Regulation M specifically authorizes the use of cross-referencing in order to avoid unnecessary text. Comment 213.4(a)-3. In addressing a similar issue, Judge Shadur of the Northern District of Illinois stated:

> Perhaps the lease at issue could be made clearer if it were made longer -- if every cross-reference were replaced by repetition of the matter covered, and if every significant term and contingency were spelled out in detail. But the Act certainly does not require the lessor to take such steps, and no doubt if the lessor did some plaintiffs' lawyer would argue (with justification) that the lessor had burdened the consumer with "informational overload". Kedziora v. Citicorp National Services, Inc., 780 F.Supp. 516, 529 (N.D. Ill. 1991).

Although the Court finds that certain paragraphs of the lease are not understandable to the average consumer, see infra, the lessor's use of cross-referencing is not a violation of the statute. Plaintiffs have not stated a cause of action for a disclosure violation related to the use of cross-referencing.

C. Difference Between Estimated Residual and the Resale Value

Regulation M requires that the lease disclose a "statement that the lessee shall be liable for the difference between the estimated value of the property and its realized value at early termination or at the end of the lease term, if such liability exists." 12 C.F.R. Section 213.4(g)(13). The law also requires that lessors write leases so that the average consumer can understand them. Burton v. Public Finance, 657 F.2d 842 (6th Cir. 1981). Paragraph 21 of defendants lease agreements states that lessees will be liable for:

> the excess, if any, of the sum of the Total Depreciation ... and the Estimated Residual Value ... over the sum of the Fair Market Value of the Vehicle ... and all depreciation amounts in the Monthly Rental Charges ... that have become due. The depreciation amounts in the Monthly Rental Charges that have become due will be calculated pursuant to the procedure described in Paragraph 22.

The Court reads and construes complicated documents and contracts on a regular basis. Nonetheless, the Court cannot say from reading paragraph 21 that a lessee would be able to understand his or her liability upon a default. Although defendants have attempted to simplify paragraph 21 in their motion to dismiss, it is the language of the lease which a lessee must construe. The plaintiffs have stated a cause of action for a violation of the regulation.

However, the Court does not believe that it was unreasonable for defendants to sell the vehicle upon a default in order to determine the value of the car. The exact argument being raised by plaintiffs has already been rejected. Kedziora, 780 F.Supp. 516. It is not unreasonable for the lessee to take the risk upon default and the lessee may actually end up in a better position than if projected values were used. As stated in Kedziora, selling the vehicle is a reasonable means of compensating the lessor where the lessee defaults. Id. at 528.

D. "Other Charges" and "Official Fees and Taxes"

Regulation M requires that the lease disclose the total amount of all other charges, individually itemized, payable by the lessee to the lessor, which are not included in the periodic payments including any liabilities the lease imposes upon the lessee at the end of the term. 12 C.F.R. Section 213.4(g)(5).

Paragraph 20 of defendants' lease agreements provides that upon a default, lessee is liable for "any other charges arising from your failure to keep your promises under this lease" and any "official fees and taxes imposed in connection with lease termination."

The Court finds that plaintiffs have stated a cause of action as to this disclosure violation. Defendant may be able to prove that it would be impossible to set out every conceivable "other charge" as defendant does not know what the "other charges" will be in advance. In contrast, plaintiffs may be able to prove that defendants knew what these "other charges" would consist of and therefore, had a duty to disclose them to the lessee. The Court cannot resolve these issues on defendants Section 2-615 motion to dismiss. Plaintiff has sufficiently stated a cause of action for the failure to disclose the "other charges" and "official fees and taxes".

E. Monthly Lease Charge

Paragraph 22 of the lease agreements states, inter alia:

> The lease charge for the entire lease term is earned by us on a constant yield basis. The lease charge portion of each Monthly Rental Charge will not change each month; however, the lease charge and depreciation portions will vary. The lease charge for the entire lease term is earned by us on a constant yield basis. The lease charge portion of each Monthly Rental Charge is determined by multiplying the sum of (i) the remaining depreciation balance, and (ii) the Estimated Residual Value ... by the constant rate implicit in the Lease. The monthly lease charge calculation is based on the assumption that we will receive your Total Monthly Payment ... on the scheduled due date each month ....

Defendants contend that this paragraph properly discloses the accounting method used to determine a lessee's default liability

in accordance with Regulation M. 12 C.F.R. Section 213.4(g)(10); see also Wiskup v. Liberty Buick Co., Inc., 1996 WL 18896 (N.D. Ill. 1996).

Although Regulation M may allow the lessor to disclose the method used for determining a penalty for default, this does not excuse the lessor from setting out the default provisions in a clear manner so that the average consumer can understand them. The Court finds that Paragraph 22 contains clauses, such as a constant rate implicit in the lease, which would be difficult for the average consumer to understand. Plaintiffs allegation as to Paragraph 22 sufficiently states a cause of action to withstand defendants' Section 2-615 motion to dismiss.

However, the Court finds no merit in plaintiffs allegation that the lessor must discount the default charges to the present value. Plaintiffs cite to no authority for this proposition. Further, as argued by the defendants, this proposition is not even supported by logic. Upon a default, the lessor is entitled to recover the unamortized cost of the vehicle without this amount being discounted. Defendants are entitled to recover their investment in the transaction. Plaintiffs allegations to the contrary do not state a cause of action upon which relief could be granted.

F. Manufacturer Express Warranties

The CLA requires that a lease contain a statement identifying all express warranties made by the manufacturer. 15 U.S.C Section 1667(a)(6). Regulation M requires that the lease contain a statement identifying any express warranties available to the lessee made by the lessor or manufacturer. 12 C.F.R.

Section 213.4(g)(7). The Commentary to the Regulation provides:

> The statement identifying warranties may be brief. For example, manufacturer's warranties may be identified simply by a reference to the standard manufacturer's warranty. Comment 213.4(g)(7)-1.

Paragraph 18 of defendants' lease agreements state that the vehicle is subject to the standard manufacturer's warranty. This is identical to the example given in the comment. Further, the allegation that the reference to a manufacturer's warranty is insufficient because the vehicle contains multiple warranties has been rejected by other courts. In Kedziora, 790 F.Supp. at 531, the court held that not only does this not state a cause of action, but that it was an understatement to label the claim as frivolous. This Court agrees. Plaintiff has not stated a cause of action for failure to disclose the express warranties of the manufacturer.

G. Disclosure of Payments Upon Inception

The CLA requires that a lease disclose the amount of any payment by the lessee at the inception of the lease. 15 U.S.C. Section 1667(a)(2). Plaintiffs allege that Robinson traded in her Chevrolet Barretta for $4,995.00 when she entered into the lease. The lease contains a notation of "N/A" in Section 3(b) where the lease refers to net trade-in allowance.

Defendants contend that Robinson was not entitled to a trade-in allowance because her vehicle was subject to a lien with Ford Motor Credit Corp., which River Oaks paid off. River Oaks attempts to verify this through an attached exhibit. However, on a Section 2-615 motion to dismiss, all well-pled facts must be accepted as true. Defendants are challenging the legal

sufficiency of the Complaint and cannot contradict facts plead in the Complaint in order to prevail on their motion. Defendants exhibit as well as other evidence may be considered at a future time. Based on the Complaint alone, plaintiffs have stated a cause of action upon which relief could be granted.

VI. Count IV

In Count IV, plaintiffs incorporate Counts I, II and III and allege that defendants violated the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 et seq. ("Consumer Fraud Act"). Defendants contend that plaintiffs lack standing to maintain a private cause of action under the Consumer Fraud Act. Defendants also contend that because the conduct challenged by plaintiffs is specifically authorized by the CLA, plaintiffs cannot challenge these actions under the Consumer Fraud Act.

The Consumer Fraud Act provides that the Act shall not apply to "actions or transactions specifically authorized by laws administered by any regulatory body or officer under statutory authority of this State or the United States." 815 ILCS 505/10b(1). The Illinois Supreme Court has interpreted this to mean that "conduct which is authorized by Federal statutes and regulations, such as those administered by the Federal reserve Board, is exempt from liability under the Consumer Fraud Act." Lanier v. Associates Finance, Inc., 114 Ill.2d 1, 17, 499 N.E.2d 440, 447 (1986). Therefore, all alleged violations which the Court has heretofore found were in accordance with the CLA cannot be brought as violations of the Consumer Fraud Act.

As to the remaining alleged violations which the Court has

found state a cause of action under the CLA, the Court finds that plaintiffs have standing to challenge these violations under the Consumer Fraud Act. The Consumer Fraud Act was intended to have broad applicability. Scott v. Association for Chilbirth, 88 Ill.2d 279, 430 N.E.2d 1012 (1981). To have standing under the Consumer Fraud Act, a plaintiff must be a consumer. Steinberg v. Chicago Medical School, 69 Ill.2d 320, 371 N.E.2d 634 (1977). A consumer is any "person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household." 815 ILCS 505/1(e).

Illinois courts have found that a person who leases real estate is a consumer under the Consumer Fraud Act. See Carter v. Mueller, 120 Ill. App. 3d 314, 457 N.E.2d 1335 (1st Dist. 1983). In Carter, the court looked at the lease which provided that the lessor would perform services in conjunction with the tenancy. Id. at 323. These services included those which would be incidental to almost any real estate lease such as the maintenance of the heating, the grounds and the water supply. Id.

Similarly, the automobile lease at issue in the present case also contains services to be provided by the lessor. The lessor provides the standard manufacturer's warranty. (See Lease ¶ 18). The lessor provides the service of reviewing the lessee's choice of insurance carrier and either accepting or rejecting the carrier. (Id. ¶ 13). Further, in the event that the vehicle is lost or stolen, the lessor will collect the insurance proceeds and apply them to any money the lessee may owe. (Id. ¶ 22).

Also, the lessor offers the lessee the option of purchasing the vehicle at the end of the lease. (Id. at ¶ 15). Although these services may be incidental to any automobile lease, they are no different than the incidental services provided by a landlord to a tenant pursuant to a real estate lease.

The Court finds that plaintiffs have standing to challenge the alleged violations under the Consumer Fraud Act. Any alleged violations which the Court has found state a cause of action under the CLA also state a cause of action under the Consumer Fraud Act.

VII. Count V

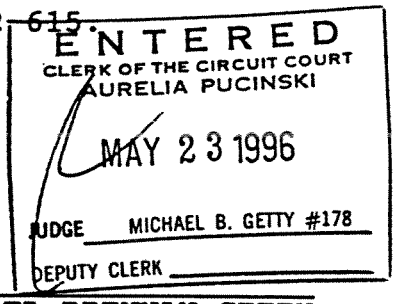
In Count V, plaintiffs again incorporate Counts I, II and III and allege that defendants violated the Uniform Deceptive Trade Practices Act ("DTPA"), 815 ILCS 510/2(12), by creating a likelihood of confusion or of misunderstanding. Defendants contend that the DTPA was not designed as a consumer protection statute. Further, defendants contend that because the conduct challenged by plaintiffs is specifically authorized by the CLA, the plaintiffs cannot challenge these actions under the DTPA.

The DTPA "was enacted to prohibit unfair competition and was not intended to be a consumer protection statute." Chabraja v. Avis Rent A Car System, 192 Ill. App. 3d 1074, 1079, 549 N.E.2d 872, 876 (1st Dist. 1989). The DPTA was meant to prevent "deceptive conduct constituting unreasonable interference with another's promotion and conduct of business." Id.

Plaintiff is attempting to use the DTPA as a consumer protection statute. There are no allegations in the Complaint of

unreasonable interference with another's promotion and conduct of business.

Accordingly, the Court grants defendants motion to dismiss Count V with prejudice pursuant to 735 ILCS 5/2-615.



ENTERED:

MICHAEL BRENNAN GETTY
CIRCUIT JUDGE

DATED: MAY 23, 1996