

52,502

7
11

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Eastern District of Kentucky
FILED

SEP 29 1999

AT FRANKFORT
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT
PLAINTIFFS,

7-55

CIVIL ACTION NO. 98-268

BEVERLY BURDEN, ET AL.,

V. MEMORANDUM OPINION AND ORDER

LARRY K. YORK, ET AL.,

DEFENDANTS.

* * * * *

This matter is before the Court on Plaintiffs' motion for partial summary judgment [Record No. 591]. Defendants have responded [Record No. 608] to which the plaintiffs have replied [Record No. 623]. This matter has been fully briefed and is now ripe for decision.

FACTUAL BACKGROUND

Plaintiffs are members of a class challenging what they allege to be the unlawful, deceptive, and extortionate lending and collection practices of the defendants. Plaintiffs claim that the defendants are engaging in illegal and fraudulent conduct by offering to loan money to consumers in exchange for a written document in the form of a personal check. Another type of transaction known as a "roll over" or "deferral" transaction, existed when a plaintiff who had written a future dated check was unable to cover the amount for which the check was written. At that point a transaction occurred whereupon

10/11

the cashing of said check would be deferred a few more days, costing the plaintiff an additional amount. The businesses at which these activities allegedly took place are located in the following cities in Kentucky: Hazard, Harlan, London, Mt. Sterling, Whitesburg, Corbin, and Jackson.

The plaintiffs allege that the activities in which the defendants engaged were not check cashing services, but rather loans at exorbitant rates, much greater than permitted by law. Their complaint alleges violations of several federal and state statutes. Plaintiffs' motion for partial summary judgment focuses only on violations of the Kentucky Interest and Usury Statutes, K.R.S. 360.010 et seq., the Kentucky Consumer Loan Act, K.R.S. 288.410 et seq., the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (hereinafter "RICO"), and the Kentucky Consumer Protection Act, K.R.S. 367.170 et seq.

ANALYSIS

I. Applicable Standard

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any

material fact and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party, or parties in this case, "cannot rest [on their] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997).

II. Plaintiffs' claims

A. Count III - Kentucky Usury Statutes

Count III of the amended complaint alleges, among other things, that the defendants have charged and collected exorbitant and usurious interest for the use of money, all in violation of K.R.S. 360.010 et seq. Said usury statutes provide that the legal rate of interest be no more than eight percent per annum. Plaintiffs allege that the interest rate charged by the defendants was at times, as great as 520 percent.¹

¹ For every one hundred dollars transacted with the defendants, Plaintiffs allege that at least twenty dollars in interest was charged.

This Court has previously determined that the check cashing transactions involved in the instant action are not service fees, but rather interest bearing loans. See *Hamilton v. York*, 987 F.Supp. 953, 956 (E.D. Ky. 1997). It can be inferred that the Kentucky Supreme Court came to similar conclusions in its certification opinion of certain issues affecting this case, as said court held that deferred deposit businesses, such as those operated by the defendants, are not exempt from Kentucky usury laws. See *White v. Check Holders, Inc.*, 996 S.W.2d 496, 500 (Ky. 1999).

In applying K.R.S. 360.020 to the facts of this case, the defendants have been knowingly "charging a rate of interest greater than is allowed by K.R.S. 360.010," and thus the entire interest on Plaintiffs' outstanding loans must be deemed forfeited. K.R.S. 360.020. Summary judgment on Count III of the amended complaint is thus proper.

B. Count IV - Consumer Loans Act

Because the defendants' businesses involve short term loans under \$15,000, Kentucky Chapter 288, Kentucky's Consumer Loan Act, is applicable to the case at bar. This finding is supported by *White v. Check Holders, Inc.*, which held that deferred transaction deposit businesses are subject to

excessive interest statutes. *White*, 996 S.W.2d at 500. Said chapter states that usurious lending practices which charge rates in excess of what is permitted under Kentucky law violate public policy. See K.R.S. 288.620. Because the defendants have charged up to 520 percent in interest on deferred deposit transactions, they are subject to any penalties set forth under the Kentucky Consumer Loan Act. Said penalties provide that the defendants "shall have no right to collect any principal, charges or recompense whatsoever" and all contracts entered into by the plaintiffs are voided. K.R.S. 288.991(1).

Additionally, K.R.S. 288.420 states that all individuals engaging in the business of making loans in the amount of \$15,000 or less must obtain a license. Licensing fees and annual reports are also statutory requirements for said businesses. See K.R.S. 288.440; K.R.S. 288.590. Defendants are in violation of several provisions of Kentucky Chapter 288 as they have never complied with its statutory requirements. Thus, K.R.S. 288.991 also subjects the defendants to any fines levied by the commissioner of financial institutions.

For the foregoing reasons, Plaintiffs are awarded summary judgment on Count IV of the amended complaint.

C. Count V - 18 U.S.C. § 1962(c)

Plaintiffs argue that summary judgment is appropriate on § 1962(c) of their RICO claim due to the participation of Defendants Larry York, Harry Watts, Jr., and Peyton L. Mitchell, Jr. in the collection of unlawful debt. Several requirements must be met in order for this RICO violation to exist. First, there must be an enterprise. An enterprise is defined as "any individual, partnership, corporation, association or other legal entity." 18 U.S.C. § 1961(4). The facts of this case are indisputable that an enterprise exists among the defendants as each check exchange is a legal entity owned and operated for a particular business purpose.

The element of participation admitted by each of the individuals named above includes the following: conducting the affairs of the check exchanges by setting/agreeing upon the policies and collection practices, setting/agreeing upon the rates to be charged, disseminating standard form instructions as to how the businesses would be run, or selecting the computer operations in each of the businesses.

There are also two requirements for an "unlawful debt" under RICO. First, the debt must be unenforceable because of usury. See 18 U.S.C. § 1961(6). Second, the rate must be at

least twice that which is enforceable. See *id.* The rates set forth by the defendants violate K.R.S. 360.010, an interest and usury law which provides that the legal rate of interest on loans should be no greater than eight percent per annum. The rates charged by the defendants which at times amounted to 520 percent, clearly exceed the lawful rate.

Plaintiffs are entitled to summary judgment on Count V as it pertains to 18 U.S.C. § 1962(c). Plaintiffs may recover "threefold the damages" sustained, as well as the costs and fees associated with the prosecution of this action. 18 U.S.C. § 1964(c). At this time all other RICO claims contain genuine issues of material fact, thus precluding summary judgment.

D. Count VI - Kentucky Consumer Protection Act

K.R.S. 367.170 makes it unlawful for any legal entity to use "[u]nfair, false, misleading, or deceptive acts or practices" in its trade or commerce. The plaintiffs list several instances in which they believe the defendants violated the Kentucky Consumer Protection Act. Plaintiffs point to the fact that the defendants operated under the guise of a check cashing service when in fact customers were entering into loan transactions with exorbitant interest

rates. Plaintiffs also note that the defendants used as part of their collection efforts, the Kentucky bad check law, or theft by deception law, found in K.R.S. 514.040. Because the plaintiffs were not actually tendering checks to the defendants, they argue that use of the bad check law to coerce payment is misleading and deceptive.

In an attempt to dispel Plaintiffs' arguments, the defendants state that the plaintiffs either knew or failed to care whether or not the item they tendered was a check. Defendants state that the plaintiffs were only concerned with receiving the money they needed. Defendants also argue that because the Kentucky General Assembly specifically prohibited prosecution of Defendants' customers under the bad check law in its 1998 legislation, that it was unclear whether prior to 1998, such prosecutions were lawful. If it was clear that such prosecutions could not take place, the defendants argue that there would have been no need for the state legislature to pass the 1998 amendment. For these reasons, the defendants urge the Court to deny summary judgment under the Kentucky Consumer Protection Act.

While Defendants' argument regarding pre-1998 bad check law is somewhat persuasive, the Kentucky Consumer Protection

Act was violated nonetheless, as the defendants were not merely cashing the plaintiffs' checks, but were making short term loans at a usurious interest rate.² See *Hamilton*, 987 F.Supp. at 956. The Court finds that "disguis[ing] [a] consumer loan business as a check cashing operation [and] fail[ing] to disclose interest rates and finance charges" is sufficient to violate K.R.S. 367.170 of the Kentucky Consumer Protection Act. *Id.* at 958. Hence, an award of summary judgment to the plaintiffs on Count VI of their complaint is proper. K.R.S. 367.220 and K.R.S. 367.387 entitle Plaintiffs up to treble their actual damages, as well as the costs and attorney fees associated with the prosecution of this action.

It has been established by this Court in *Carlene Collins v. Donald Lawson, et al.*, Pikeville Civil Action No. 98-105, and *Marsha Estridge v. Donald Lawson, et al.*, Pikeville Civil Action No. 98-167, that damages are to be calculated only as to the difference in the amount a plaintiff paid to the defendants and the amount a plaintiff received from same. For

² The Court is not stating that prior to the 1998 amendment, the defendants were free to use Kentucky's bad check law as a collecting practice. Because the Kentucky Consumer Protection Act has been violated on other grounds, it is unnecessary for the Court to make a determination on the legality of this collection practice prior to 1998.

example, if a plaintiff paid \$120 to the defendants and received in exchange \$100, the amount of actual damages is \$20, as the plaintiff actually received and made use of \$100. All damages calculated by the plaintiffs must follow this formula.

Accordingly,

IT IS ORDERED:

(1) That Plaintiffs' motion for partial summary judgment on Counts III, IV, 18 U.S.C. § 1962(c) of V, and VI of the amended complaint be, and the same hereby is, **GRANTED**;

(2) That Plaintiffs shall prepare and submit to the Court, a proposed judgment including all calculated damages, costs, and attorney fees to which they are entitled in this Memorandum Opinion and Order;

(3) That the defendants shall have fifteen days in which to file objections to same, upon which the plaintiffs shall file a reply within ten days.

This is the 24th day of September, 1999.

Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: SEP 30 1999

10

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON 9-30-99

LESLIE G. WHITMER, CLERK

BY: *maurice beverton* D.C.