

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) **Chapter 11**
)
Conseco Finance Corp.,¹)
)
Debtor.) **Case No. 02 B49675**
) **Honorable Carol A. Doyle**
) **(Jointly Administered)**
) **Hearing Date: October 12, 2005**

**CFC ESTATE’S MEMORANDUM OF LAW SUPPORTING ITS MOTION FOR
SUMMARY JUDGMENT DISALLOWING CLAIM NO. 49676-0282**

The Calvary Claim should be disallowed in its entirety. It is a matter of well-established North Carolina law that Calvary Mobile Homes, Inc. (“Calvary”) cannot prevail on either of the two remaining bases for its Claim based upon the facts as Calvary has adduced them - - even when those facts are construed in the light most favorable to Calvary. *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231, 234 (7th Cir. 1995) (citation omitted) (summary judgment motion standard); *Caldwell v. Deese*, 218 S.E.2d 379, 381 (1975) (same under North Carolina law); *Johnson v. News and Observer Pub. Co.*, 604 S.E.2d 344, 346 (N.C. App., 2004) (citing N. C. R. Civ. P. 56(c); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). Moreover, Calvary cannot prevail on either of these two remaining theories regardless of what additional facts may be adduced by further discovery. *U.S. ex rel. Small Bus. Admin. v. Light*, 766 F.2d 394, 397-98 (8th Cir. 1985) (No delay permitted under Fed.R.Bankr.P. 56(f) for discovery of evidence that would be inadmissible under the parol evidence rule); *Davis v. G.N. Mort. Corp.*, 396 F.3d 869, 886-87 (7th Cir. 2005) (denying Rule 56(f) motion for additional discovery when the contract was unambiguous on its face and additional evidence was not admissible under the parol evidence

¹ The post consummation estate for Conseco Finance Corp. (the “CFC Estate”) is the liquidating trust that holds the assets of the Finance Company Debtors in trust for distribution to creditors.

rule); *see also Kelley v. Fed. Ins. Co., et al. (In re HA 2003, Inc.)*, 310 B.R. 710, 720 (Bankr. N.D. Ill. 2004) (citing *U.S. v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1153 (7th Cir. 1985)) (“a party ... may not use Rule 56(f) to gain a continuance where he has made only vague assertions that further discovery would develop genuine issues of material fact”); *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996); (“[a] trial court [may] den[y] ... a motion for further discovery under Rule 56(f) ... if ‘there is no reason to believe that it [(i.e., such further discovery)] will lead to the denial of a pending motion for summary judgment.’”); *see also Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 458-59 (3rd Cir. 2003) (same); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass’n*, 142 F.3d 26, 45 (1st Cir. 1998) (same); *Powers v. McGuigan*, 769 F.2d 72, 76 (2nd Cir. 1985) (same); *Jones v. City and County of Denver, Colo.*, 854 F.2d 1206, 1211 (10th Cir. 1988) (same).

First, it is a matter of well-established North Carolina law that Calvary cannot prevail on its breach of contract theory. To the extent that there was any breach of contract by CFSC (which there was not), Calvary waived that alleged breach, not only by operation of an explicit term of the Amended Finance Agreement (and Calvary’s failure to comply therewith), but also by continuing to accept performance from CFSC without taking steps to rectify what it perceived to be the alleged breach. Second, as a matter of applicable North Carolina law, Calvary cannot prevail on the second basis for its Claim, unfair or deceptive trade practices, because, insofar as that theory applies to breach of contract matters, there must have been a breach of contract - - which, of course, there was not.

The facts are undisputed:

First, Calvary was a sophisticated corporate business enterprise that, in 1998, entered into a written contract, the Amended Finance Agreement (as defined below), with Conseco

Finance Services Corporation (“CFSC”). *Statement of Undisputed Facts* (“SUF”), at ¶¶ 3-4. The Amended Finance Agreement unequivocally and unambiguously provided that, if Calvary failed to object to any potential dispute contained in a billing statement from CFSC within seven days of having received that statement, it waived any objections thereto and further waived any and all claims arising therefrom. SUF at ¶ 10; Amended Finance Agreement at 1. Moreover, the Amended Finance Agreement explicitly provided that all such waivers became *express provisions* of the Amended Finance Agreement. *Id.*

Second, Calvary received approximately 40 monthly billing statements from CFSC. SUF at ¶ 9; Complaint at ¶ 13; Affidavit of E. Glassman. The disputed billing practices at issue in the Calvary Complaint were contained in those monthly statements. SUF at ¶ 9; Complaint at ¶ 13. By its own admission, Calvary did not object at any time over a nearly four-year period to any of the monthly billing statements or to any of the billing practices contained therein. SUF at ¶ 16; Adversary Proceeding Complaint at ¶ 15.

North Carolina law, as applied to these undisputed facts, is clear. Calvary intentionally and knowingly waived any breach of the Amended Finance Agreement by failing to have objected to any of the 40-odd billing statements that it received - - both as a matter of contract and as a matter of North Carolina common law.² No amount of additional evidence can change that result. The CFC Estate therefore submits that the Court should grant summary judgment in favor of the CFC Estate, thereby disallowing the remaining portions of Calvary’s Claim No. 49676-0282 in their entirety.

² To be clear, the CFC Estate does not admit that any of the allegations asserted by Calvary relating to wrongful conduct are true or accurate. Instead, the CFC Estate asserts that solely for purposes of this Motion, the veracity of Calvary’s remaining allegations are irrelevant for the determination of whether its claims have been legally waived.

JURISDICTION AND PROCEDURE

1. The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois.

2. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (I) and (O).

BACKGROUND

I. The Amended Finance Agreement.

3. On or about November 10, 1997, CFSC and Calvary entered into an Inventory Financing Agreement (the “Finance Agreement”). The parties subsequently amended the Finance Agreement by entering into: (i) a Stock Addendum to Inventory Financing and Security Agreement (the “Stock Addendum”); (ii) a Pre-Sold Addendum to Inventory Financing and Security Agreement; (iii) a First Addendum to Inventory Finance and Security Agreement; and (iv) a Reserve Account Agreement (the amendments, collectively with the Finance Agreement, the “Amended Finance Agreement”).³

4. Pursuant to the Amended Finance Agreement, which was a “floorplan - financing” arrangement, CFSC agreed to pay various mobile home manufacturers on behalf of Calvary for Calvary’s purchase of mobile homes inventory for consumer resales. *Calvary Mobile Homes, Inc.’s Response to Conseco, Inc. et al’s Second Objection to Claims* (“Calvary’s Response”), at ¶ 1. Pursuant to the Amended Finance Agreement, CFSC was generally not obligated to advance any funds directly to Calvary. *Id.* at fn 2. Instead, CFSC received invoices from various manufacturers from which Calvary was purchasing its inventory. *Id.* CFSC directed a disbursement to the relevant manufacturer in satisfaction of each such invoice. *Id.*

³ Copies of the relevant documents are attached as exhibits to the Adversary Proceeding Complaint (as defined herein), a copy of which is attached as Exhibit 1.

5. During this period, Calvary received monthly statements from CFSC stating all interest charged on each separate loan. See Exhibit A to Affidavit of Eric Glassman, attached hereto as Exhibit 2. The Inventory Financing and Security Agreement states in relevant part that:

If Dealer does not agree with the schedule(s) or billing statement(s), it must notify Green Tree in writing of any objections within seven (7) days from the date of the schedule(s) or billing statement(s) and ***any waiver of objections*** or claims thereto and such schedule(s) and billing statement(s) ***shall become part of this agreement***.

Amended Finance Agreement at 1 (emphasis added).

II. Calvary's Chapter 11 Case.

6. On July 30, 2001, Calvary filed a voluntary chapter 11 petition. Calvary Response at ¶ 2. On June 10, 2002, Calvary commenced an adversary proceeding against CFSC seeking to recover damages from CFSC (the complaint being the "Adversary Proceeding Complaint", a copy of which is attached hereto as Exhibit 1). The Adversary Proceeding Complaint alleged four causes of action. In particular, Calvary alleged that CFSC's practice of charging Calvary interest from the date of manufacturers' invoices: (i) breached the express terms of the Amended Finance Agreement; (ii) violated N.C.G.S. § 24-1 *et seq.*, which governs usurious loans; (iii) constituted an unfair and deceptive trade practice N.C.G.S. §75-1 *et seq.*; and (vi) unjustly enriched CFSC. See Adversary Proceeding Complaint.

7. In the Adversary Proceeding Complaint, Calvary alleged the following facts in support of its claims:

- Calvary entered into an Inventory Financing and Security Agreement with CFSC on November 10, 1997. Pursuant to the terms of the agreement, CFSC agreed to advance funds for the acquisition of Calvary's inventory. Adversary Proceeding Complaint at ¶ 6
- Pursuant to the agreement, Calvary agreed to pay CFSC finance and servicing charges "according to and upon receipt of the schedules and billing statements which [CFSC] delivers to [Calvary] and with the time specified by [CFSC]." Adversary Proceeding Complaint at ¶ 7

- On February 2, 1998, the parties entered into the Stock Addendum amending the finance agreement. The amendment provided that Calvary agreed to pay CFSC interest “from the date of receipt by [CFSC] of the Invoice.” Adversary Proceeding Complaint at ¶ 8
- To support its allegations in of the Adversary Proceeding Complaint at Calvary attached a copy of one of the monthly billing statements Calvary received from CFSC as an example of similar statements it received on a monthly basis. Exhibit A to Affidavit of E. Glassman.⁴
- Calvary admitted that it “did not learn of the practices of [CFSC] ... until some time after [Calvary] filed its Chapter 11 Petition.” Adversary Proceeding Complaint at ¶ 15.

III. The CFC Chapter 11 Cases and the Calvary Claim.

8. On December 17, 2002, these chapter 11 cases commenced. Calvary timely filed the Claim, which alleges damages as set forth in the Adversary Proceeding Complaint. On May 12, 2003, CFC objected to the Claim based upon a lack of documentation. *Finance Company Debtors’ First Omnibus Objection to Claims Asserted Against the Finance Company Debtors* (docket 3182). On May 28, 2003, CFC filed a subsequent objection to the claim on the basis that the Debtors had no liability for the damages asserted therein. *Finance Company Debtors’ Second Omnibus Objection to Claims Asserted Against the Finance Company Debtors* (docket 3257).

9. On August 3, 2005, this Court entered an order disallowing the Calvary Claim to the extent that it sought relief pursuant to North Carolina usury law and/or under a theory of unjust enrichment. On August 11, 2005, that Order was appealed. The Motion for Summary Judgment seeks to have Calvary’s Claim disallowed as a matter of law for: (i) breach of contract; and (ii) unfair and deceptive trade practices.

⁴ See also Calvary’s Response at ¶ 8, alleging facts supporting contention that CFSC would charge interest from date of manufacturer’s invoice.

THIS MATTER IS RIPE FOR SUMMARY JUDGMENT

10. The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *Farries v. Stanadyne/Chicago Div.*, 832 F.2d 374, 378 (7th Cir. 1987) (quoting *Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis*, 806 F.2d 146, 149 (7th Cir. 1986)). Summary judgment is encouraged as a means to dispose of factually unsupported claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

11. The burden is on the moving party to meet the statutory criteria set forth in Fed.R.Civ.P. 56, which applies to adversary proceedings pursuant to Fed.R.Bankr.P. 7056. *See also Anderson*, 477 U.S. at 248; *Matsushita*, 475 U.S. at 585-86; *Celotex*, 477 U.S. at 322. As a threshold matter, there are no disputed facts in this matter, thereby satisfying Fed.R.Civ.P. 56(c).

12. Moreover, the Calvary Claim is particularly susceptible to summary judgment because the Amended Finance Agreement contains an express and unambiguous provision governing waiver of breach. *In re Franklin Arms Court, L.P.*, 2003 WL 1883472, at *3 (Bankr. N.D. Ill. April 10, 2003) (“[c]onstruing the language of a contract is a question of law appropriate for summary judgment”); *In re Café Partners/Washington 1983*, 90 B.R. 1, 8 (Bankr. D. D.C. 1988) (“A contract is unambiguous ‘when the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends’”). Indeed, under applicable North Carolina law, this Court need only consider the Amended Finance Agreement for purposes of determining that Calvary has waived any and all claims for breach thereof. *Bicycle Transit Authority v. Bell*, 333 S.E.2d 299, 304 (N.C. 1985) (citations omitted).

13. In other words, Calvary cannot adduce parol evidence to support its argument. *Id.* Calvary thus cannot argue that, pursuant to Fed.R.Bankr.P. 56(f), it is entitled to any further discovery pending the outcome of this motion for summary judgment. *S.B.A. v. Light*, 766 F.2d at 397-98; *Davis v. G.N. Mort. Co.*, 396 F.3d at 886-87; *Kelley*, 310 B.R. at 820. This Court should therefore resolve the Calvary Claim on this motion for summary judgment as a matter of law. *Franklin Arms*, 2003 WL 1883472, at *3; *see also Hicks v. Insurance Co.*, 39 S.E.2d 914, 918 (1946) (“Waiver is a mixed question of law and fact. When the facts are determined, it becomes a question of law”).

14. Moreover, even if Calvary had not expressly waived its breach of contract claims by the terms of the Amended Finance Agreement, it has nonetheless waived them by continuing to accept performance - - which is also a matter of undisputed fact. Adversary Proceeding Complaint at ¶ 15. Deciding the waiver issue on these grounds is likewise a matter of law, and should be decided as a matter of summary judgment. *Hicks v. Insurance Co.*, 39 S.E.2d at 918.

ARGUMENT

I. The Undisputed Facts Establish That, as a Matter of Law, Calvary Waived Any Claim It May Have Had for Breach of Contract.

A. Calvary Has Waived any Breach of Contract Claim by the Express Terms of the Amended Finance Agreement.

15. It is a matter of uncontroverted North Carolina contract law that, “[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.” *Buettel v. Lumber Mut. Ins. Co.*, 518 S.E.2d 205, 209 (1999). Moreover, “when a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law.” *Bicycle Transit*, 333 S.E.2d at 304. In addition:

it is a well-settled principle of legal construction that it must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean.

Hagler v. Hagler, 354 S.E.2d 228, 234 (N.C. 1987).

16. The Amended Finance Agreement provided, in relevant part:

If Dealer does not agree with the schedule(s) or billing statement(s), it must notify Green Tree in writing of any objections within seven (7) days from the date of the schedule(s) or billing statement(s) and ***any waiver of objections*** or claims thereto and such schedule(s) and billing statement(s) ***shall become part of this agreement***.

Applying *Hagler* to these facts, it must be presumed from the four corners of the Amended Finance Agreement that:

- (i) Calvary and CFSC intended that any failure by Calvary to notify CFSC of any objection to any of CFSC's billing statements within seven days of having received each such billing statement constituted Calvary's waiver of any such objection; and
- (ii) Calvary and CFSC intended that each such waiver was to become part of the Amended Finance Agreement, which was the contract governing their relationship.

17. The plain language of the Amended Finance Agreement cannot be construed any other way. *See Hagler*, 354 S.E. 2d at 234; Inventory Financing and Security Agreement, at ¶ 1; *see also Bueltel*, 518 F.2d. at 209; *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998) ("When interpreting a contract, we must determine the meaning of the provisions from the language, and we will not arrive at a construction of the contract which runs contrary to the plain and ordinary meaning of the language used"). Moreover, the parol evidence rule precludes Calvary from citing to any extrinsic evidence to contradict this inexorable conclusion. *Bicycle Transit*, 333 S.E. 2d at 304. What is more, Calvary cannot argue that it was ignorant of the waiver provision or the effect thereof on its right to object to the financing statements. *Upton*

v. Tribilcock, 91 U.S. 45, 50 (1875); *cf* Adversary Proceeding Complaint at ¶ 15 (admission by Calvary that it failed to object to any of the monthly financing statements; claim of ignorance of purported problems with financing statements).

18. In any case, the waiver provision operated by its terms some forty times during the life of the Amended Finance Agreement. Indeed, it is a matter of undisputed fact that CFSC sent Calvary approximately 40 monthly statements until the Amended Finance Agreement terminated. *See* Glassman Affidavit at 7. It is also a matter of undisputed fact that Calvary did not object to any of the billing practices at issue until 2002, when it filed the Adversary Proceeding Complaint, which was long after Calvary received the billing statements at issue. Adversary Proceeding Complaint at ¶ 15. Given these undisputed facts, it is a matter of well-established law that Calvary expressly relinquished its right to any breach of contract claim arising from any of the billing statements by operation of the Amended Finance Agreement. *In re Kids Creek Partners, L.P.*, 212 B.R. 898, 933 (Bankr. N.D. Ill. 1997) (citations omitted) (“Waiver is the intentional relinquishment of a known right”, which “may be made either by express agreement or implied from the party’s conduct”). The Court should therefore disallow the Calvary Claim for breach of contract.

B. Calvary Has Waived any Potential Breach of Claim by Continuing to Accept Performance from CFSC.

19. Calvary has also waived any potential claim for breach of contract as a matter of North Carolina common law by having continued to accept CFSC’s continued performance under the terms of the Amended Finance Agreement. *See, e.g., Wheeler v. Wheeler*, 263 S.E.2d 763, 765 (N.C. 1980) (“continued performance or continued acceptance of performance by an innocent party after partial breach of a contract . . . constitutes a valid waiver of a contractual provision and does not need to be supported by additional consideration or estoppel to effect a

binding agreement”). In the *Wheeler* case, the North Carolina Supreme Court set forth the conditions for a valid waiver of breach:

- (1) The waiving party is the innocent, or non-breaching party, and
- (2) The breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration. Generally this means either that the contract involved is a continuing one, such as the requirements contract in *Towery v. Carolina Dairy, supra*, or the exclusive dealership contract in *Industrial Lithographic v. Mills, supra*, or it means that the breach of the contractual provision did not go to the totality of the contract as the defective delivery in *Danville Manufacturing v. Gallivan* was not a total failure of consideration, and
- (3) The innocent party is aware of the breach, and
- (4) The innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

Id. at 766-67 (citations omitted).

20. The facts in this matter, as adduced by Calvary itself, show that: (1) Calvary was the waiving party; (2) the breach (if any) did not totally repudiate the Amended Finance Agreement; (3) Calvary was aware of the breach (based on its regular monthly receipt of approximately 40 billing statements that showed the periods during which interest was charged); and (4) Calvary continued to perform under the Amended Finance Agreement and continued to accept CFSC’s performance under the Agreement, including the manner in which CFSC charged interest, which was set forth in the billing statements. Adversary Proceeding Complaint at ¶ 15. Thus, even if CFSC did breach the Amended Finance Agreement (which it did not) by charging interest from the Invoice Date instead of from some other date, Calvary has long since waived any right to claim any damages from any such alleged breach. *Wheeler*, 263 S.E.2d 765.

II. The Undisputed Facts Establish, as a Matter Of Law, That Calvary Cannot Support a Claim for Unfair or Deceptive Trade Practices.

21. Based upon the undisputed facts of this matter, Calvary cannot, as a matter of law, claim damages based upon unfair or deceptive trade practices. Such a claim requires Calvary establish that: (1) CFSC breached the Amended Finance Agreement; and (2) there were substantial aggravating circumstances. N.C. Gen. Stat. § 75-1.1 (2005); *Horack v. Southern Real Estate Co. of Charlotte, Inc.*, 563 S.E.2d 47, 51 (N.C. App. 2002). The facts adduced by Calvary do not support either requirement.

22. Under North Carolina law, it is well recognized “that actions for unfair or deceptive trade practices are distinct from actions for breach of contract.” *Horack*, 563 S.E.2d at 51 (citing *Lapierre v. Samco Development Corp.*, 406 S.E.2d 646, 650 (N.C. App. 1991)). Thus, “[a] mere breach of contract does not constitute an unfair or deceptive trade practice.” *Horack*, 563 S.E.2d at 51 (citing *Mosley & Mosley Builders v. Landin Ltd.*, 97 389 S.E.2d 576, 580 (N.C. App. 1990) (citation omitted)). Indeed, “[a] plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages.” *Horack*, 563 S.E.2d at 51 (citing *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citation omitted)); *see also Branch Banking and Tr. Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. App. 1992).

23. Calvary has asserted a claim for unfair and deceptive trade practices based solely upon an alleged breach of the Amended Finance Agreement. For the reasons set forth above, the Amended Finance Agreement was not breached, as a matter of law. Accordingly, it is a matter of well-established North Carolina that a claim for unfair and deceptive trade practices based upon a breach cannot exist without there first having been such a breach of contract. *Horack*, 563 S.E.2d at 51.

24. Moreover, the record is bereft of any mention of any substantially aggravating or egregious circumstances because:

conduct carried out pursuant to contractual relations rarely violates the UTPA. In fact, even an intentional breach of contract is normally insufficient to contravene the UTPA; a breach of contract must be particularly egregious to permit recovery under North Carolina's UTPA.

S. Atlantic Ltd. P'ship of Tenn., LP., et al., v. Riese et al., 284 F.3d 518, 536 (4th Cir. 2002) (citations omitted) (limited partners' actions constituted "egregious or aggravating circumstances" for purposes of N.C.G.S. § 75-1.1 when those partners misled the partnership concerning the status and quality of construction and the expected date of completion, sought to mislead partnership by obtaining funds to pay subcontractors and suppliers and then not paying them, and wrongfully concealed monies paid to a company owned by one of their employees, as each of these acts had the capacity to deceive). Thus, even if Calvary were to prove that CFSC had improperly charged interest, there was no capacity to deceive since the billing practices were clearly set forth on the billing statements, including the one that Calvary attached to the Adversary Proceeding Complaint.

25. Therefore, the CFC Estate respectfully submits that the Court must grant summary judgment in favor of the CFC Estate, finding that the Claim must be disallowed to the extent that it asserts damages under the North Carolina unfair and deceptive trade practices statute, N.C.G.S. § 75-1.1 (2005).

CONCLUSION

In sum, the undisputed facts establish that, as a matter of law, Calvary cannot establish a claim for breach of the Amended Finance Agreement or a claim for unfair or deceptive trade practices. Therefore, the CFC Estate respectfully requests that this Court grant its request for summary judgment disallowing the remaining bases of Calvary's Claim and for any and all other relief that this Court finds just and necessary.

Dated: Chicago, Illinois
September 12, 2005

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