IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

NATHANIEL G. MARKHAM and WILLODEEN K. MARKHAM,

Plaintiffs,

v.

WILLIAM CURTIS GIBSON III, DOUBLE CC ENTERPRISE, INC., ACCREDITED CAPITAL CORPORATION and ACCREDITED CAPITAL COMPANY,

Defendants.

Civil No. 97-01651 SPK

ORDER DENYING DEFENDANTS' MOTION TO DISMISS
AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Nathaniel G. Markham and Willodeen K. Markham ("Plaintiffs") filed a complaint on December 30, 1997 for alleged violations of the "Truth in Lending Act," 15 U.S.C. § 1601 ("TILA") against Defendants William Curtis Gibson III ("Defendant Gibson"), Double CC Enterprise, Inc., Accredited Capital Corporation and Accredited Capital Company ("Defendant Companies"). Plaintiffs stated in their complaint that on January 3, 1997, February 3, 1997, and April 8, 1997, Defendants extended credit to Plaintiffs under an "auto pawn" agreement. Defendants allegedly charged Plaintiffs more than 20% per month for the transactions. The finance charge was $316 per month and the principal was $1580. Plaintiffs stated that they were also

charged for insurance. The loan was secured by the vehicle which had a value of $5000. Defendants later repossessed Plaintiffs' vehicle. Plaintiffs claim that they notified Defendants that the loan and repossession were in violation of the law, but Defendants have not returned the car or its fair market value.

Plaintiffs argue that Defendants violated TILA by failing to properly disclose, or by disclosing in a misleading and confusing manner: the annual percentage rate, the finance charge, the amount financed, the total of payments and payment schedule and the security interest. Plaintiffs also charge that Defendants' actions constitute unfair and deceptive trade practices in violation of Haw. Rev. Stat. Ch. 480. Plaintiffs ask for actual and statutory damages, and exemplary damages for the TILA violations. Plaintiffs also ask for three times the injury to their property, but not less than $1000, pursuant to the Hawaii Revised Statute, and that the three loans be declared void.

On May 27, 1998, Defendants filed a one-page motion to dismiss pursuant to Rule 12(b) on three grounds: (1) Defendant Gibson was an employee of Defendant Double CC; (2) Defendant Double CC, a Colorado company has since dissolved; (3) AC Corporation and AC Company were tradenames of Defendant Double CC. Defendants also state that, as of October 27, 1997, Defendant Double CC has not transacted any business within the state of Hawaii. Defendants' attorney, Melodie Aduja, filed an affidavit which included as an exhibit, a copy of the Articles of

Dissolution of Double CC Enterprise, dated October 27, 1997. The court views this motion as a motion for summary judgment. Fed. Rule Civ. Proc. 12(c).

On June 18, 1998, Plaintiffs filed a counter-motion for summary judgment. In that motion, Plaintiffs assert that Defendant Gibson was the owner of the trade names Accredited Capital Company and Accredited Capital Corporation. Exhibits provided by Plaintiffs show that Defendant Gibson signed as the owner of Accredited Capital Corporation on his general excise tax licenses. The exhibits also include the disclosure statements of the three transactions entered into by the parties. Those disclosure statements confirm that the finance charge was 20% per month. Defendants also required Plaintiffs to purchase additional insurance through a company designated by Defendants, although Plaintiffs already had basic insurance. Plaintiffs state in their motion that Gibson took title to the vehicle on January 3, 1998, and took possession of the vehicle in September, 1997.

The motions came on for hearing on July 6, 1998. John Paer appeared on behalf of Plaintiffs and Melodie Aduja appeared for Defendants.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). The movant must be able to show "the absence of a material and triable issue of fact," Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the nonmoving party will bear the burden of proof at trial. Celotex, 477 U.S. at 323. But cf., Id., at 328 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. See T.W. Elec., 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Moreover, "if the

factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)) (original emphasis).

DISCUSSION

Defendants' motion to dismiss is wholly inadequate and does not provide any arguments based on the law. Because Defendants' attorney included an exhibit outside of the pleadings, the court reviews the motion as one for summary judgment. Plaintiffs refute Defendants' assertion that Gibson was only an employee of Double CC by presenting the following exhibits: (1) the three pawn transaction agreements which show the pawnbroker as Accredited Capital Company; (2) the Markhams' vehicle registration showing Accredited Capital Company as the Registered Owner; and (3) Business Licenses for the fiscal years 1995-96 and 1996-97, showing William Gibson III as owner of the pawnbroker, and second hand dealer Accredited Capital Company.

Defendants argued that Double CC was the owner of the tradenames Accredited Capital Corporation and Accredited Capital Company according to the Employment Agreement, dated December 31, 1996. Under that employment agreement, Defendants assert that Double CC assumed the tradename of Accredited Capital with the consent of Gibson. Defendants then argue that Gibson was sole proprietor of the Second Hand Dealer and Pawnbroker Business

licenses. Defendants state that Gibson's General Excise Tax license was inactive during the dates of the instant transactions and the business licenses were only used temporarily, although no evidence supports these assertions.

Additionally, the court will not consider the statements made by Defendants' attorney, Melodie Aduja in her affidavit such as, "Upon information and belief, at all relevant times, William Curtis Gibson III, was an employee of Double CC Enterprise, Inc." Ms. Aduja does not provide any documents supporting her belief. Therefore, the statement would not be admissible as required by the Rules of Evidence. On a summary judgment motion, "information and belief" declarations are legal nullities and are not competent evidence to be considered one way or another. Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc., 944 F.2d 1525, 1529, (9th Cir. 1991).

The court finds that Plaintiffs have met their evidentiary burden with respect to the issue of whether Defendant Gibson was the owner of Accredited Capital Company.

Defendants' next argument is that the complaint should be dismissed because the Defendant Companies have filed dissolution papers. Defendants have not cited to any law which indicates that the dissolution of Defendant companies would absolve Defendants from liability under either of the counts alleged by Plaintiffs.

For these reasons, the court DENIES Defendants' motion

to dismiss. The court will now address Plaintiffs' motion for summary judgment.

Plaintiffs first argue that Defendants' disclosures were in violation of TILA. TILA was enacted to "avoid the uninformed use of credit." Mourning v. Family Publications Serv. Inc., 411 U.S. 356, 377 (1973). In order to effectuate this purpose, TILA has been liberally construed in this circuit. Eby v. Reb Realty, Inc., 495 F.2d 646, 650 (9th Cir. 1974). Even technical or minor violations of TILA impose liability on the creditor. Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 704 (9th Cir. 1986).

First, Plaintiffs argue that the disclosure of the finance charge and the annual percentage rate were not more conspicuous than other required disclosures. Under Dixey v. Idaho First National Bank, 677 F.2d 749, 751 (9th Cir. 1982), the court found that boldface type in an agreement with other headings of the same type face was not conspicuous enough to comply with TILA. In this case, the disclosure statements provided as exhibits indeed have typeface in the same size and boldface style as numerous other headings. The provisions for finance charge and percentage rate would not necessarily catch the borrower's attention. The court therefore finds, as a matter of law, that the disclosures do not comply with TILA and the violation is not excusable as de minimus. 12 C.F.R. § 226.6(1).

Plaintiffs next argue that the information in the disclosure statement regarding the mandatory insurance does not

disclose the amount of the insurance charge, nor does it disclose that the insurer may be chosen by the consumer. Plaintiffs cite to Reg. Z § 226.4(d)(2) which provides that:

> Premiums for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, may be excluded from the finance charge if the following conditions are met:
>
> > (i) the insurance coverage may be obtained from a person of the consumer's choice, and this fact is disclosed.

Plaintiffs also cite to 15 U.S.C. § 1605(c) which states that:

> Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained (emphasis added).

Plaintiffs assert that neither of these provisions were met by Defendants' disclosure statement. There is no reference to insurance in the disclosures. Defendants failed to put forth evidence to the contrary, nor did they convince the court that the above-provisions do not apply. Defendants made the weak assertion that the TILA does not apply to them, but were unable to support this statement. This court holds that TILA applies to pawnbrokers. Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261 (9th Cir. 1993). For these reasons, the court grants Plaintiffs' motion and finds that the disclosures violated TILA.

Plaintiffs next argue that Defendants violated state law under Hawaii Revised statutes relating to pawnbrokers:

> No pawnbroker shall:
>
> (1) Charge or receive any pawn finance charge exceeding twenty percent per month;
>
> (2) Contract for or receive any amounts other than the pawn finance charge in connection with a pawn transaction; . . .
>
> (7) Make any charge for insurance, storage, or handling in connection with a pawn transaction.

Haw. Rev. Stat. § 445-134.13.

Under Haw. Rev. Stat. § 445-131, "Pawnbroker" is defined as "a person engaged in the business of making pawn transactions, but does not include financial institutions whose deposits are federally insured and companies that are regulated or supervised by the division of financial institutions." The Business Licenses attached as exhibits indicate that Accredited Capital Company was a pawnbroker. Furthermore, Defendants refer to themselves as auto pawnbrokers. There is no documentation that refutes Defendant companies' status as pawnbrokers. Therefore, the court finds, as a matter of law, that Defendants were in violation of Haw. Rev. Stat. § 445-134.13, subsections 2 and 7.

Finally, Plaintiffs argue that Defendants' alleged violations of the Consumer Credit Protection Act are also violations of Haw. Rev. Stat. § 480-2. Burnett, 3 F.3d at 1261. Plaintiffs argue that they are therefore entitled to treble damages due to the unfair practices which were oppressive and substantially injurious to consumers. The court agrees that

Defendants created the "likelihood of confusion" when entering into these agreements with Plaintiffs, Haw. Rev. Stat. § 480-2(a), and grants Plaintiffs' motion as to this issue.

As damages, Plaintiffs request those provided for in TILA of twice the finance charge for each transaction, $632.00 for each of the three transactions, for a total of $1896, plus loss of the car ($5000), plus insurance payments of $329. Thus damages under Count I total $7225.00. Plaintiffs also claim treble damages (of $5329.00) under Haw. Rev. Stat. § 480-2 totaling $15,987. The court grants Plaintiffs' request as to these damages.

Accordingly, the court DENIES Defendants' motion to dismiss and GRANTS Plaintiffs' motion for summary judgment. Judgment shall enter in favor of Plaintiffs in the amount of $23,212.00 plus reasonable attorneys fees and costs. Plaintiffs shall submit their application for fees and costs to the Magistrate Judge in accordance with the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, July 7, 1998.

United States District Judge
Samuel P. King