52,068

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DEBBIE A. RUTLEDGE, and all other persons similarly situated,

Plaintiffs,

v.

HAS OF GEORGIA, INC., d/b/a DIRECT RENTAL CAR SALES; CS FIRST BOSTON MORTGAGE CAPITAL CORP., d/b/a AUTOFLOW; and WORLD OMNI FINANCIAL CORP.; as Agent for CS FIRST BOSTON MORTGAGE CAPITAL CORP.

Defendants.

CIVIL ACTION

NO. CV195-106

ORDER

Plaintiff, Debbie A. Rutledge ("Rutledge"), brought the present action pursuant to the Truth-in-Lending Act ("TILA" or "the Act"), 15 U.S.C. § 1601, et seq. Currently before the Court are two motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, filed by Defendants, World Omni Financial Corp. ("World Omni") and CS First Boston Mortgage Capital Corp. ("First Boston"). For the reasons stated below, both Defendants' motions to dismiss will be DENIED.

FACTS:

In her amended complaint, filed in February, 1996, Rutledge makes several allegations against Defendants based upon TILA. As indicated below, Rutledge contends that Defendant, HAS of Georgia, Inc., d/b/a Direct Rental Car Sales ("HAS"), improperly indicated a down payment of $2,000 on her Retail Installment Contract ("contract") for the purchase of a used minivan. She also alleges that several "other charges," specifically outlined below, were included in her contract and that those charges were actually "hidden finance charges" in violation of TILA. Rutledge contends that Defendants, World Omni and First Boston, should have been aware of these violations of the Act. In addition to her enumerated substantive claims, Rutledge includes a "catch-all" provision in her amended complaint for all "other and similar hidden finance charges."[1]

On March 11, 1995, Rutledge purchased her used minivan from HAS. In purchasing the minivan, she executed the standard contract, which was on a pre-printed form prominently displaying World Omni's logo at the very top of the document. Rutledge alleges that the detailed terms of the contract violate various provisions of the TILA. Additionally, Defendants' primary arguments in support of their motions to dismiss also revolve around the minute details of the form contract. As such, a detailed description of that contract is necessary.

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[1] Rutledge also included a request for class action certification within her amended complaint. That section of the amended complaint is irrelevant to these motions to dismiss and for that reason will not be addressed.

Rutledge financed the minivan at an annual percentage rate of 19%. The total finance charges for the minivan amounted to $9,885.40. The total amount of credit provided to Rutledge, i.e., the amount financed, was $19,966.34. The total amount to be paid, after making all payments including interest, will be $29,851.74. However, the "total sales price" was computed to be $31,851.74, because it AS included a $2,000 "down payment" as part of the transaction. Rutledge denies making any down payment towards the purchase of the minivan. Given the payment schedule of 54 months, Rutledge agreed to pay under $550 per month for the vehicle.

In addition to the basic cost of the minivan, there were various "other charges" included in determining the total cost to Rutledge.[2] Among those "other charges" were Optional Credit Insurance ($603.01), an Optional Service Contract ($800), a License and/or Registration Fee ($20), a Title Fee ($19), and a Document Preparation Fee ($89.50). Although Rutledge contends that some of these other charges were unnecessarily inflated,[3] her main contention is that some of the "other charges" were, in actuality, "hidden finance charges." She claims that since

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[1] When referring to the "basic cost" of the minivan, the Court refers to the cost charged for the value of the product sold, not including finance charges, optional service charges, down payments, taxes, title fees, etc. All of the foregoing charges, when added to the basic cost for the minivan, produce a final, or "total" charge, which was apparently $31,851.74.

[2] For example, Rutledge claims that a total of $39 was charged for license, registration, and title fees. The actual cost pursuant to Georgia law is only $38. Apparently, Rutledge has not yet been reimbursed the additional $1.

"the other charges" are hidden finance charges, the actual finance charge was understated and the overall amount financed was overstated.

Rutledge, in her amended complaint, asserts that three of the "other charges" violate the TILA. First, she claims that she never made any down payment of $2,600, as clearly stated on the contract. Second, she claims that the $600 Optional Service Contract stated that it would be paid to the "company named below" when, in fact, there was no other company indicated on the contract. Finally, she claims that the $89.50 Document Preparation Fee was neither a fee nor charge permitted under the TILA, but rather was a disguise for an additional finance charge.

In addition to the above, Rutledge also purchased a Retail Purchase Contract for $298 from HAS. The Retail Purchase Contract was for the "Gold Seal" option on her used minivan. It is unclear to the Court exactly what benefit Rutledge received in exchange for her $298. She alleges that the Gold Seal option was a disguise for a hidden finance charge and, once again, created an inflated financed unpaid balance and understated finance charge.

After the contract was executed between Rutledge and HAS, the contract was nominally assigned to World Omni. The contract was then re-assigned to First Boston. Rutledge alleges that World Omni is actually the servicing agent for First Boston. She also alleges that First Boston is the undisclosed "real owner" of the contract and the undisclosed creditor of the entire transaction.

Although their arguments are considerably more detailed, Defendants' fundamental assertion is that, as mere assignees of the contract, they enjoy limited liability under the TILA for any statutory violations of that Act. Whereas creditors are held to a higher standard under TILA, Defendants assert that assignees of a contract are held to a much lower standard and, for that reason, their motions to dismiss should be granted.

In this case at bar, both Defendants have crafted colorable legal arguments supporting their contention that they are merely assignees of the contract. For the following reasons, however, the Court disagrees with Defendants and will deny both motions to dismiss.

DISCUSSION

A. Motion to Dismiss for Failure to State a Claim for Relief

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a Defendant to move to dismiss a complaint on the ground that the plaintiff has failed to state a claim upon which relief can be granted. Rule 12(b)(6) states that:

> the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b)(6).

A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of a 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true, e.g., United States v. Gaubert, 499 U.S. 315, 327, 111 S. Ct. 1267, 1276, 113 L. Ed. 2d 335, 348 (1991); Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990), and construe them in the light most favorable to the plaintiff. E.g., Sofarelli v. Pinellas County, 931 F.2d 718, 721 (11th Cir. 1991).

As Defendants correctly point out in their briefs, the Court must assume that the factual allegations of the complaint are true, but it need not accept the conclusions of law asserted by a non-movant. Applications of law are considered by the Court de novo. Leasing Serv. Corp. v. River City Constr., Inc., 743 F.2d 877, 878 (11th Cir. 1984). Pursuant to Rule 12(b)(6), the Court shall treat a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted as one for summary judgment, if matters outside the pleading are presented to and not excluded by the court. Rutledge, in her briefs opposing Defendants' motions to dismiss, has included matters outside of the pleadings. For the foregoing reasons, however, the Court need not consider those items. The Court will, therefore, treat these motions as motions to dismiss. The Court will not transform these motions into motions for summary judgment.

II. Whether Defendants are Assignees Pursuant to the TILA

A. Basic Arguments of the Parties

World Omni claims that it is not a creditor in this transaction, but rather is only an assignee of the contract. As such, World Omni claims that the TILA grants it limited liability for violations of the Act. First Boston also asserts that, as an assignee of the contract, it is held to a lower standard of liability than that of a creditor.[1] It is vital, therefore, to determine whether World Omni and First Boston are, in fact, assignees of the contract, or are creditors in this transaction. If both Defendants are assignees, then pursuant to TILA they enjoy limited liability and may only be held liable for TILA violations that appear on the face of the contract. If, however, either of the two Defendants were determined to be a creditor in this transaction, then, as a creditor, that Defendant would be fully liable for violations of the Act regardless of whether those violations were apparent on the face of the contract.

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[1] The Court recognizes that World Omni and First Boston are supporting their motions to dismiss independently, rather than consolidating their arguments. After thoroughly reading both sets of briefs filed in the case at bar, it is evident to the Court that both Defendants are actually asserting identical positions. For example, World Omni begins its argument in support of its motion by asserting that it is an assignee and not a creditor. First Boston begins its argument by claiming that the only document relevant to its liability is Rutledge's contract. (See Def.'s Reply Br. at 2). Although worded differently, these two arguments are, in essence, identical. Limited liability, as determined only by reference to the contract, presupposes that one is defined as an assignee, rather than as a creditor. First Boston's initial argument, therefore, presupposes that it is an assignee, which is identical to World Omni's initial argument.

Thus, the Court must first determine the status of each Defendant in the case at bar. In other words, it must be determined whether either Defendant is a creditor or whether either Defendant is an assignee. Depending on the status of each Defendant, the Court must then ascertain whether Rutledge has properly asserted a claim upon which relief can be granted against either Defendant, given the appropriate legal standard to which each is held pursuant to the TILA.

B. Congressional Purposes for Enacting the TILA

The TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing . . . practices." 15 U.S.C. § 1601(a). The hope of Congress was that the TILA would help enhance the stabilization of the economy and create an awareness of the cost of credit through the informed use of credit. Id. (emphasis added).

1. What Constitutes a "Creditor" For Purposes of the TILA?

Pursuant to the Act, both creditors and assignees can be held liable for TILA violations. A creditor is

> a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of

> indebtedness or, if there is no such evidence of indebtedness, by agreement . . . .

15 U.S.C. §1602(f).[3]

The regulations implementing the Act define creditor in a similar manner, but use slightly different language. Pursuant to the regulations, a creditor is

> A person (A) who regularly extends consumer credit . . . that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and (B) to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.

12 C.F.R. § 226.2(a)(17). The regulation further defines "consumer credit" as credit offered or extended to a consumer primarily for personal, family, or household purposes. 12 C.F.R. § 226.2(a)(12).

D. What constitutes an Assignee for Purposes of the TILA?

Although neither the Act nor its implementing regulations define assignee, at least one court within the Eleventh Circuit has defined that term. An assignee, for TILA purposes is simply "[a] person to whom an assignment is made." Myers v. Regency Mortgage, Inc., 878 F. Supp. 1553, (M.D. Ala. 1995) (citing Black's Law

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[3] The Court notes, with interest, that in 1982 the statutory definition of "creditor" was substantially limited in scope. Prior to the 1982 Amendments to the Act, a creditor also included "a person who regularly arranges for the extension of consumer credit, which is payable in more than four installments or for which the payment of a finance charge is or may be required, from persons who are not creditors . . . ." See Pub L. No. 97-320, § 702(a), 96 Stat. 1538 (1982). Congress amended the definition to exclude "arrangers" of credit. Instead, Congress chose to include as creditors both card issuers and any person who honors a credit card and offers a discount which is a finance charge in open-ended credit plans. In the case at bar, but for this amended definition, Rutledge could have asserted that Defendants "arranged" credit in this transaction. This amendment to TILA makes it clear that Congress intended to limit the category of creditors for TILA purposes.

Dictionary 152-53 (4th ed. 1968)). An assignment is the "transfer or making over to another of the whole of any property, real or personal, in possession or action, or of any estate or right therein." Id. (citing Holywell v. Smith, 503 U.S. 47, 53-54, 112 S. Ct. 1021, 1025, 117 L. Ed. 2d 196 (1992) (accepting Black's definitions of assignee and assignment)).

E. **Status of Defendants Under the TILA**

It is clear to the Court that, at the very least, both World Omni and First Boston are "assignees" for purposes of the transaction in question. Given that the statutory definition of creditor no longer includes mere "arrangers" of credit, it is not clear to the Court that either World Omni or First Boston are creditors.

In order to be a creditor pursuant to the Act, one must satisfy both requirements of the statutory definition outlined above. Although both Defendants may have arranged the credit transaction through their association with HAS, the contract listed neither World Omni nor First Boston, but rather HAS in Augusta, Georgia, as the initial creditor. It is unnecessary for the Court to go beyond the plain language of a statute when that plain language is clear. See generally Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) (stating that unless there is a clearly expressed intent to the contrary, the plain language of a statute is conclusive). The Official Commentary to the Act's implementing regulations, however, is also informative on this point. The Official Commentary states that

AO 72A
(Rev. 8/82)

> [i]f an obligation is initially payable to one person, that person is the creditor even if the obligation by its terms is simultaneously assigned to another person. For example: An auto dealer and a bank have a business relationship in which the bank supplies the dealer with credit sale contracts that are initially payable to the dealer and provide for the immediate assignment of the obligation to the bank. The dealer and purchaser execute the contract only after the bank approves the credit worthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

Official Commentary to 12 C.F.R Part 266, Paragraph 2(a)(17)(i) (emphasis added).[6]

Although the contract may have been printed on World Omni's letterhead and the contract may have been immediately assigned to both Defendants, it nonetheless listed HAS as the initial creditor. The Court, therefore, finds that both Defendants in this matter are properly categorized as assignees, and not as creditors.

III. Defendants Liability as Assignees Under the TILA

A. Which Documents Must the Court Consider Under TILA?

Rutledge asserts that Defendants are liable as assignees even if the TILA violations are not apparent on the face of the contract. She asserts that her claims can withstand Defendants' motions to dismiss because both World Omni and First

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[6] The Court acknowledges the high degree of deference that is accorded to the Official Commentary to 12 C.F.R. Part 226 published by the Federal Reserve Board, which is generally referred to as Regulation Z. See Ford Motor Credit Corp. v. Milhollin, 444 U.S. 555, 566, 100 S. Ct. 790, 797, 63 L. Ed. 2d 22, 31 (1980) (recognizing that considerable respect is accorded "the interpretation given [a] statute by the officers or agency charged with its administration.")

Boston should have known of the TILA violations based upon not only the contract, but based upon all of the documents assigned to them.

The TILA states that

> [e]xcept as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.

15 U.S.C. § 1641(a) (emphasis added).

Rutledge, World Omni, and First Boston seem to agree that creditors and assignees are treated differently under the Act based upon the foregoing language. The parties disagree vehemently, however, concerning which documents must be taken into account when determining assignee liability. First Boston and World Omni contend that only the contract must be viewed by the Court in determining whether an assignee is liable under the Act.[7] Rutledge asserts that the Court must look beyond the contract to those "other documents assigned." For the following reasons, the Court agrees, to a limited extent, with Rutledge.

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[7] Although the Act refers to facially apparent violations on the "disclosure statement," for the purposes of the case at bar, the disclosure statement is the contract.

The language of the Act clearly states that assignees are liable under the Act only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement. See id. However, Congress chose not to limit this section of the Act to only a single disclosure statement. Instead, Congress made it clear that a TILA violation is apparent on the "face of the disclosure statement" if the disclosure can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned." Id. (emphasis added). Congress could have chosen to limit assignees' liability based wholly on the disclosure statement, but specifically added language directing courts to consider the "other documents assigned" as well. This added language makes perfect sense. Congress enacted the TILA to assure a meaningful disclosure of credit terms so that consumers would be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit. See 15 U.S.C. § 1601(a). The Act is designed to protect the consumer against inaccurate and unfair credit billing. Id. If the Court were only to consider the contract when determining the potential liability of an assignee, then the goals of the Act would be severely undermined. By focusing the Court's attention to only a one or two page instalment contract, an assignee could easily avoid even the limited liability under TILA regardless of what information the supporting contractual documents contained.

When Congress enacted Section 1641(a), it attempted to eliminate uncertainties in the area of assignee liability. See S. Rep. No. 368, 96th Cong., 2d Sess. 32-33 (1980). The Senate report referring to section 1641(a) states that

> [u]nder present law, an assignee is generally liable only where a violation is 'apparent on the face' of the disclosure statement. What types of violations are covered is unclear. This section provides that violations are apparent on the face of a disclosure statement when disclosures are inaccurate or incomplete based on the statement or other documents involved . . . .

Id. at 32 (emphasis added). See also Myers, 878 F. Supp. at 1567 (basing its opinion on a careful review of the "documents" and briefs of the parties).

Rutledge contends that the Court, in addition to the contract, should consider all documents produced in discovery between the parties. The Court disagrees that the Act should be construed that broadly. When determining assignee liability, it is clear that although Congress intended to limit assignee liability for TILA violations Congress also intended courts to look to all documents assigned, including, but not limited to, the installment contract. As such, the documents that govern whether a TILA violation was facially apparent are those documents necessarily assigned along with the contract from the creditor to the assignee.

In ruling on Defendants' motions to dismiss, the Court must, of course, assume that all of the factual allegations of the complaint are true and construe them in the light most favorable to the plaintiff. Based only on her complaint Rutledge asserts that the TILA violations were facially apparent based upon the

contract and the Retail Purchase Contract.[8] Therefore, the Court will look beyond the contract, but will limit its discussion to those documents that Rutledge asserts in her complaint were assigned to Defendants.

B. Which Violations Should Have Been Facially Apparent to Defendants?

Based upon the two documents assigned ("the assigned documents"), Rutledge contends that Defendants should have noticed the facially apparent TILA violations in this transaction. The four TILA violations, Rutledge contends, are that the down payment was misstated, and that three charges are, in reality, hidden finance charges. Those three charges are the $89.50 Document Preparation Fee, the $600 Optional Service Contract, and the $298 "Gold Seal" option charge.

Taking the factual allegations of the complaint as true and construing them in the light most favorable to the plaintiff, the Court cannot state that these assignees should not have viewed this transaction without alarm. Rutledge agreed to pay over $30,000 for a used minivan. Although in a free-market economy, willing buyers will pay what willing sellers demand, even if the price is highly inflated, it appears to the Court that paying over $550 per month for a used minivan should have caused Defendants to closely scrutinize this transaction.

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[8] Rutledge also asserts that the Vehicle Worksheet used to determine NADA book values was also assigned to World Omni and First Boston. (See Pl.'s Br. in Opp'n to First Boston's Mot. to Dismiss at 5). However, that assertion does not specifically appear in her complaint.

1. The Down Payment and Document Preparation Fee

With respect to the alleged misstatement of the down payment and the Document Preparation Fee, the Court finds no facially apparent TILA violations. Automobile sales routinely include down payments of various amounts. Purchasers often offer a down payment to reduce their overall debt and monthly payment. Although HAS may have improperly referenced a down payment on the contract, the Court finds no facially apparent violation of which the assignees should have been aware regarding the down payment.

Similarly, although a charge of $89.50 for a Document Preparation Fee may be somewhat high, it is a charge which is routine in the sales industry. An assignee, based only upon the assigned documents, could hardly be expected to determine that the Document Preparation Fee was, in reality, a hidden finance charge. The contract specifically states that the Document Preparation Fee was a "fee" to be paid to the creditor. Section 1605 of TILA states that a "finance charge does not include charges of a type payable in a comparable cash transaction." 15 U.S.C. § 1605(a) (defining what constitutes an allowable finance charge). As such, any charges that are "imposed uniformly in cash and credit transactions are not finance charges." Official Commentary to 12 C.F.R Part 266, Paragraph 4(a) (emphasis added). Rutledge contends that this charge was excessive and only imposed because it was "customary." However, it does not appear on the face of the assigned documents that this charge was not imposed uniformly in accordance with the regulations. An assignee of the assigned documents would not be able to

discern that this charge was, as alleged, a hidden finance charge. See also Wallace v. Brownell Pontiac-GMC Co., Inc., 703 F.2d 525 (11th Cir. 1983). The Court finds that the Document Preparation Fee did not present a facially apparent TILA violation. Rutledge, therefore, has not asserted a claim upon which relief may be granted against Defendants with respect to either the Document Preparation Fee or the down payment.

2. Gold Seal Option and Optional Service Contract

With respect to the other two charges, however, alleged to be hidden finance charges, Rutledge has asserted a claim upon which relief may be granted. The Court merely has to assume that Rutledge's factual allegations are true for purposes of deciding these motions to dismiss. Rutledge asserts that the other two charges on the face of the contract are actually hidden finance charges that Defendants, due to their industry knowledge and association with the dealership, should have known to be violations of the Act. The Court need not, at this time, adjudicate the merits of this case. It must only determine whether a claim upon which relief can be granted has been asserted by Rutledge.

Regarding the charge for the Gold Seal option, the Court notes an apparent discrepancy in the assigned documents. A charge of $298 for the Gold Seal option appears on the Retail Purchase Contract, which contract also references the selling price, document preparation fee, tax, title, and down payment. However, the actual contract does not specifically reference the $298 Gold Seal

option under the "Other Charges" category.[9] It appears that the Gold Seal option was somehow rolled into the purchase price of the vehicle, which though not necessarily a violation of TILA, may amount to a violation depending upon the nature of the charge. After a detailed review of the assigned documents, it is unclear to the Court what the Gold Seal option charge encompasses or how to determine the nature of this charge. Taking the factual allegations of the complaint as true and construing them in the light most favorable to the plaintiff, the Court gives the benefit of the doubt to Rutledge in alleging that this charge may constitute a facially apparent violation of TILA.

Similarly, the Court is unable to determine the nature or category of the $600 Optional Service contract. Defendants raise interesting points with respect to the allegation that this charge was not a facially apparent violation of the Act.[10] Defendants properly assert that a service contract fee offered uniformly to both cash and credit purchasers is not a finance charge. 15 U.S.C. § 1605(a). A service contract may also be included in the "cash price" paid for the vehicle. 12 C.F.R. § 226.2 (a)(9); see also Official Commentary to 12 C.F.R Part 266, Paragraph

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[9] The Court notes that the copies of the assigned documents prepared by both parties are nearly illegible. The Court has strained to determine the exact charges and nature of those charges in deciding these motions to dismiss.

[10] Defendants contend that "a hidden finance charge cannot also be facially apparent." The Court disagrees. Although Defendants' assertion may be true when this statement is applied to one party, it is clearly untrue when applied to two different parties. A hidden finance charge may not be apparent to a purchaser, but may be facially apparent to an informed and sophisticated assignee.

2(a)(9). However, the contract also requires that the name of the company to which the funds will be paid be listed on its face. There is no company listed. Rather the contract states "N/A" instead of indicating a company's name. The Court finds that omission facially apparent. Once again, construing the factual allegations in the light most favorable to Rutledge, the Court finds that she has asserted a colorable claim with respect to the Optional Service charge of $600.[11]

CONCLUSION

The Court has considered the motions to dismiss filed by World Omni and First Boston, weighing carefully the arguments produced in support and in opposition of both motions. For the foregoing reasons, World Omni's motion to dismiss is hereby **DENIED**. Similarly, First Boston's motion to dismiss is also **DENIED**.

SO ORDERED, this 28th day of August, 1996.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[11] Rutledge also claims a violation of TILA with respect to the "tax and title" portion of the contract, in that the stated charge exceeds that required by Georgia law by $1. She does not, however, specifically plead this claim in her amended complaint. Instead, she incorporates this argument through the "catch-all" provision of her amended complaint. (See Am. Compl. ¶ 191. Given that the Court will deny Defendants' motions to dismiss based upon the reasons above, a lengthy discussion of this charge is unnecessary. Rutledge may assert that this over-charge facially violated TILA. The Court takes no position on the merits of whether this additional and allegedly unlawful over-charge was facially apparent to the assignees or was simply a de minimis error in the contract.

LAW OFFICES

DYE, TUCKER, EVERITT, WHEALE & LONG

A PROFESSIONAL ASSOCIATION

P. O. BOX 2426

AUGUSTA, GEORGIA 30903-2426

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ~~GEORGIA~~
AUGUSTA DIVISION

DEBBIE A. RUTLEDGE,

Plaintiff

v

HAS OF GEORGIA, INC. d/b/a DIRECT RENTAL CAR SALES; CS FIRST BOSTON MORTGAGE CAPITAL CORPORATION, d/b/a/ AUTOFLOW, INC.; and WORLD OMNI FINANCIAL CORPORATION, as Agent for CS FIRST BOSTON MORTGAGE CAPITAL CORPORATION;

Defendants.

CIVIL ACTION

NO. CV195-166

ORDER

In this putative class action, Plaintiff, Debbie A. Rutledge, has filed a complaint under the Truth-in-Lending Act ("TILA"), 15 U.S.C. §1601 et seq., against the above-named Defendants. The case is presently before the Court on the motion of Defendant, HAS of Georgia, Inc., d/b/a/ Direct Retail Car Sales ("HAS"), for summary judgment and on Plaintiff's motion to strike the affidavit of Nancy R. Shields. For the reasons discussed below, Plaintiff's motion to strike the affidavit

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Shields' affidavit was filed by HAS in support of its motion for summary judgment.

of Nancy R. Shields will be DENIED and Defendant's motion for summary judgment will, likewise, be DENIED.

FACTS

On March 11, 1995, Plaintiff, Debbie A. Rutledge, purchased a used 1994 Mitsubishi Minivan for $19,966.34 from Defendant, HAS. In doing so, Rutledge entered into an installment sales contract with HAS, agreeing to pay 19% interest in exchange for the financing of the purchase. This contract also charged Rutledge an $89.50 document production fee, a $600.00 optional service contract fee, and a $298.00 charge for a Gold Seal Protection Program.

PROCEDURAL HISTORY

On October 26, 1995, Rutledge filed a complaint, alleging that the above charges were hidden finance charges in violation of the TILA. In her complaint, Rutledge contended that HAS had entered into installment contracts with other credit customers, all putative class members, whereby the amounts financed and the finance charges were overstated, and whereby hidden finance charges were included in the loan agreements.

HAS has filed a motion for summary judgment on the ground that the contested charges were incurred indiscriminately in both cash and credit transactions, thereby negating any TILA violation. Rutledge has filed a response,

contending that the charges were, in fact, charged discriminately. Rutledge has also filed a motion under Rule 56(g) of the Federal Rules of Civil Procedure to strike Shields' affidavit, filed in support of HAS's motion for summary judgment.

DISCUSSION

I. Plaintiff's Motion to Strike Shields' Affidavit

Plaintiff has filed a motion to strike Shields' affidavit under Rule 56(g) of the Federal Rules of Civil Procedure. Rule 56(g) provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Id. It is Plaintiff's contention that Shields' made her affidavit in bad faith because she stated that "[a]ll retail customers, cash or credit, pay the same $89.50 [document production] charge," (Shields' Aff. at ¶4), when, in fact, Plaintiff has obtained through discovery, two contracts in which the $89.50 fee was not assessed. (Pl's Mot. to Strike, at Ex. A,B). The contested portion of Shields' affidavit reads:

> 4. In connection with said purchase, Ms. Rutledge paid an $89.50 document preparation fee which is assessed without regard to whether the transaction is financed or for cash. This charge is used to help pay for the document handling costs, including, but

not limited to preparation of sales contracts, transfer of titles, etc. All retail customers, cash or credit, pay the same $89.50 charge.

Looking at the language of this paragraph, it is reasonable to conclude that Shields' statements about the $89.50 fee reflected a general policy, and were not based upon inspection of all the consumer transactions of HAS. Indeed, at no time does Shields state in her affidavit that she has examined every contract. There is no evidence of bad faith on the part of Shields and, as such, Plaintiff's motion to strike will be DENIED.

II Defendant's Motion for Summary Judgment

Defendant has filed a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, asserting that Plaintiff cannot assert a violation of the TILA. Summary judgment requires the movant to establish the absence of genuine issues of material fact, such that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Lordmann Enterprises, Inc. v. Equicor, Inc., 32 F.3d 1529, 1532 (11th Cir. 1994), cert. denied, 116 S.Ct. 335 (1995). After the movant meets this burden, "the non-moving party must make a sufficient showing to establish the existence of each essential element to that party's case, and on which that party will bear the burden of proof at trial." Howard v. BP Oil Co., Inc., 32 F.3d 520, 524 (11th Cir. 1994)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The non-moving party to a summary judgment motion need make this

showing only after the moving party has satisfied its burden. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The court should consider the pleadings, depositions and affidavits in the case before reaching its decision. Fed. R. Civ. P. 56(c), and all reasonable inferences will be made in favor of the non-movant. Griesel v. Hamlin, 963 F.2d 338, 341 (11th Cir. 1992).

III Truth in Lending Act

Congress enacted the Truth-in-Lending Act to encourage the informed use of credit among consumers. 15 U.S.C. §1601. To that end, the regulations promulgated under the Act require that finance charges be clearly disclosed to the consumer. 12 C.F.R. §226.6. Section 1605 of the TILA defines a finance charge as:

> [T]he sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction.

15 U.S.C. §1605. See also 12 C.F.R. §226.4 (a finance charge is any amount imposed incident to the extension of credit).

Defendant contends that it has not violated the TILA because the contested charges were either imposed or made available to all consumers, regardless of the method of payment. In support of its assertion, Defendant provides the affidavit of Nancy R. Shields, Secretary/Treasurer for HAS. In her affidavit, Shields states

that the $89.50 document production fee was charged to both cash and credit consumers, and that the $298 Gold Seal Protection Program and the $600 Optional Service Contract are made available to all consumers, regardless of the method of payment.

Plaintiff vigorously denies the validity of Shields' assertions, and has provided affidavits and exhibits tending to show that the contested charges may have been hidden finance charges. Concerning the $89.50 document production fee, for instance, Plaintiff has submitted a supplemental affidavit of Rutledge, stating that she has procured, through discovery, a cash invoice that does not show a document preparation fee. (Rutledge Aff. of 5/8/96 and Ex. A). This information negates Shields' blanket statement that the fee was charged to all transactions, regardless of the method of payment and, thus, creates a genuine issue of material fact on the matter. See Celotex Corp., 477 U.S. at 324.

Concerning the charges for the Gold Seal Protection Program and the Optional Service Contract, moreover, Plaintiff has submitted the affidavit of B. John Shreiber, a paralegal at the firm employed by Plaintiff to investigate this matter. In his affidavit Schreiber alleges that he has examined the discovery obtained from Defendant and has found that in a majority of the credit transactions, there was a Gold Seal Protection Plan charge and an Optional Service Contract Charge assessed to the purchaser without corresponding warranty information in the file. (Shreiber Aff. at ¶4a and b). Moreover, Shreiber detailed that in numerous transactions, the

Optional Service Contract was duplicative of the warranties still existing on the vehicles. Id. at ¶5c, 11). This information creates a genuine issue concerning whether the two services were shams, constituting, in reality, hidden finance charges.

CONCLUSION

Plaintiff has shown that the contested charges may be hidden finance charges. Accordingly, Defendant's motion for summary judgment is **DENIED**. Moreover, the Court finds that Shields' affidavit was not made in bad faith and, as such, Plaintiff's motion to strike is **DENIED**.

SO ORDERED, this 15th day of August, 1996.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA