

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RE		: CHAPTER 13
		:
DANIEL HILL		:
		:
	DEBTOR	: BANKRUPTCY No. 01-30171SR
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DANIEL HILL		:
		:
	PLAINTIFF	:
		:
	V.	:
MERITECH MORTGAGE SERVICES, INC.,		:
CHASE BANK OF TEXAS, N.A. AS CUSTODIAN,		:
SAXON MORTGAGE, FIRST PHILADELPHIA		:
MORTGAGE AND JOHN J. DALY		:
	DEFENDANTS	: ADVS. 01-848
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OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

Introduction.

Two motions are presently before the Court. In the first, co-defendant, John Daly requests the entry of summary judgment in his favor on the Plaintiff's complaint against him for an alleged violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. 73 Pa. Cons. Stat. Ann. § 201-1 *et seq.* (The Consumer Protection Act) In the second motion Daly requests that if summary judgment is denied, the Court nevertheless exclude the report and testimony of an expert which the plaintiff proposes to offer at trial. Opposition papers were filed by the Plaintiff and oral argument was heard August 6, 2002. For the reasons which follow, the Defendant's request for summary judgment and his Motion *in Limine* will each be denied.

Background.

Few relevant facts are in dispute between the parties to this adversary proceeding. In his

underlying complaint, the Plaintiff/Debtor alleges that he was victimized in a “predatory lending” scheme. Predatory lending is a term that has come widely into use to describe the practices of various participants in the field of home equity lending to draw unsophisticated, often low income, and/or elderly homeowners into onerous mortgage loan transactions that frequently result in the loss to them of their homes.

Mr. Hill is a 58 years individual with a 10th grade education. He worked as a janitor before becoming disabled. For approximately ten years his sole source of income has been disability benefits of less than \$600 per month.

Mr. Hill owns a single family residence located as 256 Armat Street in Philadelphia, Pennsylvania. Over the years, real estate taxes and water charges for the property fell into arrears. In 1996, the City of Philadelphia apparently sold Mr. Hill’s delinquent accounts to a private investor and a collection or servicing firm known as St. Hill and Associates began to press Mr. Hill for payment. Mr. Hill was contacted sometime thereafter by a mortgage broker (co-defendant, First Philadelphia Mortgage Company) and in February 1999 he closed on a \$30,000 mortgage loan with co-defendant Saxon Mortgage. The loan settlement sheet from this transaction is attached as Exhibit “E” to the Plaintiff’s response to Daly’s summary judgment motion. The proceeds of the loan were used, *inter alia*, to retire outstanding liens against Hill’s property, but the transaction left him with an untenably high monthly mortgage payment (approximately \$330) on which he quickly defaulted. In his Complaint, Mr. Hill maintains that he was fraudulently induced into embarking on a doomed course of action by First Philadelphia and Saxon. As concerns Defendant John J. Daly, Mr. Hill contends that Daly, an appraiser, essentially conspired with First Philadelphia and Saxon by preparing at their behest an appraisal report that vastly overstated the actual value of his property,

specifically so that he would qualify to borrow the sum of money Saxon proposed to lend him. Hill contends that the conduct alleged on the part of Daly was fraudulent and deceptive giving rise to a cause of action against him under the Consumer Protection Act.

Daly disputes that there was anything inappropriate about the substance of his appraisal report, or that he acted in concert with First Philadelphia or Saxon in preparing the report. More significantly, however, Daly argues that even assuming that this were correct, Hill cannot sustain a cause of action against him under the Consumer Protection Act because 1) Hill admits that he personally did not rely on the appraisal report, and 2) because Hill cannot prove damages since A) the loan proceeds retired valid obligations secured against Hill's home, and B) Hill's damages are purely speculative, since the course events might have taken had Hill not take the loan cannot be predicted. Based on these arguments Daly requests the entry of summary judgment in his favor.

In reply, Hill concedes that he did not "rely" on Daly's appraisal in the conventional sense of the word, but he argues that his cause of action against Daly can nevertheless be maintained under the "catch-all" section of the Consumer Protection Act, which section prohibits any fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding. Reliance, he says, is not an essential element of an action brought under this subsection of the Act. Hill argues further that he can establish harm. Although he acknowledges a degree of difficulty in precisely quantifying his damages, Hill stresses the existence of various low income assistance programs that were available to him as a means to have dealt with the municipal obligations encumbering his property. Through recourse to these he claims that he could have avoided taking the mortgage loan at issue, which he insists was predestined for foreclosure. Hill also argues, however, that irrespective of calculating damages through scenarios involving the possible loss of his home, the amount charged

to him for the Daly appraisal (\$200) would set a minimum floor to support an award of damages plus attorneys fees under the Consumer Protection Act. Further, Hill points out there where a plaintiff establishes a cause of action, the Consumer Protection Act provides for a nominal award of \$100 in damages plus attorneys fees, even if the harm in question is otherwise unquantifiable. For these reasons, Hill asks that the Court deny the present Motion for Summary Judgment.

Should the Summary Judgment Motion be denied, Daly, in a companion pleading, moves to exclude the report and testimony of an expert appraiser which Hill seeks to offer at trial. The appraiser in question, Robert Ludwig places the value of Hill's property as of December 1998 at \$20,000. This is in contrast to the \$37,000 value assigned to the property by Daly at the same time. Ludwig's report is in many ways a critique of Daly's report. By way of an offer of proof, Hill states that Ludwig will testify to a myriad of inaccuracies and other flaws in Daly's appraisal report. The Daly report suffers so many shortcomings, according to Ludwig and Hill, that its preparation and use constitute violations by Daly of the standards of certain professional societies and/or regulatory agencies. Most significantly, Ludwig will apparently be called by Hill to proffer a professional opinion that the appraised value of the property, as reported by Daly, is so vastly removed from the true value of the property on the date of Daly's appraisal, that the only logical inference that can be drawn is that Daly's valuation was pre-ordained pursuant to an express or tacit understanding between Saxon and/or First Philadelphia, on the one hand, and Daly on the other. Daly objects to the proposed introduction of this evidence, arguing that is "irrelevant to the burden of proof and the elements which plaintiff must establish" in connection with the cause of action asserted against him. (Motion *in Limine* at Paragraph 19) In this respect, Daly again emphasizes that Hill has conceded that he personally did not rely on Daly's report. Nothing in the Ludwig report, he says, even speaks

to that fact, let alone changes it. The introduction of this evidence, Daly argues, will serve no other purpose than to malign Daly's character and prejudice the fact finder as to his competence.

Hill responds that the Ludwig evidence is highly relevant to his theory of Daly's liability under the Consumer Protection Act, and that although it is of course prejudicial to Daly, in that it is tremendously unflattering, it cannot be excluded under applicable rules of evidence because it is probative of important issues in this case.

Discussion.

A Motion for Summary Judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. That rule provides that summary judgment is appropriate 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 judgment as a matter of law." Fed. R.Civ. P.56(c), made applicable to his adversary proceeding by Fed. R. Bankr. P. 7056.

On a motion for summary judgment, the moving party "... always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). "[W]hen a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (quoting Fed. R.Civ.P. 56(e)). An issue is "genuine" only if a reasonable jury, considering the evidence presented, could find for the nonmoving party.

Id., 477 U.S. at 249.

With the foregoing general principles in mind, the Court turns to the specific matters raised herein. The Pennsylvania Consumer Protection Act is a remedial statute intended to protect consumers from unfair or deceptive practices. The Act provides for a private cause of action for any person who purchases or leases goods or services primarily for personal, family, or household purposes, and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of any person of a method, act, or practice declared unlawful by Section 3 of the Act. 73 P.S. § 201-9.2 The law provides that “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . are hereby declared unlawful” 73 P.S. § 201-3, and sets forth several specific acts and practices that are deemed unfair methods of competition or unfair deceptive acts or practices. 73 P.S. § 201-2(4). The list ends with what is commonly referred to as its “catch-all” category, the text of which reads as follows:

§ 201 -2. Definitions.

As used in this act.

. . .

(4) “Unfair methods of competition” and “unfair or deceptive acts or practices” mean any one or more of the following:

. . .

(xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding.

73 Pa.Con.Stat. Ann. 201-2(4)(xxi)

Numerous courts, although not all, have held that in order to prevail in a cause of action premised on the Consumer Protection Act's catch-all provision, a party must establish all of the traditional elements of common law fraud, which are 1) a specific false representation of a material fact; 2) knowledge by the person who made it of its falsity; 3) ignorance of its falsity by the person to whom it was made; 4) the intention that it should be acted upon; and 5) resultant damage to the plaintiff. *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 284 (3d Cir. 1992). One explanation for this lay in the fact that in its prior construction, the text of the Act's catch-all provision referred exclusively to fraudulent conduct which creates a likelihood of confusion or misunderstanding. In 1996, however, the Act was amended and the text of the catch-all provision was expanded to include deceptive as well as fraudulent conduct within its ambit.

In *In re Rodriguez*, 218 B.R. 764 (Bankr. E.D. Pa. 1998) this Court has previously considered the precise question of whether following the 1996 amendment it is necessary to prove all of the elements of common law fraud in order to prevail in a suit brought under the Consumer Protection Act catch-all provision, and concluded that it is not. The Court's decision, which it reaffirms here, was premised initially on a recognition that as a remedial statute the provisions of the Consumer Protection Act are to be liberally interpreted for the purpose of abating unfair and deceptive practices. *Commonwealth v. Monumental Properties, Inc.*, 459 Pa. 450, 460, 329 A.2d 812, 816 (1974). The Court's decision was based also on its observation that the inclusion of deceptive conduct to the Act's catch-all text had followed a number of judicial decisions requiring a showing of common law fraud as a pre-requisite to relief under that subsection of the Act, and the Court's belief that as opposed to simply adding redundant or superfluous statutory language, the Pennsylvania Legislature was signaling approval of the proposition that relief under the catch-all

provision of the Act was possible without the strict establishment of a common law fraud case. *Accord, Weiler v. Smith Kline Beecham Corp.*, 2001 WL 1807382.¹

Daly argues herein that this reasoning must be seen as incorrect in light of the recent decision of the Pennsylvania Supreme Court in *Weinberg v. Sun Company, Inc.*, 777 A.2d 442 (Pa. 2001). In *Weinberg*, the plaintiffs were purchasers of Sunoco Ultra gasoline who had commenced a consumer class action in the Philadelphia Court of Common Pleas alleging that Sunoco's advertisements induced consumers to purchase "ultra" when their vehicles did not need the high level of octane the gasoline contained. The trial court viewed all of the several counts in the plaintiff's complaint as sounding in fraud, and determined that class certification was inappropriate because of the requirement that each individual putative class member establish reliance and causation. The Superior Court reversed, in part, finding that two of the four claims raised under the Consumer Protection Act were essentially claims of false advertising and were not in the nature of common law fraud. The Superior Court then held that false advertising claims did not require proof of reliance and causation as did fraud based claims. 740 A.2d 1152 (Pa. Super. 1999)

The Pennsylvania Supreme Court reversed, holding that the Act did not permit a private plaintiff to pursue an advertiser because an advertisement might deceive members of the audience and might influence a purchasing decision, when the plaintiff himself was neither deceived nor influenced. 777 A.2d at 446 The Court reconfirmed that the underlying foundation of the Consumer

¹ When construing a statute, "the Legislature is presumed to have intended to avoid mere surplusage; thus whenever possible, courts must construe a statute so as to give effect to every word contained therein. *Berger v. Rinaldi*, 438 Pa. Super. 78, 86, 651 A.2d 553, 557 (1994). If the Legislature modifies the language of a statute the amendment "ordinarily indicates a change in the legislative intent." *Commonwealth v. Pierce*, 397 Pa. Super. 126, 130, 579 A.2d 963, 965 (1990); *Masland v. Bachman* 473 Pa. 280, 289, 374 A.2d 517, 521 (1977).

Protection Act was fraud prevention and that nothing in the legislative history suggested that the legislature ever intended statutory language directed at consumer fraud to do away with the tradition common - elements of reliance and causation. *Id.* Accordingly, said the Court, that meant that in the case before it, each plaintiff must allege reliance, i.e., that he purchased ultra gasoline because he heard and believed Sunoco's allegedly false advertising. *Id.*

Daly argues that in the *Weinberg* decision, the Pennsylvania Supreme Court laid to rest any doubt that in any private action brought under the Consumer Protection Act, reliance is an essential element to be pled and proved. As Hill apparently concedes that he personally did not rely on the Daly appraisal, there is no possible way, says Daly, that Hill can sustain the present action. There is undeniable appeal to Daly's argument, and of course if he is correct then summary judgment in his favor is warranted.

The *Weinberg* decision, however, does not contain a sweeping pronouncement of the proposition which Daly attributes to it. It is clear, of course, from *Weinberg* that reliance is an essential element of a false advertisement claim under the Consumer Protection Act. Indeed, it is arguably clear from *Weinberg* that when a plaintiff seeks to assert a private cause of action under the Consumer Protection Act for any conduct alleged by the Plaintiff to be fraudulent, that reliance, along with the other traditional elements of Common Law fraud must be shown. It is not axiomatic, however, that this same conclusion follows with respect to conduct alleged to be "deceptive" as opposed to fraudulent. Deceptive conduct is distinguished in the disjunctive from fraudulent conduct in the catch-all provision of the Consumer Protection Act, and the Court remains unconvinced that the 1996 Amendment adding deceptive conduct to this particular subsection of the Act was intended to create a distinction with no meaningful difference. The Court will adhere to the position,

therefore, that where a Plaintiff's cause of action is predicated on conduct that is alleged to be deceptive, reliance, such as is required in an action for common law fraud, is not strictly a required element.

The Court here registers some skepticism, furthermore, as to the alleged complete lack of reliance by Hill given the agreed facts of this case. Hill concedes, and Daly of course stresses, that reliance in the common sense of the word is missing here. But Daly, says Hill, was as instrumental as the broker and lender in the overall process of this allegedly predatory loan. Without Daly's part in the alleged scheme, says Hill, the loan would never have been made. Hill therefore argues that he was deceived by Daly in violation of the Consumer Protection Act, irrespective of technical reliance

The Court notes Hill's acknowledgment that he had virtually no conversation with Daly before, during or after Daly did his work. Indeed, Hill at no time even saw the report. Daly's client, moreover, was First Philadelphia, and not Hill. Hill ultimately paid for the appraisal, however, and given that his mortgage loan was predicated on the results of the appraisal, one might say that Hill was a *de facto* client of Daly along with First Philadelphia. One might alternatively analogize Hill to be a third party beneficiary of Daly's work. In either event, it seems that a case might be made that in this scenario; that is, in permitting Hill access to his property for the purpose of performing the appraisal, Hill, even if he was not cognizant of it, implicitly relied on Daly to perform his task without deception. The Court need not and does not resolve this question. The Court will simply close by reiterating that for the reasons discussed above, Daly's Motion for Summary Judgment will be denied, inasmuch as the Court rejects the argument that Hill cannot sustain a cause of action for deceptive conduct under the catch-all section of the Consumer Protection Act without establishing

the common law element of reliance.

The Court adds that Daly's motion additionally fails in that the Court rejects Daly's assertion that Hill can prove no harm. Without belaboring this point, the Court notes merely that irrespective of damages tied to any potential loss by Hill of his home, Hill correctly observes that damages tied to the appraisal fee, or nominal damages as provided under the Consumer Protection Act, both provide a sufficient predicate on which to prosecute the present action.

The remaining matter in issue is Daly's Motion in Limine. In it Daly, as noted, seeks to exclude Ludwig's report and testimony as irrelevant to the elements which Hill must prove to succeed in his cause of action. Daly has submitted no brief and cites no authority in his pleading in support of this request. The court rejects the Motion as being without merit.

The Court agrees that evidence which would tend to establish that Daly acted together with First Philadelphia and/or Saxon in a scheme to inflate the value of Dealy's home, so as to provide the foundation for a loan in a particular amount, would be highly relevant to Hill's cause of action against Daly under the Consumer Protection Act. Daly's, on the other hand, is certainly correct that if such evidence is demonstrated it will be prejudicial to him. As Hill points, however, relevant evidence is inherently prejudicial, while under Federal Rule of Evidence 403 only "unfair" prejudice will support a request to exclude relevant evidence. Unfair prejudice exists where the prejudice associated with the evidence substantially outweighs its probative value. *United States v. Universal Rehabilitation Services, Inc.*, 205 F.3d 657, 664 (3d Cir. 2000).

In this instance the Court notes that this is a bench trial, eliminating possibly influences that might register on members of a jury. Further, the Court notes that Hill does not propose to rely exclusively on Ludwig's testimony, a prospect which might render its consideration more

problematic. Rather, Hill proposes to offer Ludwig's testimony in conjunction with other objective evidence alluded to at oral argument, such as a loan application prepared by First Philadelphia well before the Daly appraisal which apparently stated the value of Hill's property to be precisely what Daly thereafter appraised it at. Under these circumstances, the Court concludes that there is probative value to the evidence which is not outweighed by its potentially prejudicial effect. There being no other valid basis on which to exclude the Ludwig evidence, Daly's request to do so will therefore be Denied.

An appropriate Order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: September 27, 2002

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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ORDER

AND NOW, upon consideration of Defendant John Daly's 1) Motion for Summary Judgment for an alleged violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, and 2) if denied, Motion *in Limine*; the Answers in opposition filed thereto by the Plaintiff, and trial held August 6, 2002, it is hereby:

ORDERED, that for the reasons stated in the attached Opinion, the Defendant's Motion for Summary Judgment and Motion *in Limine* shall be and hereby are denied.

BY THE COURT:

DATED: September 27, 2002

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

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