MICHAEL MURRAY,

Appellant,

v.

NATIONSTAR MORTGAGE LLC,

Appellee.

Circuit Court, 15th Judicial Circuit (Appellate) in and for Palm Beach County, Civil Division.

Case No. 502016AP900008XXXXMB.

L.T. Case No. 502015SC008841XXXXMB, Division AY.

October 25, 2016.

Appeal from the County Court in and for Palm Beach County, Judge Sandra Bosso-Pardo. C

ounsel: Brian Korte, West Palm Beach, for Appellant. Nancy M. Wallace, Tallahassee, for Appellee.

(PER CURIAM.) Appellant, Michael Murray ("Murray"), seeks review of the trial court's order granting summary judgment in favor of Nationstar Mortgage LLC ("Nationstar"). Murray filed suit against Nationstar seeking relief under the Florida Consumer Collections Practices Act ("FCCPA") based upon an account statement sent to him by Nationstar. Murray alleges that it was error to enter summary judgment as a matter of law because 1) the account statement attempted to collect a debt that was no longer owed, and 2) sending the account statement to Murray's counsel did not avoid violation of the Florida Consumer Collections Practices Act. We agree and reverse.

On January 21, 2008, Murray executed a note and mortgage. The note states that he will pay interest at a fixed rate of 6.875% for the life of the loan. After Murray defaulted on the note, Nationstar brought a foreclosure action in the Fifteenth Judicial Circuit, Nationstar Mortgage, LLC v. Michael W. Murray et al., 502011CA018339. In May 2014, Murray and Nationstar entered into a joint stipulation and consented to immediate entry of final judgment of foreclosure in favor of Nationstar. Nationstar waived a deficiency decree, and the Final Judgment of Foreclosure states that interest from that date forward will accrue at the prevailing rate under the foreclosure judgment -- which equates to 4.75%. On August 18, 2015, Nationstar sent an account statement to Murray's counsel seeking to collect the principal amount due under the mortgage at an interest rate of 6.875%.1

On September 25, 2015, Murray filed a complaint in Palm Beach County Court seeking relief pursuant to the Florida Consumer Collections Practices Act ("FCCPA"), alleging that Nationstar Mortgage, LLC violated sections 559.72 and 559.77, Florida Statutes (2015). Specifically, Murray states that because the parties entered into a joint stipulation which waived any deficiency judgment, and the final judgment of foreclosure set the interest rate at 4.75%, the account statement sent to Murray's attorney violated the FCCPA because it attempted to collect on a debt that was no longer owed.

Nationstar moved for summary judgment, stating that it was required to send the account statement under the Truth in Lending Act ("TILA"), and alternatively that the letter was sent to Murray's counsel which precludes Murray from succeeding on an FCCPA claim. The court held a hearing and granted Nationstar's motion, finding that the account statement sent by Nationstar was required by federal regulation, and that the monthly statement was sent to Murray's counsel, which precluded recovery because no competent attorney would have been misled by the statement. Murray thereafter filed this appeal, arguing that both of the trial court's rulings on the motion for summary judgment were in error.

The standard of review on a ruling of a motion for summary judgment is de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) [25 Fla. L. Weekly S390a]. Summary judgment is appropriate

when there are no genuine issues of material fact. Gonzalez v. J W. Cheatham LLC, 125 So. 3d 942, 944 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D1183a]. A summary judgment motion "should not be granted unless the facts are so crystallized that nothing remains but questions of law." Id. "In determining whether to grant a motion for summary judgment, all facts must be taken in the light most favorable to the non-moving party." Carnes v. Fender, 936 So. 2d 11, 14 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D1383a].

The FFCPA states that "[i]n collecting consumer debts, no person shall . . . [c]laim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist." § 559.72, Fla. Stat. (2015). "In applying and construing [section 559.72], due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." § 559.77(5), Fla. Stat. (2015). Further, "[t]he FCCPA is to be construed in a manner that is protective of the consumer." Laughlin v. Household Bank, Ltd., 969 So. 2d 509, 512-13 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2761c]; see § 559.552, Fla. Stat.

1. Nationstar's account statement was not required under TILA, therefore his FCCPA claim was not preempted.

The trial court entered summary judgment for Nationstar because it determined that the account statement was required under TILA and thus could not violate the FCCPA as a matter of federal preemption. Murray argues that the account statement was not required due to the parties' stipulation and the circuit court's entry of a final judgment of foreclosure, even though a foreclosure sale had not yet taken place.

"Under the Supremacy Clause, a federal law may preempt state law." W. Florida Reg'l Med. Ctr., Inc. v. See, 79 So. 3d 1, 15 (Fla. 2012) [37 Fla. L. Weekly S22a]; U.S.C.A. Const. Art. 6, cl. 2. "Implied conflict preemption occurs only when it is physically impossible to simultaneously comply with both federal and state law on a topic, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." W. Florida Reg'l Med. Ctr., Inc., 79 So. 3d at 16.

The relevant portion of TILA states that "[a] servicer of a transaction . . . shall provide the consumer, for each billing cycle, a periodic statement meeting the requirements of paragraphs (b), (c), and (d) of this section." 12 C.F.R. § 1026.41(a)(2). Paragraph (d) requires the periodic statement to include the amount due, the amount of the outstanding principal balance, and the current interest rate in effect for the mortgage loan. 12 C.F.R. § 1026.41(d).

Nationstar alleges that because no foreclosure sale had occurred, the note and mortgage were not yet extinguished, therefore Nationstar must continue to send account statements. See Aventura Mgmt., LLC v. Spiaggia Ocean Condo. Ass'n, Inc., 105 So. 3d 637, 639 (Fla. 3d DCA 2013) [38 Fla. L. Weekly D190b] ("mortgage merges with a final judgment of foreclosure and is extinguished by the sale of the underlying property"). We disagree, and find that Nationstar's account statement did not comply with TILA. TILA requires a servicer to provide the consumer with a periodic statement indicating the amount due, the outstanding principal balance, and the current interest rate in effect. In accordance with the joint stipulation, which waived any deficiency, and the subsequent entry of the judgment of foreclosure, the amount due is zero, the outstanding principal balance is zero, and the current interest rate is 4.75%. Regardless of whether a sale has occurred, based upon the final judgment, Nationstar is no longer able to recover the amounts listed on the account statement, therefore its account statement was not required under TILA. As Nationstar's account statement was not required by TILA, its argument that Murray's FCCPA claim was preempted by TILA is meritless, and it was error to grant summary judgment on that basis.

2. The competent attorney standard does not apply to the FCCPA.

The trial court also entered summary judgment for Nationstar because the account statement was sent to Murray's attorney and the court found that "no competent attorney" would have been misled by the account statement. This standard was articulated by the Seventh Circuit in Evory v. RJM Acquisitions Funding LLC, 505 F.3d 769 (7th Cir. 2007).

As stated above, in construing the FCCPA, great weight should be given to interpretations of the Federal Trade Commission and the Fair Debt Collection Practices Act. § 559.77(5), Fla. Stat. (2015). In Evory, the Seventh Circuit stated that when determining whether section 1692(e) of the FDCPA was violated by a communication with counsel, "a representation by a debt collector that would be unlikely to deceive a competent lawyer, even if he is not a specialist in consumer debt law, should not be actionable." However, the Eleventh Circuit has also considered this issue and determined that there is "no basis in the FDCPA to treat false statements made to lawyers differently from false statements made to consumers themselves." Bishop v. Ross Earle & Bonan, P.A., 817 F.3d 1268 (11th Cir. 2016) [26 Fla. L. Weekly Fed. C172a]. We follow the Eleventh Circuit's construction of the FDCPA and find that the competent lawyer standard employed by Evory does not apply to the FCCPA. The trial court erred by entering summary judgment based upon that standard.

Based on the foregoing, we find that the the trial court erred by granting Nationstar's motion for summary judgment. Murray's FCCPA claim was not preempted by federal law, and it was not precluded on the grounds that the account statement was sent to his attorney. Accordingly, we REVERSE the trial court's order granting summary judgment in favor of Nationstar and REMAND for further proceedings.

Murray has also filed a motion for appellate attorney's fees and costs. The motion for appellate attorney's fees is GRANTED contingent upon Murray ultimately being the prevailing party in the court below. See § 559.72, Fla. Stat. (2015). If Murray prevails, then the trial court may determine and award Murray a reasonable amount of appellate attorney's fees. To the extent that Murray requests appellate costs, such request is DENIED without prejudice to request costs from the lower tribunal. See Fla. R. App. P. 9.400(a). (GILLEN and SASSER, JJ., concur. BARKDULL, J., dissents without opinion.)

_____

1The account statement itself was not authenticated or sworn to, and thus was not considered by the trial court or attached to the record. However, the parties agree on the existence of the account statement, that the account statement was sent to Murray's counsel, and on the contents of the account statement.

* * *