STATE OF VERMONT
CHITTENDEN COUNTY, SS

ARTHUR VENTO, Plaintiff)
v.)
ACTION MOVING AND STORAGE, INC., Defendant)

Chittenden Superior Court
Docket No. 1538-00 CnC

DECISION AND ORDER

Plaintiff's Motion for Partial Summary Judgment, filed September 4, 2001

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment filed on September 4, 2001. Defendant's response was filed on October 1, 2001. Plaintiff is represented by Michael J. Harris, Esq. Defendant is represented by Anthony I. Blenkinsop, Esq. and William B. Skiff, Esq.

Facts

The facts in this case are undisputed and are stated in both the Plaintiff's and Defendant's Statements of Undisputed Facts, supporting affidavits and documents. In the spring of 1997, Plaintiff rented from the Defendant a self storage unit located in Colchester, Vermont, and signed a written Rental Agreement. It provided that in the event of nonpayment of rent, Defendant's remedy was to overlock Plaintiff's unit. No security interest in the contents of the unit was created under the terms of the agreement. On November 12, 1997, Defendant notified the Plaintiff that his account was in arrears in the amount of $280.00, that his unit had been overlocked, and that if payment was not received within ten days, "we will begin procedures for the auctioning of your belongings to settle this account." Sometime in January 1998, Plaintiff paid Defendant $200.00 toward the outstanding balance of his account. The payment was accepted and Defendant thereafter sent Plaintiff monthly bills including interest charges of 1 1/2% per month on the overdue account balance. Other than sending the monthly bills, Defendant gave Plaintiff no further notice of an intent to proceed with any "procedures" or auction.

On May 6, 1998, Defendant auctioned the contents of Plaintiff's storage unit. Defendant did not give Plaintiff individual notice of the impending auction before it occurred. Rather, the only notice was a public advertisement of an auction placed in the Burlington Free Press

newspaper. Defendant held the auction, and received $510.00 for the contents of Plaintiff's storage unit. The undisputed facts do not establish the value of Plaintiff's personal property stored in the unit, although the Rental Agreement shows that the items stored were "household items," "furniture", and "kitchen items common to a home." Plaintiff claims that they consisted of valuable household items with a value of $65,000.00. Two days after the auction, on May 8, 1998, Defendant sent Plaintiff a letter stating that the auction had occurred and requesting that the Plaintiff remit a remaining overdue balance of $139.00.

It is Defendant's standard practice on overdue accounts to send customers, following a late notice, a letter telling them that they are running the risk of having their goods auctioned if they do not become current. At that time the unit is overlocked pending payment in full. Then, after three or four months with no payment and no response, a letter of notice is sent telling the customer that there will be an auction. If there is still no response at that point, Defendant places an ad for the auction in the Free Press to run three consecutive weeks, describing the time and day of the auction and the owner. (Dep. of Carlton Laroe, July 20, 2001, at 30.) These steps were followed in this case, except that only one letter was sent.

Conclusions

Plaintiff filed suit alleging conversion of his personal property and violation of Vermont's Consumer Fraud Act. Plaintiff now moves for summary judgment on the issue of liability for each claim. Defendant opposes the motion, claiming that Plaintiff abandoned the stored property, that he had a duty to mitigate damages, that genuine issues fact exist which preclude judgment, and that for the purposes of the consumer fraud claim, Plaintiff cannot show that he suffered injury.

The Court concludes from the undisputed facts that Plaintiff is entitled to summary judgment on liability on both the claim of conversion and the claim of consumer fraud. The reasons are set forth below. No genuine issue of material fact exists, and as described below, Plaintiff is entitled to judgment as a matter of law on the issue of liability for both claims. V.R.C.P. 56(c)(3); see also e.g., Politi v. Tyler, 170 Vt 428, 431 (2000) (a court should grant a motion for summary judgment when the record indicates there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law).

Conversion

On the claim of conversion, Plaintiff has established that Defendant wrongfully exercised dominion over his property by auctioning it off against Plaintiff's right of ownership. P.F. Jurgs & Co. v. O'Brien, 160 Vt. 294, 299 (1993) ("The key element of conversion, therefore, is the wrongful exercise of dominion over property of another."). Defendant's auction of Plaintiff's property was not authorized under the Rental Agreement and there is no evidence that Defendant had any contractual or other interest in the property upon which exercise of authority might be

based. See e.g. 9A V.S.A. § 9-203(1)(b) (Nonpossessory security interests under Article Nine of the Uniform Commercial Code require: (1) a writing (2) signed by the debtor (3) containing a description of the collateral.) Even if a security interest had been created by the written agreement, legal process would still have been a prerequisite to the exercise of possessory rights. Defendant does not argue that it had a right to Plaintiff's property based on the Rental Agreement. Instead, Defendant argues: 1) that Plaintiff voluntarily abandoned his property; 2) that Defendant notified Plaintiff of the intent to auction; and 3) that Plaintiff had a duty to mitigate his damages by paying the rent for the storage unit.

None of the Defendant's arguments are supported by facts or law. First, beyond the bare assertion that Plaintiff abandoned his property, Defendant offers no evidence to support the argument. While this Court will resolve all reasonable doubts and inferences in favor of the non-moving party, Samplid Enterprises, Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996), once a summary judgment motion is made and supported the non-moving party must respond with affidavits or other documents which "set forth specific facts showing that there is a genuine issue for trial." V.R.C.P. 56(e). Here, Defendant merely claims Plaintiff abandoned the property, but the evidence supports a contrary conclusion. Plaintiff, shortly after receiving notice of the possibility of proceedings leading to an auction, made a partial payment in January 1998. The only reasonable inference from this conduct is intent on the part of Plaintiff not to abandon the property.

Second, Defendant's claim that it "notified" Plaintiff of the intent to auction his belongings, even if it were supported by facts showing individual notice, provides no basis for a legal defense against a claim of conversion. The process in Vermont for satisfaction of an unsecured debt by taking property requires filing a lawsuit and obtaining an attachment and a judgment. V.R.C.P. 4.1; 12 V.S.A. §§ 3251-3255 . Here, Defendant made no attempt to pursue a legal remedy or attach the property. Where no written agreement otherwise establishes a right or process for satisfaction of a debt from stored property, judicial process is required prior to the seizure of the property. See e.g. Finley v. Williams, 142 Vt. 153, 155 (1982) (defendants had no right to seize and eventually to sell plaintiffs' property without judicial oversight when no security interest or abandonment of property was found). Defendant cannot avoid any of these requirements by simply claiming it gave "notice" to Plaintiff.

Furthermore, the notice that was given to Plaintiff in the form of the November 12, 1997 letter only notified Plaintiff of an intent to commence "procedures" if Plaintiff did nothing. The language is ambiguous as to whether the procedures to be commenced would be a lawsuit or either lawful or unlawful selfhelp measures, but it was reasonable for Plaintiff to infer that any procedures would be consistent with the requirements of law. Partial payment was made, but even if Plaintiff had paid nothing, the letter was not sufficient to shift to Plaintiff the responsibility to act. Defendant remained obliged to follow required legal process before taking possession.

Defendant also claims to have given notice through the public newspaper ad concerning

the auction. Defendant had Plaintiff's address and did not use it. The ad was not designed to reach Plaintiff personally, and it cannot reasonably be inferred that his failure to respond to it demonstrates abandonment of his interests in the stored property.

Third, Plaintiff's duty to mitigate, if one exists under these circumstances, would only become relevant in assessing the amount of damages incurred by the Plaintiff. A duty to mitigate does not serve as an affirmative defense to liability for conversion of Plaintiff's property.

It should be emphasized that the court does not endorse Plaintiff's conduct in failing to pay rent due and failing to address his overdue account responsibly. The conclusion is simply that Plaintiff's nonpayment under the circumstances of the "notice" provided in this case is not sufficient to show abandonment, nor does it confer on Defendant the right to exercise dominion over Plaintiff's property.

Consumer Fraud

Plaintiff argues that the unlawful conversion of his property, by itself, constitutes an unfair or deceptive practice giving rise to a private remedy under the Consumer Fraud Act. Plaintiff further argues that any violation of a rule or regulation promulgated by the Attorney General to ensure consumer protection constitutes prima facie proof of the commission of an unfair or deceptive act in commerce (9 V.S.A. § 2453(c)-(d)), and that Defendant violated three rules adopted by the Attorney General: 1) Rule CF 104.01 (Threats or Coercion); 2) Rule CF 104.04 (Deceptive Representation); and 3) Rule CF 104.05 (Unconscionable Means). On summary judgment, Plaintiff must do more than show a prima facie case. Nonetheless, the undisputed facts support judgment on the merits as a matter of law on the issue of liability.

The Consumer Fraud Act provides that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 9 V.S.A. § 2453(a). The Attorney General and State's Attorneys have the authority to bring enforcement actions under the statute. In addition, the statute provides for a private right of action to

> [a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 of this title, or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, or prohibited by any rule or regulation made pursuant to section 2453 . . . .

9 V.S.A. § 2461(b).

The sentence structure of section 2461(b) is complex. Breaking it down is helpful in analyzing the elements of alternative bases for consumer fraud claims. As set forth below, there are two main clauses, with the second clause containing multiple components.

A private cause of action is established for:

[Clause I] any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453,[1] or

[Clause II] [any consumer] who sustains damages or injury as a result of
A. any false or fraudulent representations, or
B. any practices prohibited by section 2453 of this title (i.e., unfair or deceptive), or
C. [any practices] prohibited by any rule or regulation made pursuant to section 2453.

The issue for the court in this case is thus whether Plaintiff's undisputed facts show damages or injury based on either false or fraudulent representations, *or* practices prohibited by section 2453, *or* practices prohibited by any rule or regulation made pursuant to section 2453. Id. (emphasis added). Any of these is sufficient to establish a private civil claim. The cross reference to section 2453 is to the statutory prohibition against unfair or deceptive acts or practices that applies to both public and private enforcement claims. 9 V.S.A. § 2453.

The Vermont Supreme Court has not yet ruled on whether a private consumer claimant has a private right of action under section 2453 based on an act that is simply "unfair" as opposed to one that is also a "deceptive" act. Lalande Air and Water Corp. v. Linda Pratt, No. 2000-202 (March 29, 2002) (mem.). Also undecided is the related issue of whether the claimant is required to show reliance on the unfair or deceptive act. The issue was specifically identified by the Court as unresolved.[2] This case presents these issues. Based on the structure of section 2453, and for the reasons set out below, the court concludes that under Clause II, a private claim is authorized by the statute if it is an unfair practice, without a showing of deception or reliance.

---

[1]The first clause establishes a right of action for a consumer who relies upon false or fraudulent representations or practices prohibited by the statute at the time of contracting for goods or services. Reliance is clearly a necessary element of a claim under this first clause. This clause does not apply in this case, as the acts complained of occurred not at the time of contracting, but at a later time in the relationship, after the contract was established.

[2]The Court in Lalande decided the case on factual grounds, and thus did not reach legal analysis on these issues. It is noted, however, that the quotation from 9 V.S.A. §2461(b) in the Entry Order omits two words that could have an impact on statutory analysis: a private right of action is established for "[a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453, or who sustains damages or injury as a result of any false or fraudulent representations *or practices* prohibited by section 2453 of this title, or prohibited by any rule or regulation made pursuant to section 2453." 9 V.S.A. §2461(b) (emphasis added). In the quotation of the statute in the Entry Order the words "or practices" were omitted. See Lalande Air and Water Corp. v. Linda Pratt, No. 2000-202 (March 29, 2002) (mem.).

Conversion. The court concludes that the conversion in this case constituted an unfair act in commerce and supports a statutory claim if the consumer claimant shows damage or injury as a result of the unfair act. The purposes of the Consumer Fraud Act are more appropriately implemented by the broadest reading that the language of the statute reasonably permits, and the statutory language supports recovery for a consumer who sustains damage or injury from an unfair act or practice, without the necessity of showing reliance by the particular consumer on a representation. The governing state statute, 9 V.S.A. § 2453(c), links state interpretation and enforcement to the parallel federal statute: "rules and regulations [under section 2453] shall not be inconsistent with . . . federal courts interpreting the Federal Trade Commission Act." The construction of the statute applied here adheres to federal precedent in broadly construing what constitutes unfair practice. See e.g., Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 240 (1972) (describing the Congressional intent under the Federal Trade Commission Act to leave undefined the term "unfair" due to the myriad of situations that could constitute an unfair practice). This broad interpretation furthers the purpose of the Act, which is to deter a broad range of unfair as well as deceptive practices in commerce. Id. To the extent private parties share in the enforcement effort through private actions, the public expense of enforcement is reduced, and the preventive function of the statute is enhanced.

In this particular case, the conversion of Plaintiff's property constitutes an unfair act in commerce. The nature of the unfairness has already been described. Defendant's conduct was not an isolated act of theft, but a practice routinely used by the Defendant in the conduct of its business. Because Defendant's conversion resulted in the loss of Plaintiff's property, damages have been established. The undisputed facts establish the three elements necessary for a consumer fraud claim: Plaintiff was a consumer, Defendant engaged in an unfair act, and Plaintiff suffered damages. Plaintiff is entitled to summary judgment as to liability.

The three other grounds. Plaintiff asserts three other bases for violation of the Consumer Fraud Act. As to each of these particular claims, Plaintiff must show "practices . . . prohibited by any rule or regulation made pursuant to section 2453." Id. Plaintiff relies on violations of the three rules adopted by the Attorney General: Threats or Coercion, Deceptive Representation, and Unconscionable Means.

Threat. The Rule against Threats or Coercion prohibits the use of any unfair threat, coercion or attempt to coerce in order to collect or attempt to collect any debt. Rule CF 104.01. Acts which fall under this Rule include: "[t]he threat that nonpayment of any alleged claim will result in . . . the seizure . . . or sale of any property . . . without proper notice and court order permitting such action unless such action is in fact contemplated by the debt collector and permitted by the law." Rule CF 104.01(f).

The undisputed facts show that even if Defendant did threaten the Plaintiff in a manner prohibited by the rule, Plaintiff suffered no injury or damage as a result of the threat. Plaintiff did not remit any portion of his overdue bill until January 1998, and he owed the Defendant the money. Plaintiff has not demonstrated that the threat alone resulted in any damage or injury. As

such, Plaintiff does not have a claim based on violation of this particular rule. 9 V.S.A. § 2461(b) (to establish a claim under section 2453 claimant must sustain "*damages or injury* as a result of any false or fraudulent representations or practices prohibited by any rule or regulation made pursuant to section 2453 . . . ") (emphasis added).

Deceptive Representation. The Rule prohibits the use of false, fraudulent, deceptive or misleading representations to collect any debt. Rule CF 104.04. Actions which fall under this Rule include: "[a]ny false representation, or any representation which tends to create in the mind of the ordinary debtor a false impression, of the character, extent or amount of a claim against the debtor." Rule CF 104.04(e).

The undisputed facts establish that Defendant made representations prohibited by this Rule in two respects:

False representations. The undisputed facts show that when Defendant wrote the letter to Plaintiff in November of 1997 stating that if payment was not made in ten days, procedures leading to an auction would begin, Defendant gave Plaintiff reason to believe that it would commence a lawsuit if nonpayment persisted, suggesting that Plaintiff would receive notice of procedures before any auction would take place.[3] This letter reasonably misled Plaintiff into believing that continued nonpayment would not result in an auction without Plaintiff knowing about it. At the time of making that statement, Defendant's practice was to proceed to auction without commencing legal proceedings with notice, and Defendant knew it had no intention of commencing legal proceedings. The letter also misled Plaintiff into thinking that payment would stop any procedures leading toward an auction. In the letter, Defendant made a false representation.

When Defendant accepted the partial payment and continued sending regular monthly bills, Defendant further misled Plaintiff into believing that no auction or procedure was yet imminent. This was a second false representation. These two false representations support a further implicit misrepresentation that Defendant was taking no action that threatened the security of Plaintiff's property. Plaintiff's reasonable expectation, based on what he had received, was that his overdue account balance was increasing, and that his unit was overlocked so that he could not have access to his personal property, but that Defendant was doing nothing to jeopardize his continued ownership of the property. In fact, this was false, because Defendant was proceeding without legal process to advertize an auction of the property in the newspaper, and auction off the property. Based on the undisputed facts, the court concludes that Defendant has made false and fraudulent representations prohibited by the Rule against Deceptive Representations in the manner detailed above, and that Defendant is therefore liable to Plaintiff

---

[3]As noted previously in this opinion, the language in the letter is ambiguous and capable of supporting inferences that any procedures would be unlawful as well as lawful. Under the circumstances, a consumer is justified in inferring that any procedures would be lawful ones, in which case the consumer would receive notice.

for such damages as Plaintiff can establish. Plaintiff has established through undisputed facts that he suffered damages as a consequence of the false representation, in that he was lulled into believing that his personal property was safely overlocked when in fact it was being converted and sold to third parties without his knowledge.

A representation which tended to create in the mind of the ordinary debtor a false impression, of the character, extent or amount of a claim. When Defendant sent Plaintiff monthly bills showing an increasing balance including interest accruing at an annual rate of 18%, it made a representation which would tend to make an ordinary debtor believe that the debtor owed interest at an annual rate of 18%. Under Vermont law, absent a contractual agreement that stipulates a different rate of interest, the statutory or legal rate of interest applies to an overdue debt. Greenmoss Builders Inc. v. King, 155 Vt. 1, 8 (1990). Here, nothing in the rental agreement between the Defendant and the Plaintiff even mentions a rate of interest. Thus, the only rate that would legally apply to Plaintiff's overdue balance would be the rate of 12%. 9 V.S.A. § 41a(a). In representing to the Plaintiff that he owed interest at an 18% annual rate if his bill remained unpaid, Defendant was falsely representing the extent or amount of Defendant's claim against Plaintiff. It is not clear that Plaintiff can show damages with respect to the 18% interest rate billings, unless Defendant received funds in excess of interest charged at the rate of 12% on the overdue balance. That issue can be determined at a hearing on damages.

Unconscionable Means. Rule CF 104.05 prohibits the use of unfair or unconscionable means to collect a debt. The undisputed facts show that Defendant not only proceeded to auction without filing a case and without giving notice to Plaintiff even though it had Plaintiff's address (and notified Plaintiff of the results of the auction two days after it occurred), it *intended* to do just that, and in fact used this tactic as its standard procedure. This represents an unconscionable means of collecting a debt. Because Defendant's unconscionable debt collection practice resulted in the loss of Plaintiff's property, Defendant is liable to Plaintiff for such damages as Plaintiff establishes at a hearing.

ORDER

For the foregoing reasons,

The Plaintiff's Motion for Partial Summary Judgment is *granted*, and liability is established as to both conversion and consumer fraud claims.

A status conference will be scheduled to determine appropriate hearing time for the remaining issues in the case.

Dated at Burlington, Vermont, this 13th day of May, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge