UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VORCELIA OLIPHANT,	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	3:03cv2038 (SRU)
	:	
JENNIFER SIMBOSKI and REINER,	:	
REINER & BENDETT, P.C.,	:	
Defendants.	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Vorcelia Oliphant has sued the law firm Reiner, Reiner & Bendett, P.C. and one of its attorneys, Jennifer Simboski, alleging that they violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., when they instituted a foreclosure action and required Oliphant to pay certain fees in order to reinstate her mortgage. Oliphant moved for partial summary judgment with respect to liability only. The defendants opposed the motion and moved the court to treat their opposition as a cross-motion for summary judgment.

In the note securing her mortgage, Oliphant expressly agreed that, in the event the lender required immediate payment in full, she would pay the costs and expenses of enforcing the note "to the extent not prohibited by applicable law." Note ¶ 6(C), Ex. C to Defs.' Mem. Supp. Objection Summ. J. Therefore, because the fees do not violate any provisions of Connecticut state law, I grant summary judgment in favor of the defendants.

I. Factual Background

The following facts are undisputed. The law firm, Reiner, Reiner & Bendett, and one of its attorneys, Jennifer Simboski, attempted to collect Oliphant's mortgage debt on behalf of Principal Residential Mortgage, Inc. ("Principal Residential"). Pl.'s L. Rule 56(a)1 Statement at ¶¶ 3, 4; Defs.' L. Rule 9(c)2 [*sic*] Statement at ¶¶ 3, 4. The defendants initiated a foreclosure

action on the property. Pl.'s L. Rule 56(a)1 Statement at ¶ 4; Defs.' L. Rule 9(c)2 [*sic*] Statement at ¶ 4.

In December 2002, the defendants mailed Oliphant a document listing "Reinstatement Figures Good Through 12/27/02." Ex. 3 to Pl.'s Mem. Supp. Summ. J. The figures included overdue payments, late charges, attorneys' fees, and various other itemized fees relating to the foreclosure action. *Id.* The document is divided into two parts: (1) overdue payments, late charges, and "other fees" owed to Principal Residential, the sum of which is calculated as the "subtotal" of $5,506.42, and (2) fees related to the collection of the debt and foreclosure action, including attorneys' fees, which total $2159.10. The total amount demanded (the "total reinstatement") was $7,665.52. *Id.* Oliphant paid the amounts listed in the reinstatement document, and her mortgage was reinstated. Pl.'s L. Rule 56(a)1 Statement at ¶ 10; Defs.' L. Rule 9(c)2 [*sic*] Statement at ¶ 10.

Reiner, Reiner & Bendett invoiced Principal Residential the amounts reflected on the reinstatement document. Ex. A to LaRosa Aff. At Principal Residential's request, the firm retained the amounts for attorneys' fees and costs and remitted $13 to the clerk of New Haven to release the lis pendens. LaRosa Aff. at ¶ 6.

The parties dispute the amount of attorney time spent on the Oliphant foreclosure and whether Oliphant requested the reinstatement figures before the document was sent to her. Neither of those issues is material to the resolution of the summary judgment motions. Despite her focus on attorney hours, Oliphant has brought forth no evidence regarding the unreasonableness of the attorneys' fee charged.

II. Discussion

A. Standard for Summary Judgment

Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law, under the applicable substantive law." *Anderson*, 477 U.S. at 248. An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; *see also Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). Thus, if reasonable minds could differ in the interpretation of evidence that is potentially determinative under substantive law, summary judgment is not appropriate. *See R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 59 (2d Cir. 1995).

When ruling on a summary judgment motion, the court must construe the facts in a light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) (quoting *Diebold*, 369 U.S. at 655); *see also Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992).

When cross-motions for summary judgment are presented to the court, summary judgment should not be granted "unless one of the moving parties is entitled to judgment as a matter of law

upon facts that are not genuinely in dispute." *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

B. The Note

Oliphant secured her mortgage debt with a note, containing the following provision:

Payment of Costs and Expenses

> If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

Ex. C Def.' Mem. Supp. Objection Summ. J.

The parties agree that by instituting a foreclosure action the Lender had "required immediate payment in full." Accordingly, unless it was in violation of "applicable law" – which the parties agree is the state law of Connecticut – the defendants' conduct did not violate the parties' agreement. Oliphant rests her argument solely on violations of Conn. Gen. Stat. §§ 42-150aa, 49-7, and 52-249, and the incorporation of state law into the note. The defendants respond that the fees demanded did not violate the parties' agreement or state law.

C. FDCPA Violations Based on Violations of State Law

Oliphant alleges that by demanding the figures listed in the reinstatement document, the debt collectors violated state law, thereby also violating sections 1692f, 1692e(2), and 1692e(10) of the FDCPA.

Section 1692f provides that "unfair practices" proscribed by the FDCPA include:

> The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

15 U.S.C.A. § 1692f(1).

Section 1692e(2) prohibits the "false representation of (A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." 15 U.S.C. § 1692e(2). Section 1692e(10) prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(10).[1]

Oliphant alleges that the defendants violated these sections of the FDCPA because Connecticut law prohibits the attorneys' fees, costs, and various other fees demanded from Oliphant.

D. Connecticut Statutory Provisions

Oliphant relies on three Connecticut statutes to support her claim that the defendants' demands violated state law and, in turn, the FDCPA: Conn. Gen. Stat. §§ 42-150aa, 49-7, and 52-249.

1. *Conn. Gen. Stat. § 42-150aa.*

With respect to attorneys' fees, Oliphant points to Conn. Gen. Stat. § 42-150aa(b), which limits attorneys' fees in actions on consumer contracts or leases to "not more than fifteen percent of the amount of any judgment which is entered." Connecticut courts have held that section 42-150aa is not applicable to actions in which the underlying transaction involved a mortgage on real

[1] At oral arguments on March 10, 2005, Oliphant also claimed a violation of 15 U.S.C. § 1692d because the defendants' actions were "oppressive." She did not address that claim in her memorandum of law in support of summary judgment although I note that her complaint included an allegation that the defendants violated sections 1692d, -e, -f, *or* -g of the FDCPA. Compl. ¶ 7 (emphasis added). The only allegedly "oppressive" aspect of the defendants' conduct appears to be that the amounts demanded violated state law. As discussed *infra*, the defendants' actions did not violate state law.

estate in excess of $25,000. *E.g.*, *Liapes v. Beaulieu*, 557 A.2d 934, 935 (Conn. App. 1989).[2] The foreclosure action underlying Oliphant's claim involved a mortgage on real estate in excess of $25,000. Ex. J. to Defs.' Mem. Supp. Objection Summ. J. at n.p. ("Preliminary Statement of Debt"). Thus, section 42-150aa is inapplicable.

2. *Conn. Gen. Stat. §§ 49-7 and 52-249.*

Oliphant also points to Conn. Gen. Stat. §§ 49-7 and 52-249 to argue that attorneys' fees and other costs are not recoverable before a judgment is entered. These statutes do not, however, prohibit parties from agreeing to pay costs and attorneys' fees necessary for enforcement of a note, even when the enforcement does not result in a court judgment.

Section 49-7 addresses mortgages and allows for agreements in notes "to pay costs, expenses or attorneys' fees." That provision also provides that such an agreement should be construed as one "for fair compensation rather than as a penalty, and the court may determine the amounts to be allowed" for attorneys' fees. Conn. Gen. Stat. § 49-7.

In actions for foreclosure, section 52-249(a) allows the plaintiff to recover "costs, including a reasonable attorney's fee" "upon obtaining judgment of foreclosure." Conn. Gen. Stat. § 52-249(a). In foreclosure judgments when a lis pendens has been recorded, section 52-249(b) requires the court to determine "a reasonable fee" for the title search.

---

[2] Oliphant argues that the Connecticut Supreme Court overruled *Liapes* in *Rizzo Pool Co. v. Del Grosso*, 240 Conn. 58 (1997). Her argument is not persuasive. In *Rizzo Pool*, the Supreme Court did not address whether a mortgage on real estate is a "consumer contract" and did not apply section 42-150aa. Rather, the court held that a contract to install a swimming pool was a "consumer contract" under Conn. Gen. Stat. § 42-150bb. *Id.* at 71. Furthermore, the Supreme Court held that section 42-150bb did not incorporate 42-150aa, and that the award of attorneys' fees based on the parties' contract was not subject to the fifteen-percent cap of section 42-150aa. *Id.* at 73-74.

Neither section 49-7 nor section 52-249 prohibits the collection of reasonable attorneys' fees pursuant to an agreement between the parties. In addition, neither section requires a court to enter judgment in order for contractual fees to become due. Here, the parties' agreement provided for attorneys' fees for enforcing the note if the lender required immediate payment in full, and an attorneys' fee of $1275.00 to file and prosecute a foreclosure action is not unreasonable.[3]

Unlike the debtors in the cases she cites, Oliphant *agreed* to pay attorneys' fees and expenses associated with enforcing the note in a debt collection effort. *Cf. Veach v. Sheeks*, 316 F.3d 690 (7th Cir. 2003) (attorneys' fees and court costs were not component of "debt" under the FDCPA and debt collector's inclusion of those amounts in action to collect *dishonored check* violated 15 U.S.C. § 1682g(a)(1)).

With respect to the fees charged for a title search and title update, Oliphant argues that, because full-time employees of Reiner, Reiner & Bendett completed the title search and update, these were "costs not incurred." Pl.'s Memo Supp. of Summ. J. at 5. She points to no case law in support of her argument that debt collectors must pay out-of-pocket for such services in order for their costs to be recoverable when a debtor agrees to pay "costs and expenses including reasonable and customary attorneys' fees" for enforcing the note. Moreover, these costs were

---

[3] Relying on Simboski's deposition testimony, Oliphant asserts that "only one-half hour of attorney time (at best) had been expended." Pl.'s Reply Mem. Supp. of Summ J. at 1; Pl.'s L. Rule 56(a)1 Statement ¶¶ 6, 7. The fee of $1,275.00 was, in fact, a flat-fee that was actually charged to Principal Residential in connection with Oliphant's foreclosure action. Ex. A to LaRosa Aff. The fee charged is within the range established by the Department of Housing and Development (HUD) for lender reimbursement purposes. *See* Ex. F to Defs.' Mem. Supp. Objection Summ. J., HUD Mortgagee Letter 01-19 (listing $1300 maximum for attorneys' fee in judicial foreclosure action on mortgage in Connecticut); Ex. E to Defs.' Mem. Supp. Objection Summ. J., HUD Mortgagee Letter 98-26 (describing schedule of allowable attorneys' fees).

incurred out-of-pocket by Principal Residential, the lender whose costs and expenses Oliphant agreed to pay.

With respect to costs, Oliphant emphasizes that no judgment was entered against her and thus no court awarded "costs." Accordingly, she argues that the amounts charged for a court entry fee, appraisal, and certified copies, were not permitted under section 52-249. That statute, however, addresses costs that are *permitted* by law when a foreclosure judgment is entered. It does not *prohibit* parties from agreeing to such fees and costs irrespective of a final judgment. Oliphant cites *Shula v. Lawent*, 359 F.3d 489 (7th Cir. 2004), in support of her argument, but in fact, that case illustrates the distinction. "Had it not been for the suit against Shula to collect the debt he owed the doctor, no claim for costs would have arisen. *And of course there was no agreement by Shula to pay the costs.*" *Id.* at 493 (emphasis added).

E. Unchallenged Fee

The reinstatement document includes one line-item marked "other fees" in the amount of $25. That fee is included in the subtotal, i.e., the amount remitted to Principal Residential, not a fee or cost associated with the foreclosure. In a footnote in her memorandum in support of summary judgment, Oliphant notes the twenty-five dollar charge, "for which there is no known contractual or legal authority." Pl.'s Mem. Supp. Summ. J. at n.5, 5. When questioned at oral argument, however, she did not pursue this fee as one in violation of the FDCPA.

III. Conclusion

Based on the contractual authority in Oliphant's note and because no Connecticut statutes were violated, the defendants' actions in requiring payment of attorneys' fees, court costs, and other expenses totaling $2159.10 in order to reinstate her mortgage, did not violate the FDCPA.

Oliphant's motion for partial summary judgment (doc. # 24) is DENIED. The defendants' cross-motion for summary judgment (doc. # 27) is GRANTED. The clerk shall enter judgment and close the file.

It is so ordered.

Dated at Bridgeport, Connecticut, this 31st day of March 2005.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge