

SO ORDERED.

SIGNED this 22nd day of February, 2013.



Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:)	
)	
Joseph Walter Melara and)	
Shyrell Lynn Melara,)	Case No. 10-51385
)	
Debtors.)	
)	
_____)	
)	
Joseph Walter Melara and)	
Shyrell Lynn Melara,)	
)	
Plaintiffs,)	Adv. Proc. No. 11-06057
)	
v.)	
)	
Springleaf Financial Services, Inc.,)	
)	
Defendant.)	
_____)	

**ORDER GRANTING DEFENDANT SPRINGLEAF
FINANCIAL SERVICES INC.'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court, after notice to all parties in interest, on Defendant's Motion for Summary Judgment on December 18, 2012, in Winston-Salem, North Carolina. Kenneth Love appeared on behalf of the Plaintiffs, and Dennis Fairbanks and Tyler Brown appeared on behalf of the Defendant. After considering the material in the record and arguments of counsel, this Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

JURISDICTION

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), which this Court has the jurisdiction to hear and determine. Pursuant to the analysis in *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011), the Court may enter a final order in this matter.

PROCEDURAL HISTORY AND FACTS

Joseph Walter Melara and Shyrell Lynn Melara (“Plaintiffs”) filed a petition for relief under Chapter 13 of the Bankruptcy Code on July 23, 2010. The Debtor’s Chapter 13 Plan was confirmed on April 14, 2011. Springleaf Financial Services, Inc. (“Defendant”) filed a timely proof of claim in the amount of \$17,318.53. Subsequently, on August 12, 2011, Plaintiffs filed the Complaint that initiated this adversary proceeding. In the Complaint, Plaintiffs objected to Defendant’s proof of claim on grounds of usury, unfair and deceptive trade practices (“UDTP”), Truth in Lending Act (“TILA”) violations, fraudulent misrepresentation, and actual fraud. After discovery, the Defendant filed a motion seeking summary judgment on all of Plaintiffs’ claims.

On August 10, 2001, Plaintiffs executed a Home Equity Line of Credit Agreement for \$18,375.00 (“Loan”) with Defendant, then known as American General Finance, Inc. The terms of the Loan were as follows:

- (A) minimum monthly payments as shown on monthly statements
- (B) an assumed term of 20 years;
- (C) a fixed annual interest rate of 14.5%;
- (D) a 5% late charge penalty of not less than \$25 if a monthly payment was made more than 15 days late; and
- (E) a balloon payment due August 9, 2011.

Plaintiffs alleged that they did not agree to a balloon payment and that the balloon payment selection box was checked on the Loan document after the Plaintiffs had signed the Loan documents and returned those Loan documents to the Defendant. The Defendant stipulated at the hearing that any balloon payment due is waived. Further, the Plaintiffs allege that it is not possible for the Loan to amortize without charging a usurious rate of interest. Plaintiffs also claim the Defendant charged illegal late fees, and the Plaintiffs dispute the late payment history presented by the Defendant. The Defendant disputed the Plaintiffs’ allegations by submitting evidence of an amortization schedule, a payment history of the Loan, and a copy of a monthly statement that the Plaintiffs returned to the Defendant. Lastly, the Plaintiffs allege that the Defendant did not provide the TILA disclosures; however the Defendant presented TILA disclosures with the Plaintiffs’ initials. The male Plaintiff, Joseph Melara, testified at a deposition that the initials on the TILA disclosures looked like his initials and that he had no reason to believe that the initials did not belong to him.

DISCUSSION

The standard for summary judgment is set forth in Fed. R. Civ. P. 56, which is made applicable to this proceeding by Federal Bankruptcy Procedure Rule 7056, and provides that the movant will prevail on a motion for summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). The movant has the initial burden of establishing that there is an absence of any genuine issue of material fact, and all reasonable inferences must be drawn in favor of the nonmoving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). After this initial burden is met, to survive a motion for summary judgment, the non-movant must present evidence that, when all inferences are made in favor of the non-movant, would support a judgment in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). For the non-moving party to meet its burden, the nonmoving party is required to present evidentiary support for every essential element of its case and upon which it bears the burden of proof at trial. *Celotex*, 477 U.S. at 330. However, the nonmoving party cannot “create a genuine issue of material fact through mere speculation or the building of one inference upon another.” *Harleysville Mut. Ins. Co. v. Packer*, 60 F.3d 1116, 1120 (4th Cir. 1995) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir.1985)).

A. Usury and Unfair and Deceptive Trade Practices based on the Claim of Usury

Plaintiffs allege usury and unfair and deceptive trade practices based on the claim of usury. Specifically, Plaintiffs contend that the rate must be usurious, and the Plaintiffs base this assertion on a purported simple calculation of the amount paid on the Loan and the amount owed as of the petition date. Defendant contends that the Loan documents show the interest rate of the Loan to be no more than 14.5% during the term of the Loan.¹

Plaintiffs’ usury claim and unfair and deceptive trade practices claim based on usury fail as a matter of law. The elements of usury are a loan or forbearance of the collection of money, an understanding that the money owed will be paid, payment or an agreement to pay interest at a rate greater than allowed by law, and the lender’s corrupt intent to receive more in interest than the legal rate permits for use of the money loaned. *Swindell v. Fed. Nat’l Mortgage Assn.*, 330 N.C. 153, 159 (1991) (citing *Auto Supply v. Vick*, 303 N.C. 30, 37 (1981)). Section 24-1.2A of the North Carolina General Statutes states that the maximum rate allowed by law for equity lines of credit is set forth in N.C. GEN. STAT. § 24-1.1(c). The parties do not dispute that sixteen percent (16%) is the maximum applicable interest rate for this Loan as published by the North Carolina Commissioner of Banks. UDTP is set forth by N.C. Gen. Stat. § 75-1.1. The Supreme Court of North Carolina has ruled that “[i]n order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs.” *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 68 (2000).

¹ Defendant also erroneously argued that the statute of limitations is two years, and that the usury claim is barred due to the applicable statute of limitations. However, N.C. Gen. Stat. § 1-53 states that “the two year [statute of limitations] period shall accrue with each payment made and accepted on the loan.” As such, the payments made within the last two years prior to the filing of the bankruptcy petition are actionable and not barred by the statute of limitation. *See* U.S.C. § 108 (c).

Defendant offered into evidence the amortization schedule of the Loan as well as the Plaintiffs' detailed payment history showing how the payments were applied to late fees, accrued interest, life insurance premiums, and disability insurance premiums. Defendant's evidence shows that the interest rate charged did not exceed sixteen percent (16%). As such, the Defendant met the burden of establishing that there is no genuine issue of material fact as to usury. Plaintiffs' offered mere allegations that the Defendant's calculation is incorrect without presenting evidence as to the method of calculation upon which Plaintiffs' assertion is based. Plaintiffs' allegations are not sufficient to establish a genuine issue of material fact. Speculation does not fulfill Plaintiffs' burden of producing evidence as to every essential element of Plaintiffs' usury claim. Therefore, the usury claim does not survive summary judgment. It follows that since the Plaintiffs were not able to present evidence to show a material issue of genuine fact as to usury, the Plaintiffs' UDTP claim based on the claim of usury does not survive summary judgment for the same reason.

B. Usurious Late Fees and Unfair and Deceptive Trade Practices Claim based on Usurious Late Charges

Defendant moves for summary judgment on Plaintiffs' claims that the late fees charged during the life of the Loan were usurious under N.C. GEN. STAT. § 24-1.2A (2012). Defendant presented a detailed documentation of late fees charged to the Loan. Plaintiffs did not proffer any evidence, but only alleged that they were not late in their payments all of the specific times that the Defendant noted in its records.

N.C. GEN. STAT. § 24-1.2A refers to N.C. GEN. STAT. § 24-10, which sets caps on fees for loans secured by real property. Although N.C. GEN. STAT. §24-10 sets caps on many loan fees, the statute does not set a cap on late fees for home equity lines of credit. Since there is no cap on late fees for home equity lines of credit, the late fees assessed are not usurious; therefore, the Plaintiff is precluded from prevailing on this claim. Further, Plaintiffs did not present any evidence to show that a payment was timely made or that a late fee was erroneously charged. This claim does not survive summary judgment and the Plaintiffs claim must be dismissed as a matter of law. For the same reasons, Plaintiffs' UDTP's claim based on usurious late fees also fails to survive summary judgment.

C. Truth in Lending Act Violation Claim and attendant Unfair and Deceptive Trade Practices Claim

Plaintiffs allege a violation of TILA and an attendant UDTP claim. Defendant has submitted into evidence the required TILA disclosures with the initials of the Plaintiffs, as well as a deposition in which Joseph Melara admits that he has no reason to believe the initials on the TILA disclosures are not his initials. Despite this admission, Plaintiffs allege that they never received Truth-In-Lending disclosures at the time the Plaintiffs made their initial application for the Loan, as required by Regulation Z of 12 C.F.R. § 226.5b. Regulation Z requires that TILA disclosures "be delivered or placed in the mail not later than three business days following the receipt of a consumer's application." 12 C.F.R. § 226.5b n.10a (2012). The Defendant has met its burden of proof that there is no genuine issue of material fact as to whether the Plaintiffs received the required TILA disclosures. The Plaintiffs have not submitted evidence to establish

a genuine material issue of fact regarding their initials on the TILA disclosures. Therefore, this cause of action does not survive summary judgment and is dismissed. Since the underlying TILA violation is dismissed, the UDTP claim that is based on the TILA claim is also dismissed upon summary judgment.

D. Fraudulent Misrepresentation

Plaintiffs pled that the Defendant fraudulently misrepresented the interest rate, the balloon payment term, and alleged negative amortization of the Loan. In order to prove a claim of fraudulent misrepresentation, the party asserting the claim must show false representation or concealment of a material fact that is reasonably calculated to deceive and made with intent to deceive, which does in fact deceive, and results in damage to the injured party. *Taylor v. Gore*, 161 N.C. App. 300, 303 (2003).

(a) Interest Rate & Negative Amortization

Plaintiffs contend that the Defendant falsely represented that the Loan did not negatively amortize and that its interest rate was not usurious. Defendant's evidence of the amortization schedule of the Loan shows that the Loan is not negatively amortized, and that the interest rate is not usurious. Defendant has also admitted relevant TILA disclosures that have the initials of the Plaintiffs on the disclosures. Defendant has met its burden to show there is no genuine issue of material fact as to the representation of the interest rate and amortization of the Loan on its terms. The Plaintiffs have not provided any evidence to counter the Defendant, but only made blanket unsupported statements to the contrary. As such, this count for the claim of false representation does not survive summary judgment and is dismissed.

Plaintiffs also contend that the Defendant concealed how the Plaintiffs' payments were applied, such that the Loan in actuality was a negatively amortized loan with a usurious interest rate. Defendant has admitted into evidence a copy of a statement that the Plaintiffs received and returned to the Defendant. That exhibit shows that the Plaintiffs were informed of how their payments were applied to interest and principle for the year to date, as well as the previous balance on the Loan, the debits, insurance charges, finance charges, payments, and the new balance. Defendant has met its burden to show that there was no concealment of the actual interest rate or actual amortization of the Loan. Again, the Plaintiffs failed to provide any evidence to counter the Defendant, but only made blanket unsupported statements to the contrary. This count for the claim of false representation is dismissed as there is no genuine issue of material fact to support a finding otherwise.

(b) Balloon payment

Plaintiffs contend that Defendant falsely represented that the Loan did not have a balloon payment feature. Plaintiffs allege that after they signed the Loan documents, the balloon feature provision on the Loan was checked such that it would appear that the Plaintiffs agreed to have a loan with a balloon payment. Defendant has stipulated that the balloon payment feature of the Loan is waived. By this stipulation, the Defendant has met its burden that there is no genuine issue of material fact; whether or not the Plaintiffs signed the balloon payment feature is immaterial since the Defendant waived the balloon payment feature of the Loan. The Court

finds there is no genuine issue of material fact to support the material misrepresentation claim surviving summary judgment. The claim is dismissed.

E. Actual Fraud

The Plaintiffs allege actual fraud for the false representation or concealment of the interest rate, alleged negative amortization, and balloon payment term of the Loan. The following elements of actual fraud have been established by the North Carolina Supreme Court: a false representation or concealment of a material fact that is reasonably calculated to deceive and made with intent to deceive, which does in fact deceive, and results in damage to the injured party. *Forbis v. Neal*, 361 N.C. 519, 526-27 (2007) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974)). Reliance on the allegedly false representations must be reasonable. *See Forbis*, 361 N.C. at 526-57.

As discussed above, the Defendant has shown that there is no genuine issue to any material fact that would support a claim of actual fraud. Further, the Plaintiffs failed to present a genuine issue of any material fact, but only presented mere allegations. As such, the claims of actual fraud do not survive summary judgment and are dismissed.

CONCLUSION

Defendant has established that there is no genuine issue of material fact and the Plaintiffs have failed to present evidentiary support for their claims. As such, this Court will grant Defendant's motion for summary judgment.

For the foregoing reasons, it is **ORDERED, ADJUDGED, and DECREED** that the Defendant's Motion for Summary Judgment is hereby **GRANTED**.

END OF DOCUMENT

SERVICE LIST

Kenneth Love
P. O. Box 779
Rural Hall, NC 27045
Attorney for Plaintiffs

R. Dennis Fairbanks
HUNTON & WILLIAMS LLP
PO Box 109
Raleigh, NC 27602
Attorney for Defendant

Tyler P. Brown
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Attorney for Defendant

Kathryn L. Bringle
P. O. Box 2115
Winston-Salem, NC 27102-2115
Trustee