

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

Submitted: July 12, 2010
Decided: July 27, 2010

**ON DEFENDANT'S MOTION TO DISMISS
GRANTED**

David E. Matlusky, Esq., and Brett Bendistis, Esq., THE MATLUSKY FIRM, LLC, Wilmington, Delaware, Attorneys for Plaintiff.

J. Scott Shannon, Esq., and Art C. Aranilla, Esq., MARSHALL, DENNEHEY, WARNER, COLEMAN, & GOGGIN, Wilmington, Delaware, and Daniel Griffith, Esq., WHITEFORD, TAYLOR & PRESTON, LLP, Wilmington, Delaware, Attorneys for Defendant.

ABLEMAN, JUDGE

I. Introduction

Plaintiff Jose Nieves claims that Defendant All Star Title, Inc. (“All Star”) provides less than stellar settlement services by conducting closings on loans secured by Delaware real estate without the participation of a Delaware attorney. Nieves filed suit both as an individual and as representative of a putative class of similarly-situated borrowers, seeking to recover damages for All Star’s practices. Nieves acknowledges that he cannot raise a private cause of action for All Star’s purported unauthorized practice of law, but maintains that All Star is liable for consumer fraud, deceptive trade practices, professional negligence, and breach of contract.

All Star has moved to dismiss Nieves’ suit for failure to state a claim upon which relief can be granted. Specifically, All Star contends that Nieves has not identified any violations of recognized legal duties and has not pled facts to support that its actions directly caused any harm. All Star emphasizes that the absence of a Delaware attorney in the settlement process does not automatically invalidate a mortgage, and that Nieves has not offered any non-conclusory allegations that the loan was adversely affected by its conduct.

The Court concludes that dismissal is merited on several alternative bases. First, the theories of liability described in the Complaint are

essentially claims for the unauthorized practice of law, despite Nieves' careful attempts to avoid labeling them as such. Furthermore, even if the Court weighed form over substance to consider Nieves' claims, each is legally insufficient on the merits. Finally, because Nieves' alleged "damages" consist solely of fees voluntarily paid to All Star with full knowledge that it was not providing an attorney's services, the Court finds that the voluntary payment rule acts as a bar to his claims.

Thus, for reasons discussed more fully herein, All Star's Motion to Dismiss must be granted.

II. Factual & Procedural Background

Nieves instituted this action based upon All Star Title's failure to ensure that Delaware attorneys prepared documents and conducted settlements relating to the refinancing of loans secured by Delaware real property. Nieves's claim derives from *In re Mid-Atlantic Settlement Services, Inc.*,¹ in which the Delaware Supreme Court adopted a decision of the Board on the Unauthorized Practice of Law finding that real estate settlements constitute the practice of law, and that a Delaware attorney must

¹ 755 A.2d 389, 2000 WL 975062 (Del. May 31, 2000) (TABLE).

therefore conduct the closing of a refinancing loan secured by Delaware real property.²

Nieves claims that All Star improperly charged “considerable” amounts for non-attorneys to complete work that must, under *Mid-Atlantic*, be performed by a Delaware attorney. Nieves further alleges that he did not receive a “true and correct” Truth in Lending Act statement or Right of Rescission notice, and that the loan documents “did not contain the previously agreed terms between Plaintiff and the lender.”³ Based upon these allegations, Nieves filed this proposed class action, claiming that All Star is liable for unlawful practices under the Delaware Consumer Fraud Act (Count I); deceptive trade practices (Count II); professional malpractice/negligence (Count III); and breach of contract (Count IV). On May 27, 2010, All Star moved to dismiss Nieves’ Complaint.

III. Parties’ Contentions

All Star contends that Nieves cannot establish that it violated any legally cognizable duty by failing to provide notice that he should have been represented by a Delaware attorney or by failing to ensure that he received

² The *Mid-Atlantic* decision subjects this general rule to certain exceptions, none of which appear relevant to Nieves’ loan based upon the information currently before the Court.

³ Pls.’ Compl., ¶ 18.

representation.⁴ All Star notes that *Mid-Atlantic* concerns the unauthorized practice of law, and that the rules governing unauthorized practice cannot be enforced via a private cause of action. In addition, All Star contends that the Complaint does not demonstrate a causal link between its actions and the supposed defects in the closing, which All Star considers too vague to satisfy this Court’s notice-pleading standard.⁵

In response, Nieves urges that dismissal is inappropriate because his case “presents issues of statewide consumer protection” that are a matter of first impression.⁶ He denies that he has brought a claim for the unauthorized practice of law; rather, he contends he is entitled to recovery based upon consumer protection principles which prevent All Star from “profiting off predatory lending techniques.”⁷ Nieves alleges that All Star caused damages by charging “excessive fees . . . for services that were bargained for and required by law, but not provided,” even if the resulting mortgages are valid despite the absence of a Delaware attorney in the settlement process.

⁴ Def.’s Mot. to Dismiss 2-3.

⁵ *Id.* at 4.

⁶ Pl.’s Resp. to Def.’s Mot. to Dismiss 1.

⁷ *Id.* at 2.

IV. Standard of Review

Upon a motion to dismiss, the Court subjects a statement of claim to a broad test of sufficiency.⁸ Dismissal is appropriate only if it is reasonably certain “that the plaintiff could not prove any set of facts that would entitle him to relief.”⁹ A plaintiff’s claim will not be dismissed unless it clearly lacks factual or legal merit.¹⁰ When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.¹¹ In addition, every reasonable factual inference will be drawn in favor of the plaintiff.¹²

V. Analysis

A. Plaintiff’s Claims Attempt to Create a Private Cause of Action for the Unauthorized Practice of Law

Although it will separately address the elements of each count of the Complaint, the Court finds that all of Nieves’ claims are subject to dismissal

⁸ *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268 (Del. Super. Jan. 3, 2007).

⁹ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

¹⁰ *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

¹¹ *Spence v. Funk*, 396 A.2d at 968; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007) (citing *Ramunno*, 705 A.2d at 1036).

¹² *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

as impermissible attempts to craft a private cause of action for the unauthorized practice of law. Each count of the Complaint is premised upon All Star's alleged violations of *Mid-Atlantic* and *In re Member of the Bar of the Supreme Court*.¹³ While Nieves attempts to describe his claims under various other theories of liability, his essential position is that he and the other members of the proposed class are entitled to relief for All Star's alleged unauthorized practice of law. Nieves has not alleged any monetary damages arising from All Star's conduct other than its fees. Consistent with prior case law, the absence of a Delaware attorney from the pre-settlement process or closing will not invalidate his mortgage unless it deprived him of the benefit of his loan or resulted in a failure to understand the transaction or the obligations it created.¹⁴ Nieves' Complaint conclusorily suggests that the loan did not contain agreed-upon terms and that he did not receive all required disclosures, but he has not specified the nature of these defects, nor indicated that they caused him any monetary loss or denied him the benefit of the loan.

¹³ 911 A.2d 803, 2006 WL 3169511 (Del. Nov. 1, 2006) (TABLE) (holding that supervision of disbursal of loan proceeds in a real estate settlement constitutes the practice of law).

¹⁴ *Hancock v. Citifinancial, Inc.* 878 A.2d 461, 2005 WL 1653775, at *2 (Del. July 6, 2005) (TABLE); *see also Manley v. MAS Assocs., LLC*, 968 A.2d 492, 2009 WL 378172, at *3 (Del. Feb. 17, 2009) (TABLE).

The Ohio Supreme Court confronted a nearly identical situation in *Greenspan v. Third Federal Savings & Loan Association*,¹⁵ in which a mortgagor brought common-law claims of unjust enrichment and money had and received in an attempt to recover fees charged by his lender for document preparation performed by non-attorney personnel in violation of the state's rules against the unauthorized practice of law. The trial court held that the plaintiff's claims impermissibly attempted to seek damages for the unauthorized practice of law, which was not recognized as a private cause of action in Ohio at the time.¹⁶ Accordingly, the trial court granted judgment on the pleadings in favor of the mortgagee.

The Ohio Supreme Court affirmed on appeal, concluding that the trial court had properly refused to invade its exclusive jurisdiction to regulate the practice of law. The *Greenspan* Court held that “[t]he fact that [the plaintiff] creatively framed the action as one for unjust enrichment and money had and received” could not “alter the essential nature of the action,” which was to seek recovery for the lender’s purported unauthorized practice of law.¹⁷ Because the “exclusive power to regulate, control, and define the practice of

¹⁵ 912 N.E.2d 567 (Ohio 2009).

¹⁶ Ohio’s legislature enacted a statutory cause of action subsequent to the filing of the plaintiff’s case. *Id.* at 569-70.

¹⁷ *Id.* at 570.

law in Ohio” rested with the state’s highest court, the plaintiff could not use this creative framing to avoid the procedures provided by the Ohio Supreme Court to investigate and adjudicate claims regarding the unauthorized practice of law.¹⁸ Those procedures included a mechanism by which the plaintiff could have brought his claims before Ohio’s Board on the Unauthorized Practice of Law.¹⁹ The alternative the plaintiff pursued in attempting to bring a common-law claim for the unauthorized practice of law “would require trial courts to make determinations explicitly reserved” to Ohio’s Supreme Court.²⁰

The principles expressed in *Greenspan* are equally applicable in Delaware. The Delaware bar adheres to a longstanding tradition of internal professional regulation. That tradition vests the Delaware Supreme Court with exclusive responsibility for both the admission of attorneys and the exclusion of unauthorized persons from practice.²¹ In exercising its duty to maintain and regulate the legal profession, the Supreme Court has the authority to sanction violations of its “exclusive right to license attorneys at

¹⁸ *Id.* at 571 (quoting *Cleveland Bar Ass’n v. CompManagement, Inc.*, 818 N.E.2d 1181 (Ohio 20004)).

¹⁹ *Id.*

²⁰ *Id.* at 572.

²¹ *Del. Optometric Corp. v. Sherwood*, 128 A.2d 812, 816-17 (Del. 1957).

law by [those] presuming to practice law without such license” as contempt.²² The Board on the Unauthorized Practice of Law was established pursuant to the Supreme Court’s authority. The General Assembly has not intervened in the Supreme Court’s professional oversight function by providing criminal sanctions against the unauthorized practice of law, nor does any cause of action exist under Delaware law by which private individuals may enforce the state’s rules of professional conduct for lawyers or its rules regarding unauthorized practice.²³

In respecting the roles of the Delaware Supreme Court and the Board on the Unauthorized Practice of Law in defining and sanctioning the unauthorized practice of law, this Court must honor substance over form. Nieves’ insistence that he is not bringing claims for the unauthorized practice of law does not dispose of the issue. For Nieves to recover on any of his claims would require a predicate finding that All Star committed the unauthorized practice of law—a matter which rests exclusively in the purview of the Board on the Unauthorized Practice of Law and the Delaware Supreme Court. Moreover, for this Court to allow Nieves to pursue this action would be tantamount to creating a vehicle for private enforcement of

²² *Id.*

²³ *Id.* at 815-18.

the rules regarding unauthorized practice of law. Such a cause of action is not recognized under Delaware law. As in *Greenspan*, this trial court finds that permitting the plaintiff to proceed would encroach upon the exclusive authority of the state's highest court to define and control of the practice of law.

B. Plaintiff Fails to Establish the Elements of His Claims

Even if the Supreme Court's exclusive jurisdiction over matters involving the unauthorized practice of law did not bar Nieves' suit, fatal defects plague every count of his Complaint. The Court will address each of Nieves' claims in turn, as their flaws serve in part to highlight why he would be better served pursuing a claim for the unauthorized practice of law through the prescribed channels, rather than searching for a cause of action in which to shoehorn the facts of his case.

1. Delaware Consumer Fraud Act

The Delaware Consumer Fraud Act (DCFA) is intended "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State."²⁴ Section 2513 of the DCFA defines an unlawful practice, in pertinent part, as follows:

²⁴ 6 Del. C. § 2512.

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.²⁵

This definition of an “unlawful practice” produces three crucial differences between a consumer fraud claim under the DCFA and a common-law fraud claim. First, the plaintiff proceeding under the DCFA need not prove that the defendant intended to misrepresent, conceal, or omit a material fact;²⁶ all that the plaintiff must establish is that the defendant concealed a material fact with the intent to induce reliance upon the concealment.²⁷ In other words, liability may be premised upon a merely negligent misrepresentation or omission.²⁸ Second, the DCFA plaintiff does not have to prove that the defendant intended by its misrepresentation to induce or mislead the plaintiff to act or to refrain from acting.²⁹ Finally, the DCFA does not require that the plaintiff establish that he reasonably relied upon the defendant’s misrepresentation to his detriment, as is required in a common-law fraud

²⁵ 6 Del. C. § 2513(a).

²⁶ *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Goldsborough v. 397 Prop., L.L.C.*, 2000 WL 33110878, at *2 (Del. Super. Sept. 29, 2000).

²⁷ See *S&R Assocs., L.P., III v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. 1998).

²⁸ *Stephenson*, 462 A.2d at 1074.

²⁹ *Id.*; *Goldsborough*, 2000 WL 33110878, at *2.

claim.³⁰ Consumer fraud under § 2513(a) occurs “regardless of actual reliance by the plaintiff.”³¹

Here, Nieves’ DCFA claim fails for a number of reasons. First, the Complaint fails to set forth facts supporting that the alleged unlawful practices occurred wholly or partially in Delaware. The statement of the DCFA’s purpose contained in § 2512 expresses that the Act is meant to address “unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State.”³² Furthermore, the section of the act that authorizes the Attorney General to institute an injunctive action against unlawful practices mandates that such actions “shall be brought in a court of competent jurisdiction *in the county in which the alleged unlawful practice has been, is, or is about to be performed.*”³³ These two provisions have been applied to bar any attempt to give extraterritorial effect to the DCFA.³⁴ Thus, a DCFA claim is available only when at least some part of the defendant’s alleged fraudulent conduct

³⁰ *Stephenson*, 462 A.2d at 1074.

³¹ *Id.*

³² 6 Del. C. § 2512.

³³ 6 Del. C. § 2522(a) (emphasis added).

³⁴ *Marshall v. Priceline.com Inc.*, 2006 WL 3175318, at *2 (Del. Super. Oct. 31, 2006).

occurred in Delaware.³⁵ A bare allegation that the defendant “actively conducts business” in this state is insufficient to establish that the particular conduct forming the basis of the plaintiff’s claim occurred in Delaware for purposes of the DCFA.³⁶

In this case, Nieves’ claims bear some connection to Delaware: he is a Delaware resident, and the settlement at issue related to real property located in Delaware. Nevertheless, in determining whether a claim has been stated under the DCFA, the Court must focus on the location of the transaction and the defendant’s conduct. Nieves’ allegations of consumer fraud relate to All Star’s provision of services in Maryland, where All Star is located and where the settlement occurred. Plaintiff’s Complaint states no facts to support that All Star provided services or made any misrepresentations or omissions in Delaware.

³⁵ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 117 (Del. 2006); *Marshall*, 2006 WL 3175318, at *2; *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1202-03 (Del. Ch. 1988);

³⁶ *Goodrich*, 542 A.2d at 1203 (“The plaintiff in the present case has not alleged any facts which, if true, could constitute unfair or deceptive conduct occurring within Delaware. He alleges only one connection between [the defendant] and Delaware: that [defendant] ‘actively conducts business’ here. . . Because no transaction occurred in Delaware, the Delaware Consumer Fraud Act cannot apply.”); *see also Marshall*, 2006 WL 3175318, at *2 (“[W]hile incorporation may be enough to allow Delaware law to apply to a dispute, it is not enough to allow the DCFA to apply to fraudulent transactions which did not occur in Delaware.”).

Furthermore, even if the fact that All Star's services related to Delaware real property sufficed to establish that its alleged unlawful practices occurred in the conduct of commerce "within" Delaware, the facts set forth in the Complaint and attached settlement statement cannot support a finding that All Star misrepresented or omitted a material fact with the intent to induce reliance. The settlement statement executed at Nieves' closing itemized the charges payable to All Star as follows:

1101. Settlement or closing fee to All Star Title, Inc.	100.00
1102. Abstract or title search to All Star Title, Inc.	350.00
1103. Title examination to All Star Title, Inc.	650.00
1104. Title insurance binder to All Star Title, Inc.	50.00
1105. Document Preparation to All Star Title, Inc.	250.00
1106. Notary Fees to All Star Title, Inc.	50.00
1107. Attorney's fees	

(Includes above items No:)

Notably, the settlement statement lists no attorney's fees, and indicates that none of the All Star charges included amounts attributable to an attorney's work. By his Complaint, Nieves does *not* allege that All Star represented to him that its services were performed by an attorney, or that All Star prevented him from obtaining representation by a Delaware lawyer. Rather, Nieves suggests that All Star represented that the refinancing would be "completed within the guidelines of Delaware law and statutory

guidelines,”³⁷ failed to inform him of his right to have a Delaware attorney conduct the closing, and consequently defrauded him by charging fees “for services that were legally and customarily required to be provided by a Delaware attorney.”³⁸ However, Nieves does not allege that he was operating under the belief that All Star provided an attorney’s services, nor would such a belief have been reasonable in light of the settlement statement. The settlement statement precludes any colorable argument that All Star intended for Nieves to rely upon its providing an attorney to draft documentation and oversee the closing.

On the facts alleged, it is possible—and perhaps even plausible—that All Star knowingly engaged in the unauthorized practice of law. Nonetheless, even assuming this to be the case, All Star’s awareness does not necessarily imply that it engaged in consumer fraud in the absence of any allegations that it falsely represented the nature of its services or negligently misled Nieves to reasonably believe that an attorney’s services had been provided. While Nieves has alleged that All Star represented that the closing would be “completed within the guidelines of Delaware law,”³⁹

³⁷ Pl.’s Compl., ¶ 22.

³⁸ *Id.* ¶ 25.

³⁹ *Id.* ¶ 22.

such a statement cannot be construed as a misrepresentation of material fact intended to induce reliance when the services provided by All Star resulted in a valid mortgage with no prejudice to Nieves' interests.

Furthermore, the Court must reject the implication in Nieves' Complaint that All Star was subject to duties to "disclose" the absence of a Delaware attorney's participation in its activities or to "ensure" that Nieves received representation. *Mid-Atlantic* requires a Delaware attorney's participation in closing and certain drafting and title-related activities, but it stops short of imposing an obligation on the lender or settlement agent to ensure that the borrower receives representation or is notified of his rights. Nieves has not identified, nor has the Court been able to locate, any basis for enforcing such an obligation upon a non-attorney settlement agent through a private cause of action.⁴⁰ Accordingly, the Court finds that Nieves has not stated a viable claim under the DCFA.

⁴⁰ Interpretive Guideline (a)(1) to Delaware Lawyers' Rule of Professional Conduct 1.16 requires an attorney representing a residential property mortgagor upon referral by a lender or other person with interest in the transaction to provide written notification to the mortgagor of his right to retain a lawyer of his own choosing to represent him throughout the settlement process. However, this ethical obligation, like the rules regarding the unauthorized practice of law, cannot be enforced through a private cause of action, and moreover does not address the obligations of the mortgagee or settlement agent when the mortgagor is entirely unrepresented, as Nieves contends occurred in this case.

2. Delaware Deceptive Trade Practices Act

Delaware's Deceptive Trade Practices Act (DTPA), which "prohibits unreasonable interference with the promotion and conduct of another person's business," protects a different category of wrongs than the DCFA.⁴¹ Consumers lack standing to raise deceptive trade practice claims under the DTPA, because the Act protects *competing business interests* against unfair trade practices.⁴² Since Nieves contracted for All Star's services as a consumer, he lacks standing to proceed on his claim for deceptive trade practices.⁴³

3. Negligence and Breach of Contract

Nieves' remaining theories of professional malpractice and breach of contract require him to allege that All Star breached a duty and thereby caused him recoverable damages. As previously discussed, Nieves has not identified any basis for imposing a duty upon All Star to ensure that he was

⁴¹ *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 66-67, 70 (Del. 1993).

⁴² *Grand Ventures*, 632 A.2d at 70 ("[A] litigant has standing under the DTPA only when such person has a business or trade interest at stake which is the subject of interference by the unfair or deceptive trade practices of another."); *S&R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. 1998).

⁴³ Cf. *MAS Assocs., LLC v. Manley*, CA. No. 06L-06-017, at 8 (Del. Super. Mar. 31, 2008), *aff'd*, 968 A.2d 492 (Del. 2009) (finding no violation of DTPA where mortgage closing was conducted by a Maryland attorney and a title company retained by the lender, despite borrower's allegation that lender affirmatively told him that he did not need to retain an attorney).

represented by a Delaware attorney. In addition, because the lack of a Delaware attorney did not prejudice Nieves by undermining the validity of his mortgage or his understanding of the transaction, he has not alleged facts to support a causal relationship between All Star's purported breaches and any damages. All Star's fees cannot constitute "damages" in this context because they did not result from the alleged negligence or contractual breach. Thus, Nieves has not stated a viable claim for negligence or breach of contract.

C. The Voluntary Payment Rule Bars Plaintiff from Recovering Fees

Finally, the Court concludes that to the extent Nieves' suit seeks to recover the fees paid to All Star for its services, he is barred from doing so by the voluntary payment rule, which provides that "where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying."⁴⁴

Although the parties did not directly address the issue, the Court is persuaded by the thorough opinion of the Supreme Court of Illinois in *King*

⁴⁴ 53 A.L.R. 949; *see also Home Ins. Co. v. Honaker*, 480 A.2d 652, 653 (Del. 1983) ("As a general rule, money paid due to a mistake of law is not recoverable, while money paid under a mistake of fact may be recovered in equity under an unjust enrichment theory."); *W. Natural Gas Co. v. Cities Serv. Gas Co.*, 201 A.2d 164, 169 (Del. 1964) ("[P]ayment voluntarily made with full knowledge of the facts cannot be recovered, in the absence of a contract to repay.").

v. First Capital Financial Services Corp.,⁴⁵ which applied the voluntary payment rule to affirm the dismissal of a class action suit brought by mortgagors against their lenders for using non-attorney employees of a third-party document preparation service to prepare loan documents, in contravention of the state's rules against the unauthorized practice of law. In *King*, the plaintiff mortgagors brought claims against their lenders for unauthorized practice of law, money had and received, restitution, and consumer fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act.⁴⁶ The trial court granted a motion to dismiss filed by the lenders, and the Appellate Court of Illinois affirmed on the grounds that the voluntary payment doctrine was dispositive as to all of the plaintiffs' claims.⁴⁷ On appeal, the Illinois Supreme Court concluded that the voluntary payment rule was properly applied:

[T]he lenders fully disclosed that the document preparation fees were separate from any attorney fees. The closing statements contain separate places for the itemization of attorney fees and document preparation fees. . . . Accordingly, plaintiffs could not have mistakenly believed that the loan documents were prepared by attorneys. . . . Plaintiffs do not allege in their complaints or argue in their briefs that the lenders represented

⁴⁵ 828 N.E.2d 1155 (Ill. 2005).

⁴⁶ *Jenkins v. Concorde Acceptance Corp.*, 802 N.E.2d 1270, 1274-75 (Ill. App. Ct. 2003), *aff'd sub nom. King v. First Fin. Servs. Corp.*, 828 N.E.2d 1155 (Ill. 2005).

⁴⁷ *Id.* at 1276.

that attorneys prepared the documents, nor do they allege that they believed that attorneys prepared the documents. . . . Further, we note that plaintiffs do not plead any facts in their complaints that might demonstrate that they were compelled to either pay the fee or forgo their loan transaction. . . . For instance, plaintiffs do not allege that they were precluded by the lenders from having documents prepared by their own attorneys. Reduced to its essence, plaintiffs' argument is that the preparation of loan documents by nonlawyers is illegal. However, the voluntary payment doctrine applies in the very circumstance where the payment sought to be recovered was illegally obtained by the defendant. Plaintiffs cannot avoid application of the doctrine by merely alleging that defendants engaged in the unauthorized practice of law.⁴⁸

The *King* Court considered and rejected the plaintiffs' arguments that public policy concerns barred the application of the voluntary payment rule to their case. The Illinois Supreme Court emphasized that the lenders never misrepresented the nature of the services provided, and were not attempting to enforce void mortgages against the plaintiffs. Because the plaintiffs sought "to recover payments voluntarily made with full knowledge as to the nature of the services rendered," public policy concerns did not render the voluntary payment rule inapplicable.⁴⁹

The Court views this case as indistinguishable from *King*. Nieves has not alleged that All Star misrepresented its services such that he believed he was paying for an attorney to participate in document preparation or

⁴⁸ *King*, 828 N.E.2d at 1172-73.

⁴⁹ *Id.* at 1174.

supervise the closing process. Thus, he was mistaken as to his legal rights to have a Delaware attorney participate in the settlement, but not as to the facts regarding the services for which he paid. Because All Star did not misrepresent its services, its actions could not have misled Nieves to forego hiring an attorney on his own behalf, nor has he alleged that All Star prevented him from doing so.

Although the voluntary payment doctrine is subject to public policy exceptions, the Court concludes, in accordance with *King*, that the facts of this case do not merit an exception. The practice of law is regulated in Delaware “not so much to protect the public from having to pay fees to unqualified legal advisors as it is to protect the public against the often drastic and far-reaching consequences of their inexpert legal advice.”⁵⁰ Nieves’ Complaint does not allege any specific, cognizable negative consequences of All Star’s purported unauthorized practice of law, other than the fact that he paid a fee for its services. As previously discussed, Delaware courts have observed that the absence of a Delaware lawyer from the settlement process does not always prejudice the borrower.⁵¹ Thus, the mere fact that the allegations in this case involve the unauthorized practice

⁵⁰ *Del. State Bar Ass’n v. Alexander*, 386 A.2d 652, 661 (Del. 1978) (quoting *In re Baker*, 85 A.2d 505, 514 (N.J. 1951)).

⁵¹ *Manley*, 2009 WL 378172, at *3; *Hancock*, 2005 WL 1653775, at *2.

of law does not demand that Nieves’ claims be considered beyond the purview of the voluntary payment rule.

In reaching this conclusion, the Court emphasizes that the voluntary payment rule would *not* bar claims where conduct constituting the unauthorized practice of law results in legal damages—for example, the Court strongly suspects that public policy concerns would deny All Star the benefit of the voluntary payment rule in a suit for negligence or breach of contract brought by a plaintiff whose loan preparation or settlement process was materially affected by its “inexpert” practice of law such that the borrower suffered damages. Similarly, the voluntary payment rule could not be applied if a plaintiff presented a viable claim of common-law or consumer fraud, such that it could not be said that the plaintiff paid for services with “full knowledge” of the material facts. Moreover, voluntary payment offers no defense where a defendant has violated a recognized duty to disclose particular facts or legal rights to consumers.⁵² Nevertheless, as

⁵² See *Sobel v. Hertz Corp.*, __ F. Supp. 2d __, 2010 WL 1006882, at *4 (D. Nev. Mar. 17, 2010) (holding that voluntary payment doctrine was inapplicable on public policy grounds where defendant’s conduct violated consumer protection statute that required full disclosure of rates and fees). The Court recognizes that *Sobel* and other cases have used broad language in deeming the voluntary payment doctrine inapplicable to the unauthorized practice of law or to alleged violations of consumer protection statutes. See, e.g., *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339-340 (Mo. 2007) (finding that permitting mortgagee to raise voluntary payment defense would be “illogical and inequitable” where it engaged in the unauthorized practice of law in preparing documents in violation of both judicial and statutory prohibitions). These holdings do not alter the

previously discussed, Delaware law has not imposed a disclosure duty requiring settlement agents to notify unrepresented borrowers of their right to have a Delaware attorney participate in the settlement process. Plaintiff clearly sees such a duty as a natural extension of the *Mid-Atlantic* holding, but it is not an extension this Court has the authority to enact. Thus, while the Supreme Court may be able to order disgorgement of fees as a sanction for the unauthorized practice of law, the voluntary payment doctrine prevents this Court from permitting Nieves to recover fees paid to All Star as damages for the legal claims stated in his Complaint.

VI. Conclusion

For the foregoing reasons, All Star is entitled to dismissal of Nieves' individual and class action claims. However, the Court wishes to dispel the suggestion raised in Nieves' response that dismissing his action would leave consumers with no remedy for violations of their rights under *Mid-Atlantic*.

Court's conclusion in this matter, as they arose in distinguishable cases where the plaintiff has presented at least a material dispute of fact concerning misrepresentations or omissions that violated non-waivable *statutory* duties. Because Delaware does not recognize a private cause of action for the unauthorized practice of law, and because the rationale for defining and regulating unauthorized practices focuses primarily upon the quality of services provided to consumers rather than the fees that may be paid for acts violating the prohibitions on unauthorized practice, the Court considers *King* a much closer "fit" to this case and finds no bar to applying the voluntary payment rule on the facts under consideration, in which there has been no violation of statutory or common-law duties and no allegation of resulting harm to the plaintiff.

To the contrary, in the absence of prejudice to the borrower, the proper avenue for vindicating a violation of *Mid-Atlantic* would be the very one pursued in that case: the filing of a complaint with the Board on the Unauthorized Practice of Law. The settlement statement which establishes that All Star did not purport to provide a Delaware attorney's services may have relieved it of potential liability for consumer fraud in this action, but it also strongly suggest that All Star was indeed flouting this state's rules against the unauthorized practice of law. In dismissing Nieves' Complaint, the Court neither condones All Star's conduct nor concludes that no redress exists if Nieves' allegations are true; however, this Court is simply not the proper forum for redressing the unauthorized practice of law in the absence of any viable claim for a breach of statutory or common-law duties.

Therefore, Defendant All Star's Motion to Dismiss is hereby GRANTED.

IT IS SO ORDERED.

/s/

Peggy L. Ableman, Judge

Original to Prothonotary

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