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NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

EMPP Incorporated,

Plaintiff,

v.

RoundPoint Mortgage Servicing
Corporation,

Defendant.

No. CV-14-00946-PHX-JJT
ORDER

At issue are Plaintiff EMPP Inc.’s Motion for Partial Summary Judgment on Liability, Illegality, and an Element of Damages (Doc. 123, Pl.’s MSJ), to which Defendant RoundPoint Mortgage Servicing Corp. filed a Response (Doc. 133, Def.’s Resp.), and Plaintiff filed a Reply (Doc. 142, Pl.’s Reply); Defendant’s Motion for Summary Judgment (Doc. 127, Def.’s MSJ), to which Plaintiff filed a Response (Doc. 129, Pl.’s Resp.), and Defendant filed a Reply (Doc. 141, Def.’s Reply); and Defendant’s Request for Judicial Notice (Doc. 143), to which Plaintiff filed a Response (Doc. 144), and Defendant filed a Reply (Doc. 147). The Court finds these matters appropriate for decision without oral argument. *See* LRCiv 7.2(f).

I. BACKGROUND

Plaintiff EMPP Inc. offers a product to mortgage borrowers called the Early Mortgage Pay-Off Plan (EMPP). A borrower enrolled in EMPP simply makes an extra monthly payment of principal on the mortgage loan each year. If the borrower succeeds in making the extra payment yearly, the borrower avoids substantial interest over the life

1 of a typical mortgage. Plaintiff offers its product through financial institutions, including
2 loan servicers like Defendant RoundPoint Mortgage Servicing Corp. Borrowers who sign
3 up for EMPP pay a one-time enrollment fee of \$295.00 and a \$1.50 fee for each payment
4 draft.

5 On July 11, 2013, Plaintiff and Defendant entered into an EMPP Services
6 Agreement with the goal of enabling Plaintiff to solicit Defendant's customers to enroll
7 in EMPP. (Doc. 7-1, EMPP Serv. Agree.) The term of the Agreement was one year with
8 the possibility of renewal, and Defendant granted Plaintiff the exclusive right to solicit
9 Defendant's customers to enroll in EMPP during this term. Under the Agreement,
10 Plaintiff was to "prepare and submit for [Defendant's] approval all materials, including
11 solicitation letters, follow-up solicitation letters, brochures, and maintenance letters
12 (collectively, 'Plan Materials')" to be used for soliciting borrowers to enroll in EMPP.
13 (EMPP Serv. Agree. at 3.) Plaintiff was also responsible for creating and maintaining a
14 website and toll-free number for the Plan. For its part, Defendant was responsible for
15 reviewing and approving the Plan Materials and providing its loan portfolio data to
16 Plaintiff, among other tasks. The parties did not exchange money in entering into the
17 Agreement; instead, Plaintiff would receive \$220.00 and Defendant would receive \$75.00
18 of each \$295.00 enrollment fee received from a borrower, and Plaintiff would receive
19 \$1.00 and Defendant would receive \$0.50 of each \$1.50 draft fee received from a
20 borrower.

21 Around mid-August 2013, Plaintiff sent a draft solicitation letter for Defendant's
22 review and approval. (Doc. 124, Pl.'s Statement of Facts (PSOF) Exs. 9, 10.) Defendant
23 took the draft solicitation letter under review but did not approve it. (PSOF Ex. 10.) Over
24 the course of the next ten months, Defendant delayed implementing any aspects of the
25 Agreement, and Plaintiff and Defendant discussed the possibility of re-setting the term of
26 the Agreement but never amended the Agreement. On May 5, 2014, when Defendant had
27 not completed its tasks under the Agreement, Plaintiff filed its Complaint against
28 Defendant in this action for breach of contract, breach of the implied duty of good faith

1 and fair dealing, and specific performance. (Doc. 1, Compl.) On June 5, 2014, Defendant
2 terminated the Agreement by notifying Plaintiff of its intent not to renew it upon its
3 expiration in July 2014. (PSOF Ex. 33.)

4 Having completed discovery in this matter, the parties have now filed cross-
5 Motions for Summary Judgment.

6 **II. LEGAL STANDARD**

7 Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is
8 appropriate when: (1) the movant shows that there is no genuine dispute as to any
9 material fact; and (2) after viewing the evidence most favorably to the non-moving party,
10 the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v.*
11 *Catrett*, 477 U.S. 317, 322–23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285,
12 1288–89 (9th Cir. 1987). Under this standard, “[o]nly disputes over facts that might affect
13 the outcome of the suit under governing [substantive] law will properly preclude the
14 entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
15 A “genuine issue” of material fact arises only “if the evidence is such that a reasonable
16 jury could return a verdict for the non-moving party.” *Id.*

17 In considering a motion for summary judgment, the court must regard as true the
18 non-moving party’s evidence if it is supported by affidavits or other evidentiary material.
19 *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. The non-moving party may not
20 merely rest on its pleadings; it must produce some significant probative evidence tending
21 to contradict the moving party’s allegations, thereby creating a question of material fact.
22 *Anderson*, 477 U.S. at 256–57 (holding that the plaintiff must present affirmative
23 evidence in order to defeat a properly supported motion for summary judgment); *First*
24 *Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

25 “A summary judgment motion cannot be defeated by relying solely on conclusory
26 allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
27 1989). “Summary judgment must be entered ‘against a party who fails to make a showing
28 sufficient to establish the existence of an element essential to that party’s case, and on

1 which that party will bear the burden of proof at trial.’’ *United States v. Carter*, 906 F.2d
2 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

3 **III. ANALYSIS**

4 In its Motion for Partial Summary Judgment, Plaintiff first argues that no genuine
5 dispute of fact as to performance of the parties under the Agreement remains and it is
6 entitled to summary judgment regarding Defendant’s liability for breach of the
7 Agreement. (Pl.’s MSJ at 4-7.) The Court agrees that no genuine dispute of material fact
8 remains, but the facts demonstrate the opposite: Defendant is not liable for breach of the
9 Agreement. (*See* Def.’s Resp. at 11-15.)

10 The specific terms of the Plan Materials, including the solicitation letter to
11 Defendant’s customers, were not part of the Agreement, and the parties do not argue
12 otherwise. Under the Agreement, Defendant had the right to review and approve the Plan
13 Materials, and the Agreement set no deadline for these tasks. The fact that Defendant
14 never approved the draft solicitation letter that Plaintiff provided within the one-year
15 Agreement term was not a breach of at least the explicit terms of the Agreement. And
16 approval of the solicitation letter was an essential step in the process of soliciting
17 Defendant’s customers to enroll in the EMPP, so the fact that Defendant did not complete
18 other tasks under the Agreement resulted in insignificant, if any, harm to Plaintiff.

19 Defendant argues that, when it ultimately reviewed the terms of the solicitation
20 letter, it could not approve the letter because of concerns that the letter was unlawfully
21 deceptive to consumers in violation of both North Carolina¹ and federal law. (*See* Def.’s
22 Resp. at 15; Def.’s MSJ at 13-17.) That may be so. The draft solicitation letter does not
23 inform potential customers that a large portion of those enrolling in the EMPP do not stay
24 enrolled long enough to even recoup their initial investment in the Plan. The Consumer
25 Financial Protection Bureau (CFPB) has brought actions against companies selling plans
26 like the EMPP for failing to disclose drop-out or attrition rates in violation of the

27
28 ¹ The Agreement provides that North Carolina law governs the construction and enforcement of the Agreement, and the parties do not dispute the application of North Carolina law.

1 Consumer Financial Protection Act, 12 U.S.C. § 5531 (CFPA), and, while no Court has
2 ruled that these failures to disclose violate the CFPA, several of these cases have ended
3 with the parties' stipulation to a Consent Order in which the company agrees that its
4 marketing of EMPP-like plans shall include disclosures regarding attrition and its effects.
5 (See Doc. 143, Exs. 1-4.) North Carolina has similar laws prohibiting deceptive practices.
6 See N.C. Gen. Stat. § 75-1.1(a).

7 Plaintiff argues that Defendant breached the Agreement if not by violating its
8 explicit terms, then by failing to complete the required tasks to give effect to the
9 Agreement within a reasonable time. In *Fletcher v. Jones*, 333 S.E.2d 731, 734 (N.C.
10 1985), the North Carolina Supreme Court stated that, when a contract lacks a "time is of
11 the essence" clause, the contracting parties have a reasonable time in which to perform
12 their obligations under the contract. The Agreement contained no "time is of the essence"
13 or other clause to indicate urgency, and Defendant points to evidence showing that the
14 parties continually tried to reset the clock on the time in which to perform over the one-
15 year contract term. Plaintiff tries to distinguish *Fletcher* by arguing that it contemplated a
16 real estate transaction in which there is only one "closing," whereas the instant case
17 involves an Agreement requiring performance of a number of obligations on an on-going
18 basis within a set period of time. But, like the closing date in *Fletcher*, this case does
19 involve one action—approval of the solicitation letter—upon which the other actions are
20 predicated and without which the purpose of the Agreement cannot be fulfilled. Plaintiff
21 has produced insufficient evidence and no legal support for the proposition that the
22 reasonable time Defendant had to review and approve the draft solicitation letter had
23 passed.

24 Moreover, the Agreement contains an explicit notice of default provision with
25 which Plaintiff never complied. The Agreement provides:

26
27 Should any Party hereto commit a material breach or default of this
28 Agreement (a "Default"), the other Party shall promptly give to the
defaulting Party written notice specifically describing the Default (a
"Default Notice"). The defaulting Party shall have thirty (30) days after
receipt of a Default Notice to correct or cure such Default (the "Cure

1 Period"). If after expiration of the Cure Period the defaulting Party has not
2 corrected or cured the Default, then the non-defaulting Party may terminate
this Agreement by written notice of termination to the defaulting Party.

3 (EMPP Serv. Agree. at 2.) Plaintiff argues that it was not required to comply with this
4 provision because it did not want to terminate the Agreement, but rather wanted
5 Defendant to perform its obligations. But the Agreement contains no such condition. The
6 explicit terms of the default provision provide that Plaintiff was required to give to
7 Defendant written notice and an opportunity to cure when it believed Defendant had
8 defaulted. Under North Carolina law, failure to provide a 30-day cure period required by
9 a contract's default provision relieves the allegedly defaulting party of any further
10 obligation to perform under the contract. *Dishner Developers v. Brown*, 549 S.E.2d 904,
11 906 (N.C. Ct. App. 2001).² The evidence thus demonstrates that Defendant did not breach
12 the Agreement at any point during its one-year term, and Defendant terminated the
13 Agreement at the end of that term.

14 Even if Defendant were liable for breach of the Agreement here—which it is
15 not—damage to Plaintiff would be difficult to ascertain. As for Plaintiff's request for
16 specific performance, the Court could not practically order the parties to agree on the
17 terms of the solicitation letter to Defendant's customers and would certainly not require
18 Defendant to assent to the sending of a potentially illegal solicitation letter. And, as the
19 Court stated above, the purposes of the Agreement cannot be fulfilled if the parties never
20 agree as to the terms of the solicitation letter. As for money damages, aside from the fact
21 that no money exchanged hands between the parties in the execution of the Agreement,
22 any damages to Plaintiff from lost profits are speculative given the uncertain effect of an
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24 ² Citing an unpublished District of Utah case, Plaintiff also argues that the
25 Agreement did not require it to give Defendant notice of default before bringing this
26 lawsuit. (Pl.'s Reply at 3.) First, in that case, the agreement contained an express
27 provision to that effect, which the Agreement here does not contain. Second, and more
28 importantly, the fact that Plaintiff brought this lawsuit without giving notice of default to
Defendant does not mean that Plaintiff did not breach the notice of default provision by
not informing Defendant of the alleged default and giving Defendant an opportunity to
cure. Plaintiff's argument thus has no merit.

1 amended solicitation letter—one that, for example, discloses EMPP attrition or drop-out
2 rates—on EMPP enrollment.

3 In sum, the Agreement between the parties contained neither a deadline for
4 Defendant’s review and approval of the draft solicitation letter nor a “time is of the
5 essence” provision, and the evidence shows that the parties made several efforts at
6 resetting the timeframe for the term of the Agreement. Moreover, Plaintiff never
7 informed Defendant of what Plaintiff believed was default or gave Defendant an
8 opportunity to cure, in contravention of the express terms of the Agreement. As a result,
9 Defendant did not breach the Agreement within the one-year Agreement term, and
10 Defendant properly terminated the Agreement at the end of the term. Because the Court
11 finds that Defendant did not breach the Agreement as a matter of law, the Court need not
12 address the other arguments the parties made in their Motions.

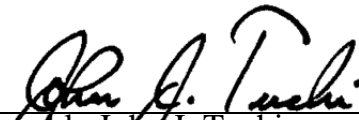
13 IT IS THEREFORE ORDERED denying Plaintiff EMPP Inc.’s Motion for Partial
14 Summary Judgment on Liability, Illegality, and an Element of Damages (Doc. 123).

15 IT IS FURTHER ORDERED granting Defendant RoundPoint Mortgage Servicing
16 Corp.’s Motion for Summary Judgment (Doc. 127) with regard to lack of liability.

17 IT IS FURTHER ORDERED granting Defendant’s Request for Judicial Notice
18 (Doc. 143).

19 IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment in
20 accordance with this Order and close this case.

21 Dated this 30th day of August, 2016.

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24 _____
25 Honorable John J. Tuchi
26 United States District Judge
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