

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

James R. Hagy, III, et al.,	:	
		Plaintiffs,
		:
v.	:	Case No. 2:11-cv-530
		:
Demers & Adams, LLC, et al.,	:	Magistrate Judge Kemp
		:
Defendants.		

OPINION AND ORDER

This matter is before the Court on a second motion for reconsideration filed by Defendants Demers & Adams, LLC and David J. Demers ("the Law Firm Defendants"). (Doc. 132). Plaintiffs James R. Hagy, III, on behalf of himself and Patricia R. Hagy¹ ("the Hagys") have filed an opposition to the motion. (Doc. 134). For the reasons set forth below, the second motion for reconsideration will be denied. (Doc. 132).

I. Background

The background of this case has been set forth in previous orders of this Court and will not be set forth in great detail here. Briefly, for purposes of the current motion, this case arises from a foreclosure action initiated by the Law Firm Defendants on behalf of Green Tree against the Hagys. The Hagys allege that, after the foreclosure action was filed, they signed a warranty deed in lieu of foreclosure, which the parties agreed would prevent any attempt to collect a deficiency balance remaining after the sale of the collateral. The Hagys claim that after the warranty deed in lieu of foreclosure was executed, Green Tree began contacting them by telephone for the collection

¹On February 9, 2012, this Court granted James R. Hagy's motion requesting that he be substituted for his wife, Patricia R. Hagy, following Mrs. Hagy's death. (Doc. 47).

of an alleged deficiency. Accordingly, on June 15, 2011, the Hagys filed this case against the Law Firm Defendants and Green Tree alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§1692, *et seq.*, the Ohio Consumer Sales Practices Act ("OCSPA"), O.R.C. §§1345.01 *et seq.*, and common law invasion of privacy.

The Hagys' claims against the Law Firm Defendants arising under the OCSPA are the sole claims at issue in this Opinion and Order. In those claims, the Hagys allege that the Law Firm Defendants knowingly committed unfair, deceptive, and unconscionable acts and/or practices in violation of O.R.C. §§1345.02 and/or 1345.03, and they are therefore entitled to relief under O.R.C. §1345.09. (Amend. Compl., Doc. 18, ¶¶28-31). On February 5, 2013, this Court issued an Opinion and Order granting the Hagys' partial motion for summary judgment on the OCSPA claims. (Doc. 95 at 16-19).

On May 16, 2013, the Law Firm Defendants filed a motion for reconsideration, asking this Court to reconsider the portion of its February 5 Opinion and Order relating to the OCSPA claims in light of the Ohio Supreme Court's decision in Anderson v. Barclay's Capital Real Estate, Inc., Slip Opinion No. 2013-Ohio-1993, decided May 14, 2013. The Law Firm Defendants argued that, under Anderson, "when a party such as Law Firm Defendants is working for and acting on behalf of a client, Green Tree in this case, that first party does not become a 'supplier' to its client's customers or engage in a 'consumer transaction' with its clients customers." (Doc. 105 at 5). In a September 23, 2013 Opinion and Order, this Court held that the Law Firm Defendants' position, if adopted, would extend the Anderson decision beyond its facts. The Court noted that Anderson involved a real estate transaction, whereas this case involves a mixed transaction including the transfer of both a mobile home and real property.

The Court also noted that the Law Firm Defendants' position required an evaluation of whether one's role in a given transaction is so inconsequential as to fall outside the scope of the OCSPA. Unaware of any decision that supported such a broad reading, this Court found that Anderson should be limited to its facts. Because those facts were readily distinguishable from the facts in the instant case, the Court found the Law Firm Defendants' argument to be without merit and denied the motion for reconsideration. (Doc. 115).

On October 3, 2014, the Law Firm Defendants filed a motion for leave to file a second supplement to the motion for reconsideration filed May 16, 2013. (Doc. 132). In an Order issued on October 6, 2014, this Court cited to its September 23 Opinion and Order denying the motion for reconsideration and found that there was no pending motion to be supplemented. The Court, however, looked to the substance of the motion and noted that the Law Firm Defendants were moving for reconsideration of the decision on the OCSPA claims based upon two subsequent cases from this Circuit. Consequently, the Court construed the Law Firm Defendants' motion as a second motion for reconsideration, rather than a supplement to the original motion for reconsideration which had been decided previously. The Court allowed the Hagys twenty-one days from the issuance of the Order to file a response to the second motion for reconsideration, and allowed the Law Firm Defendants to file their reply fourteen days thereafter.

The Hagys filed a response to the Law Firm Defendants' second motion for reconsideration on October 7, 2014. (Doc. 134). Although the Hagys "did not oppose this Court reviewing" the two decisions relied upon by the Law Firm Defendants, they argue that, like Anderson, those decisions are "factually distinguishable from the instant case." Id. at 2 (internal

quotation omitted). More specifically, the Hagys argue that neither decision "raises any question" about this Court's determination that this case involves a "mixed use consumer transaction." Id. On this basis, the Hagys urge this Court to deny the second motion for reconsideration.

The Law Firm Defendants filed a reply in support of their second motion for reconsideration on October 20, 2014. (Doc. 137). In their reply, the Law Firm Defendants state that "[t]hree cases decided since [their] prior motion for reconsideration have clarified that: 1) a foreclosure lawsuit is not a 'consumer transaction' under the [OCSPA], and; 2) law firms representing plaintiffs in foreclosure are not 'suppliers' to those they sue." Id. at 1. For these reasons, the Law Firm Defendants argue that the Hagys' OCSPA claims against them should be dismissed.

II. Discussion

As noted above, the Law Firm Defendants rely on three decisions in support of their second motion for reconsideration. The Law Firm Defendants set forth the first two decisions, namely Clark v. Lender Processing Services, 562 Fed. Appx. 460 (6th Cir. 2014) and Kline v. Mortgage Electronic Security Systems, 2014 WL 4425820 (S.D. Ohio Sept. 8, 2014) in their motion, and they provide the third decision, Slorp v. Lerner Sampson & Rothfuss, 2014 WL 4800100 (6th Cir. Sept. 29, 2014), in their reply brief. The Court will set forth a summary of the relevant portions of those cases and then will examine their applicability to the facts of this case.

In their second motion for reconsideration, the Law Firm Defendants first rely upon Clark v. Lender Processing Services, 562 Fed. Appx. 460 (6th Cir. 2014). In Clark, the appellants were homeowners who were defendants in foreclosure lawsuits. The homeowners brought the action against Lender Processing Services,

a vendor which provided services to mortgage servicers and lenders, its subsidiaries, and two law firms, alleging that a series of mortgage assignments led to violations of, among other laws, the OCSPA. The district court granted the defendants' motion to dismiss, finding that the OCSPA claims failed because, inter alia, the defendants were not suppliers under the statute. The homeowners appealed.

In evaluating the merits of the appeal, the Court of Appeals looked to the relevant provisions of the OCSPA and set forth those provisions as follows:

[t]he OCSPA forbids a 'supplier' from committing an 'unfair or deceptive act or practice in connection with a consumer transaction.' ORC §1345.02. Supplier is in turn defined as 'a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions.' Id. §1345.01(C). Consumer transaction 'means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household.' Id. §1345.01(A).

Id. at 467-68. The Court of Appeals then examined the Ohio Supreme Court's decision in Anderson and found it to be factually distinguishable. More specifically, the Court of Appeals noted that Anderson "involved traditional mortgage servicers (i.e., businesses that collect monthly mortgage payments on behalf of lenders)," whereas the case before it involved a vendor hired to help manage the foreclosure process. Id. at 468. Although Anderson was not controlling, the Court of Appeals found it to be instructive in that it "teaches that the plain language of the OCSPA should be taken seriously: companies not in the business of 'effecting or soliciting consumer transactions' are not suppliers engaging in consumer transactions." Id. The Court of Appeals stated:

Like a traditional mortgage servicer, Lender Processing falls into a category of businesses that do not seek to

provide consumers with services. Rather, both mortgage servicers and companies like Lender Processing offer their services to lenders. As is the case when a mortgage servicer collects a monthly mortgage payment on behalf of a financial institution, Lender Processing helps initiate and manage foreclosure proceedings on behalf of a financial institution. In fact, mortgage servicers offer at least some marginal service to consumers because they collect money from those consumers on behalf of a lender. Consumers would only interact with Lender Processing because its lender-client had hired the company to help initiate and manage a foreclosure. Managing a process that ends with a consumer losing her home could scarcely be considered a "service for the consumer."

Id. Moreover, the Court of Appeals found that the reasoning in Anderson applied "not just to Lender Processing, but also to its subsidiaries and the defendant law firms." Id. Based upon its determination that the defendants were not suppliers involved in consumer transactions for purposes of the OCSPA, the Court of Appeals affirmed the decision of the district court dismissing the homeowners' OCSPA claims.

The second decision which the Law Firm Defendants rely upon in support of their second motion for reconsideration is Kline v. Mortgage Electronic Security Systems, 2014 WL 4425820 (S.D. Ohio Sept. 8, 2014). In Kline, the Court examined whether the law firm defendant, Lerner, Sampson and Rothfuss ("LSR"), which acted in a foreclosure action on behalf of its client, a mortgage servicer, could be liable under the OCSPA. The Court found that "[r]ecent holdings from the Sixth Circuit and the Ohio Supreme Court appear to place LSR's actions outside the reach of the OCSPA, at least with regard to its representation of a mortgage servicer in foreclosure proceedings." Id. at *6. The Court stated:

Here, like the mortgage servicer in Anderson and the vendor of foreclosure-related services in Clark, the service that LSR provided was to its client and not to Kline. LSR's client, a mortgage servicer, is

specifically exempt from the reach of the OCSPA under Anderson. In extending that holding to the vendors of foreclosure-related services and their attorneys, it is unquestionable that Clark would also apply to the attorneys of mortgage servicers. Furthermore, under Clark, LSR is not a "supplier" under the OCSPA, at least with regards to foreclosures that it institutes on behalf of its clients. See also Floyd v. Bank of Am., N.A., No. 1:13-cv-2072, 2014 WL 3732591 at *7 (N.D. Ohio July 25, 2014)(applying Anderson and Clark and dismissing OCSPA claims against a bank and the law firm that represented it in the foreclosure proceedings).

Id. at *6. Based on its determination that, "[u]nder Clark and Anderson, LSR was not a 'supplier' of a 'consumer transaction,'" the Court granted LSR's motion for partial summary judgment as to the plaintiff's OCSPA claim. Id. at *7.

Finally, the Law Firm Defendants rely on Slorp v. Lerner Sampson & Rothfuss, 2014 WL 4800100 (6th Cir. Sept. 29, 2014). In Slorp, the Court of Appeals held that the district court properly dismissed the plaintiff's OCSPA claim against LSR, the law firm which filed the mortgage foreclosure lawsuit on behalf of its mortgage servicer client. The Court of Appeals found that the state-court foreclosure action was not a "consumer transaction" under the statute because "[l]awsuits do not involve the transfer of goods or services for personal purposes." Id. at *9. The Court of Appeals explained:

When a debt collection agency files a lawsuit to enforce a debt stemming from a consumer transaction, the consumer may bring suit against the debt collection agency under the CSPA. Celebrezze v. United Research, Inc., 482 N.E.2d 1260, 1262 (Ohio Ct. App. 1984). This is because "[s]ince the Act provides consumer protection through all phases of the transaction, the seller cannot relieve itself of its duty fairly by assigning its claim to an agent or assignee and having that assignee conduct practices prohibited by the Act. Such a narrow construction of [Ohio Rev. Code §] 1345.01(C) would defeat the purpose of the Act." Id. Here, LSR brought an allegedly deceptive lawsuit on behalf of Bank of America, a mortgage servicer. The Ohio Supreme Court recently

held that the servicing of residential mortgage is not a consumer transaction under the CSPA "because there is no transfer of an item of goods, a service, a franchise, or an intangible, to an individual." Anderson, 989 N.E.2d at 1001 (quoting Ohio Rev. Code §1345.01(A)).

Id. (alterations in original). Based on the fact that the lawsuit at issue involved "a residential mortgage, which is not a consumer transaction," the Court of Appeals held that it was not subject to regulation under the OCSPA. Id.

Although the cases relied upon by the Law Firm Defendants provide insight into the scope of the Ohio Supreme Court's decision in Anderson and the applicability of the OCSPA to foreclosure actions more generally, each of those cases involved a real estate transaction, as opposed to the mixed transaction at issue in this case, which includes the transfer of both a mobile home and real property. To apply Clark, Kline, or Slorp to this case would extend those decisions beyond their facts, which involved real estate transactions and not mixed transactions. Consequently, the Court will not reconsider its prior decision on this basis.

III. Conclusion

For the reasons set forth above, the second motion for reconsideration filed by the Law Firm Defendants is denied. (Doc. 132).

/s/ Terence P. Kemp
United States Magistrate Judge