Soberanis v. City Title Loan LLC et al Doc. 20

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Latitia Soberanis, Plaintiff, v. City Title Loan, LLC, *and* 1st Choice Recovery, LLC, Defendants.	)	Civil Action No. 2:16-4034-RMG **ORDER AND OPINION**

This matter is before the Court on Defendants' motion to dismiss. For the reasons set forth below, the Court grants the motion as to unfair trade practices claims against Defendant 1st Choice Recovery, LLC, and otherwise denies the motion.

I. Background

Defendant City Title Loan, LLC ("City Loan") loaned $2,800 to Defendant Letitia[1] Soberanis for the purchase of a used 2003 Mercury Mountaineer, to be repaid over three years at an annual percentage interest rate of 118.49%. (Dkt. No. 14 ¶ 7.) Ms. Soberanis provided City Loan a security interest in the vehicle. (*Id.* ¶ 8.) Ms. Soberanis apparently[2] did not remit the first payment installment and, on August 19, 2015, Defendant 1st Choice Recovery, LLC ("1st Choice"), repossessed the vehicle from Ms. Soberanis's property on behalf of City Loan, allegedly over Ms. Soberanis's objections in a manner constituting breach of the peace. (*Id.* ¶¶ 11–15.) Ms. Soberanis alleges City Loan did not mail her a right to cure letter, which South Carolina law requires as a prerequisite to repossession of personal property securing a consumer loan. (*Id.* ¶ 9.)

[1] Misspelled "Latitia" in the caption of the complaint.

[2] Plaintiff does not allege that she made no payments, but she does not controvert Defendants' assertion that she did not.

Dockets.Justia.com

Ms. Soberanis filed a complaint with the South Carolina Department of Consumer Affairs, to which Defendants allegedly responded that she was attempting to avoid the mandatory arbitration agreement in her promissory note. (*Id.* ¶ 19.) On June 1, 2016, she attempted to commence an arbitration action with the American Arbitration Association ("AAA"), the arbitration organization identified in the promissory note. (*Id.* ¶ 20.) The arbitration agreement provides for arbitration in South Carolina, with Ms. Soberanis responsible for arbitration fees up to the amount of filing fees for bringing a civil suit in state or federal court in South Carolina and City Loan responsible for the remainder of all arbitration fees. (Dkt. No. 11-1 at 6.) Ms. Soberanis alleges that because City Loan failed to register the arbitration clause with the AAA and refused to pay required arbitration fees, AAA closed the file and refused to administer the arbitration agreement. (Dkt. No. 14 ¶ 22–26.)

On September 30, 2016, Ms. Soberanis filed the present action in the Dorchester County Court of Common Pleas. (Dkt. No. 1-1.) The complaint was served on November 30, 2016, and Defendants removed to this Court on December 30, 2016. (Dkt. No. 1.) Defendants move to dismiss the amended complaint in its entirety. (Dkt. No. 17.)

II. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails "to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the complaint and "does not resolve contests surrounding the facts, the merits of the claim, or the applicability of defenses. . . . Our inquiry then is limited to whether the allegations constitute 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (quotation marks and citation omitted). In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the

complaint's allegations." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). However, while the Court must accept the facts in a light most favorable to the non-moving party, it "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

To survive a motion to dismiss, the complaint must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the requirement of plausibility does not impose a probability requirement at this stage, the complaint must show more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint has "facial plausibility" where the pleading "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. Discussion

A. First Cause of Action – Conversion

South Carolina law provides that creditor in a secured consumer credit transaction payable in installments may not take possession of goods that are collateral for the debtor's obligation "until twenty days after a notice of the consumer's right to cure is given." S.C. Code 37-5-111(1) (citation omitted). A notice of the right to cure must be delivered to the consumer or mailed to the consumer's residence no earlier than ten days after the consumer defaults—*i.e.*, fails to make a required payment. S.C. Code 37-5-110(1). If the creditor repossesses the collateral in violation of those statutory requirements, it is liable to the debtor in conversion. S.C. Code 37-5-111(7).

Plaintiff's first cause of action asserts a claim for conversion against City Loan because City Loan had 1st Choice repossess Plaintiff's vehicle without first sending a right to cure letter in compliance with statutory requirements. (Dkt. No. 14 ¶¶ 30–34.) Defendants move to dismiss the

conversion claim, arguing Plaintiff is estopped from denying that a proper right to cure letter was mailed.

Defendants' argument is without merit. Estoppel is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1). "[A] motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense . . . [b]ut in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6). This principle only applies, however, if all facts necessary to the affirmative defense 'clearly appear[ ] on the face of the complaint.'" *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). A court "may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity," and "a document is integral to the complaint where the complaint relies heavily upon its terms and effect." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) (internal quotation marks omitted). Here, Plaintiff alleges a right to cure letter was not sent. (Dkt. No. 14 ¶ 9.) Defendants cannot move to dismiss by refuting that allegation with evidence like envelopes and postal tracking information because that evidence is not apparent from the face of the complaint, or from documents integral to it, such as the promissory note. The complaint does not "rely heavily" on the terms of postal tracking information or an envelope returned to City Loan as undeliverable. Defendant's "estoppel" argument is really an argument that there is no genuine dispute that the letter was sent. That is an argument for summary judgment under Rule 56, not dismissal under Rule 12. The Court therefore denies the motion to dismiss as to the first cause of action.

Although the Court denies Defendants' motion to dismiss the first cause of action based on the above without considering evidence beyond the complaint and documents integral to it, the Court, in the interests of judicial economy, will address the merits of Defendants' estoppel argument to prevent relitigation of the argument. Defendants appear to argue Plaintiff is estopped because Plaintiff provided evidence to refute Defendants' baseless suggestion that Plaintiff actually refused to accept delivery of the letter or is otherwise responsible for City Loan's failure to deliver it:

> Plaintiff has argued that City Loan handwrote the address. Plaintiff is incorrect as the envelope in question in Dkt 11-2 is a copy of the failed certified delivery with the handwritten notes on the label to refuse delivery. More importantly, the only way to fail a delivery is to attempt delivery, which is all that is required by SC Code Ann § 37-5-110. In fact, this Exhibit provided by Plaintiff goes directly to prove Defendant City Loan mailed a letter to Plaintiff with a post mark [sic] and the letter was returned because Plaintiff refused delivery or provided inaccurate information.
>
> (Dkt. No. 17-1 at 3 n.3 (emphasis added).)

The only handwriting on the envelope is in fact the address information handwritten by City Loan. (Dkt. No. 11-2 at 1.) The envelope has a printed "return to sender / not deliverable as addressed" label partially covering the address written by City Loan. (*Id.*) From the copy of the envelope filed in this case, it appears that City Loan might not have written the zip code with the address, causing the envelope to be undeliverable, but, because the position of the return-to-sender label obscures the handwritten address, it is impossible to be certain. Regardless, Defendants are well aware that the letter was returned to City Loan having never left California, and so it was never "refused" by Plaintiff. (*See* Dkt. No. 11-3.)

Defendants also repeatedly assert the address Plaintiff provided City Loan is somehow "inaccurate" or "incorrect." (*See* Dkt. Nos. 17-1 at 3 n.3; 19 at 2 ("The address of the Right to Cure letter, while incorrect, is the address provided by Plaintiff in documents to City Title Loan."); 19 at 3 (citing "notices on the United States Postal Service website, again showing mailing

although undeliverable based on the misinformation provided by Plaintiff").) Defendants provide no support whatsoever for those assertions, which are clearly intended to suggest the right to cure letter was undeliverable because of some misconduct by Plaintiff. The Court has confirmed via public records that 145 Jordan Simmons Road, Mailbox A, Summerville, South Carolina, 29483 is a valid postal address. The Court does not know who lived there in June 2015, but nothing suggests the address was inaccurate or incorrect.

Beyond blaming Plaintiff for City Loan's failure to mail a right to cure letter, Defendants' estoppel argument is that Plaintiff, by providing evidence showing City Loan did not properly mail a right to cure letter, admits one was mailed, albeit improperly, and that any attempted mailing, no matter how defective, satisfies the requirement to "mail" a letter. (Dkt. Nos. 17-1 at 6–7; 19 at 3.) The Court finds that argument utterly unpersuasive. The Court will not construe the verb "mails" in S.C. Code § 37-5-110 so loosely as to include a self-metered letter so inadequately addressed that the postal service could not even attempt delivery. The statutory requirement to "mail" a right to cure letter to a debtor's residence requires a good faith attempt to cause mail services actually to deliver the letter to the residence. That requirement is not satisfied when an incompletely addressed mailing is promptly returned to the creditor, having never been within 2000 miles of the intended destination.

Even if the letter were deemed mailed, it would be effective only if it were mailed no less than ten days after Plaintiff defaulted. S.C. Code § 37-5-110(1). The right to cure letter is dated July 3, 2015. (Dkt. No. 11-2 at 2.) Defendants represent to the Court that "[p]rior to repossession, Plaintiff was required to pay $75.00 on June 2, 2015 and $286.13 on June 23, 2015." (Dkt. No. 17-1 at 3.) Defendants provide no citations supporting those asserted due dates, which does not appear to be an accident because those dates are not accurate. The promissory note—provided by

Plaintiff, not Defendants who instead assert dates as counsel's *ipse dixit*[3]—plainly states that the first payment was due on June 25, 2015, not June 23, 2015. (Dkt. No. 11-1 at 1 (providing payments are due "Monthly, beginning 6/25/2015").) June 23, 2015 just happens to be exactly ten days before July 3, 2015, the date of City Loan's right to cure letter. Further, nothing in the promissory note suggests that a $75 payment was due on June 2, 2015. To the contrary, City Loan represented to the South Carolina Department of Consumer Affairs that the loan agreement was *executed* on June 2, 2015. (Dkt. No. 7-4.) The right to cure letter itself also states the loan was executed on June 2, 2015. (Dkt. No. 11-2 at 2.)

The Court is aware Plaintiff's counsel stated that the first payment due date was June 23, 2015 in the opposition to the first motion to dismiss, despite attaching the promissory note with the correct date to that opposition, before catching his mistake in the opposition to the second motion to dismiss. (*Compare* Dkt. No. 11 at 2 *with* Dkt No. 18 at 2, 8.) After Plaintiff's error, Defendants argued the June 23, 2015 date as evidence that the letter was sent in compliance with the statute and that this case should be dismissed. (Dkt. No. 17-1 at 3.) In the reply in support of the second motion to dismiss—*i.e.*, after Plaintiff correctly pointed out that the first payment was due June 25, 2015 and so the right to cure letter could not possibly have been mailed in compliance with the statutory 10-day waiting period—Defendants abandoned the June 23, 2015 date, pivoting to a $75 administrative fee they claim Plaintiff defaulted on June 2, 2015—*the same day the loan agreement was executed*:

---

[3] Defendants erroneously assert that "[i]n this matter, both Defendants and Plaintiff have submitted the subject Promissory Note." (Dkt. No. 17-1 at 5.) Defendants have not submitted a copy of the promissory note. Defendants have submitted: (1) legal memoranda, (2) a list of other foreclosure actions against Ms. Soberanis, (3) the right to cure letter, (4) City Loan's response to Ms. Soberanis's complaint with the South Carolina Department of Consumer Affairs, and (5) two unpublished court opinions.

> The Promissory Note required fees to be paid as early as June 2, 2015, which were never paid nor has Plaintiff disputed the she paid the fees. *See* Dkt 18, Plaintiff's Memorandum Oppositions [*sic*] Defendants' Motion to dismiss wherein Plaintiff did not address the initial finance fee.
>
> She fails to address, or even acknowledge, Defendants' points regarding the payments she never made beginning on June 2, 2015.
>
> Plaintiff also ignores in her Memorandum in Opposition that the promissory note fee of $75.00 was due and payable at the time of the loan of June 2, 2015 thereby starting the 10 days for failure to make a payment. Payment, not default of payment, is the required term under S.C. Code Ann. § 37-5-110.[4] Thus, any argument that the Right to Cure letter was sent less than 10 days is improper.
>
> (Dkt. No. 19 at 1, 2, 4.)

City Loan indeed did charge a $75 administrative fee. (Dkt. No. 11-1 at 1.) The promissory note's "Promise to Pay" section states the loan amount is $2,875 (the $2,800 provided to the borrower plus the $75 administrative fee) plus interest at 115% APR—which results in a $286.13 monthly payment. (*Id.*) If the $75 payment is treated as interest rather than as part of the principal borrowed, then the effective APR is 118.49%, as shown, correctly, in the promissory note's Federal Truth in Lending Act disclosure, which lists the amount financed as $2,800, the APR as 118.49%, and the monthly payment as $286.13. (*Id.*) Ms. Soberanis did not default on a $75 payment due at signing (which, if true, would have changed the loan amortization and caused the monthly payment to have been calculated as $278.67). Rather, Ms. Soberanis paid the $75 administrative fee with funds borrowed from City Loan and included in her loan amortization—she borrowed $2,875 but received only $2,800.

---

[4] The Court does not understand this sentence. The statute provides that a notice of "the consumer's right to cure the default" may be sent "after a consumer has been in default for ten days for failure to make a required payment." S.C. Code § 37-5-110.

B. Second Cause of Action – Repossession in Violation of S.C. Code § 37-5-112[5]

South Carolina law permits creditors to take possession of collateral to a consumer credit transaction without judicial process only if possession can be taken without breach of the peace. S.C. § 37-5-112. "[A] breach of the peace is a violation of public order, a disturbance of public tranquility, by any act or conduct inciting to violence. . . . It is not necessary that the peace be actually broken . . . [i]f what is done is unjustifiable, tending with sufficient directness to break the peace, no more is required." *Jordan v. Citizens & S. Nat. Bank of S.C.*, 298 S.E.2d 213, 214 (1982) (internal quotation marks omitted). Plaintiff's second cause of action asserts City Loan took possession of her vehicle in violation of S.C. Code § 37-5-112 when its agent 1st Choice repossessed her vehicle without judicial process and in a manner constituting a breach of the peace. Planitiff alleges 1st Choice refused to leave her residential property when confronted, forcing her to call the police. (Dkt. No. 14 ¶¶ 11–15.) Refusing to leave someone's residential property when asked is, of course, a breach of the peace, which is why the police responded to her call. Defendants' counterargument—that 1st Choice had already effected the repossession before Plaintiff asked them to leave—is without merit because Plaintiff clearly alleges that the repossession was effected only *after* police arrived on the scene. (*Id.* ¶ 15.) The Court therefore denies the motion to dismiss as to the second cause of action.

C. Third Cause of Action – Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act ("FDCPA") protects consumers from unfair practices by debt collectors. 15 U.S.C. § 1692f. Section 1692f provides that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt," including

[5] Counterintuitively, Plaintiff pleads this cause of action only against City Loan, and not against 1st Choice (the party who allegedly breached the peace).

"[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest." *Id.* Plaintiff alleges 1st Choice violated the FDCPA when it repossessed her vehicle without a present right to do so. (Dkt. No. 14 ¶ 40.)

Defendants argue the FDCPA claim against 1st Choice should be dismissed for two reasons. First, Defendants argue 1st Choice is not a debt collector as that term is defined in the FDCPA. (Dkt. No. 17-1 at 4.) That argument is without merit. "The term 'debt collector' . . . . also includes person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interest." 15 U.S.C. § 1692a(6). Plaintiff alleges 1st Choice uses instrumentalities of interstate commerce in a business the principal purpose of which is the enforcement of security interests. (Dkt. No. 14 ¶ 39.) The proof of that allegation is not a matter to decide on a motion to dismiss.

Defendants also argue any FDCPA action is barred by the statute's one-year statute of limitations. *See* 15 U.S.C. § 1692k(d) (providing one-year limitations period). Plaintiff admits the action is untimely but argues the statute of limitations should be equitably tolled because Defendants engaged in inequitable conduct to prevent this action from being timely filed. (Dkt. No. 18 at 4–7.) Specifically, Plaintiff alleges City Loan refused to waive the promissory note's mandatory arbitration provision yet refused to participate in arbitration, thereby delaying the filing of this action. (Dkt. No. 14 ¶¶ 19–29.)

"The doctrine of equitable tolling preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). Equitable tolling is appropriate when "the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant," and when "extraordinary

circumstances beyond plaintiffs' control made it impossible to file the claims on time." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (internal quotation marks omitted). Equitable tolling requires a plaintiff to show "the party pleading the statute of limitations fraudulently concealed facts that are the basis of the [plaintiff's] claim, and (2) the [plaintiff] failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995).

The Court finds Plaintiff's allegations, if proven, sufficient for equitable tolling of the statute of limitations. Plaintiff alleges City Loan insisted on enforcement of the mandatory arbitration clause, then, after Plaintiff filed an arbitration action, refused to participate, causing the arbitration association to refuse to administer the arbitration. Assuming those allegations true, it would be inequitable to allow Defendants now to argue this action is untimely filed.

Defendants further argue the arbitration provision should not toll a claim against 1st Choice because 1st Choice was not a party to the arbitration agreement. (Dkt. No. 17-1 at 7–8.) That argument is without merit. Plaintiff was a party to the arbitration agreement, which required Plaintiff to arbitrate its claims against 1st Choice:

> "Claim" also includes claims by or against any third party using or providing any product, service or benefit in connection with the Agreement (including, but not limited to, credit bureaus, third parties retained by you, credit insurance companies, debt collectors and all of their agents, employees, directors and representatives) if and only if, such third party is named as a co-party with me or you (or files a Claim with or against me or you) in connection with a Claim asserted by me or you against the other.
>
> (Dkt. No. 11-1 at 5.)

The arbitration provision explicitly includes claims against third party debt collectors or any third party providing a service in connection with the promissory note, which the repossession company unquestionably provided.

The Court therefore denies the motion to dismiss as to the third cause of action.

D. Fourth Cause of Action – Unconscionable Debt Collection Conduct

South Carolina law provides that, "[w]ith respect to a consumer credit transaction, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, . . . the consumer has a cause of action to recover actual damages and, in an action other than a class action, a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars." S.C. Code § 37-5-108(2). In considering whether debt collection action is unconscionable, the statute directs courts to consider many factors, including whether the debt collector has engaged in improper communications with the consumer. The statute enumerates many examples under that factor, including, *inter alia*, calling the consumer late at night, directly calling a consumer known to have legal representation, calling family members without permission, using profane language, or "tak[ing] or threaten[ing] to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest or other ownership interest." S.C. Code § 37-5-108(5).

Plaintiff appears to misread the statute as an additional cause of action for improper repossession. (*See* Dkt. No. 14 ¶ 45 ("Defendants violated S.C. Code §[]37-5-108(5)(b)(xi) by taking and threatening to take a non-judicial action to effect disposition of property when there was no present right to do so.").) South Carolina Code § 37-5-108(5)(b)(xi) is simply one of many enumerated types of improper conduct that would support a finding that a debt collector engaged in improper communications with a consumer, which in turn would support a holding that the debt collector used unconscionable debt collection practices. It is not, standing alone, an independent regulation of primary conduct giving rise to a civil cause of action. An improper repossession may (or may not) be part of a course of conduct constituting unconscionable debt collection practices,

but an improper repossession is not *per se* unconscionable debt collection. Nonetheless, the Court finds Plaintiff has met the minimum standard for pleading unconscionable debt collection under South Carolina law by alleging the unlawful repossession of a vehicle serving as collateral, in a manner constituting a breach of the peace. The Court therefore denies the motion to dismiss as to the fourth cause of action.

E. Fifth Cause of Action – Unfair Trade Practices

The South Carolina Unfair Trade Practices Act ("SCUTPA") forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code § 39-5-20(a). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *Wogan v. Kunze*, 623 S.E.2d 107, 120 (S.C. Ct. App. 2005). "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright v. Craft*, 640 S.E.2d 486, 498 (S.C. Ct. App. 2006).

Plaintiff alleges Defendants engaged in unfair or deceptive acts by (1) including a mandatory arbitration clause and refusing to waive it, when City Loan never actually intended to arbitrate claims but simply wanted to delay litigation, (2) by repossessing vehicles without sending right to cure notices, and (3) by repossessing vehicles in a non-peaceful manner. (Dkt. No. 14 ¶ 49–50.) She alleges that conduct damaged her, and that it affects the public interest because it is capable of repetition. (*Id.* ¶¶ 51–52.)

Defendants present two arguments for dismissal of Plaintiff's SCUTPA claims. First, Defendants argue the repossession was lawful and therefore cannot be the basis for a SCUTPA claim, and second, they argue Plaintiff fails properly to allege effect on the public interest. The first argument is obviously a disputed factual contention rather than a proper legal argument in

support of a motion to dismiss. But Defendants' second argument is more substantial. SCUTPA claims must allege an impact on the public interest, which "may be shown if the acts or practices have the potential for repetition." *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461, 466 (S.C. 2004). "The potential for repetition may be demonstrated in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Wright*, 640 S.E.2d at 501–02. Conclusory statements that unfair acts could be repeated are insufficient to show a potential for repetition. *See, e.g.*, *Ameristone Tile, LLC v. Ceramic Consulting Corp.*, 966 F. Supp. 2d 604, 621 (D.S.C. 2013). "Otherwise every intentional breach of contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages." *Ardis v. Cox*, 431 S.E.2d 267, 271 (S.C. Ct. App. 1993).

Defendants argue Plaintiff's allegation that "Upon information and belief, Defendants are repeating this conduct throughout the state of South Carolina and/or the conduct is capable of repetition" is a conclusory statement insufficient to show the impact on the public interest required by the SCUTPA. (*See* Dkt. No. 14 ¶ 52.) Certainly, Plaintiff has alleged nothing suggesting the alleged failure to mail a right to cure letter in this case is not simply a one-time failure, but instead part of broader practice of never mailing right to cure letters. Similarly, Plaintiff alleges nothing suggesting 1st Choice's purportedly non-peaceful repossession was a repeated or likely to be repeated business practice. The Court agrees Plaintiff fails to state SCUPTA claims regarding those alleged practices, and, therefore, grants the motion to dismiss the fifth cause of action as to 1st Choice.

The promissory note and its arbitration agreement, however, are standardized forms clearly used for transactions other than the loan to Plaintiff. Plaintiff specifically alleges City Loan failed to register the arbitration agreement as required by the arbitration association that City Loan selected, yet it refuses to waive the arbitration agreement. (Dkt. No. 14 ¶ 22–26.) It is plausible to infer from those allegations that City Loan does not intend to honor the arbitration clauses in its loan agreements and attempts to enforce them only as a device to delay adjudication of claims. That is sufficient to allege a deceptive or unfair practice with the potential for repetition, in violation of the SCUTPA. The Court therefore denies the motion to dismiss the fifth cause of action as to City Loan.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion to dismiss (Dkt. No. 17). The Court **DISMISSES** claims under the South Carolina Unfair Trade Practices Act against Defendant 1st Choice Recovery, LLC. The motion to dismiss is otherwise **DENIED**.

AND IT IS SO ORDERED.

Richard Mark
United States District Court Judge

April 3, 2017
Charleston, South Carolina