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The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER SYPOLT,)	
)	
Plaintiff,)	Case No. C07-1892 MJP
v.)	
)	ORDER GRANTING
THE TALON GROUP, a division of First)	DEFENDANT'S MOTION FOR
American Title Insurance Company, a foreign)	PARTIAL SUMMARY
corporation,)	JUDGMENT
)	
Defendant.)	
_____)	

This matter comes before the Court on Defendant's motion for partial summary judgment. (Dkt. No. 19.) The Court has considered the motion, the response (Dkt. No. 28), the reply (Dkt. No. 39) and all other pertinent documents in the record. After hearing the parties' presentations at oral argument on February 9, 2009, the Court indicated it would grant Defendant's motion. For the reasons set forth below, the Court GRANTS Defendant's motion for partial summary judgment.

Background

Plaintiff Christopher Sypolt challenges the pooled account practices used by his escrow agent, The Talon Group, in connection with a real estate transaction. (Dkt. No. 22 at 1.) Defendant The Talon Group ('Talon') is a division of First American Title Insurance

1 Company, a subsidiary of The First American Corporation (FAC'). (Dkt. No. 19 at 1.)

2 Though the Plaintiff's complaint includes factual allegations relating to Talon's use of a
3 'wire/express fee,' both parties agree that the present motion only involves Mr. Sypolt's
4 allegations about Talon's 'retained interest' claims.

5 I. Sypolt-Hauser Transaction

6 Plaintiff's action arises out of his purchase of a condominium. On June 16, 2005, Mr.
7 Sypolt entered into an agreement to purchase a condominium from Gary and Patricia Hauser
8 for \$355,000. (Solonti Decl. ¶ 4.) There were several components to the transaction. First,
9 on June 16, 2005, Mr. Sypolt transferred \$10,000 in earnest money to his real estate agent,
10 RE/MAX, which held the money in its own trust account. (Id.) Because Talon credited the
11 earnest money against RE/MAX's commission, the money was not transferred to Talon. (Id.)
12 Second, on July 15, 2005, Mr. Sypolt provided Talon with a \$31,054.80 personal check,
13 which Talon deposited into its IOLTA escrow trust account on July 18, 2005 (the following
14 Monday). (Id. ¶ 6.) Third, on July 21, 2005, Talon received two wires from RBC Mortgage
15 on Mr. Sypolt's behalf, one for \$284,000.00 and another for \$35,500.00. (Id. ¶ 7.) These
16 amounts were also held in Talon's IOLTA escrow trust account.
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19 On July 21, 2005, after receiving the two wire transfers, Talon sent the required deeds
20 to a title company and the King County Recorder recorded the documents that afternoon. (Id.
21 ¶ 8.) The transaction officially closed when Talon received the recording information from
22 the title company that afternoon. (Id.) On July 22, 2005, Talon issued a number of checks
23 disbursing the funds. (Id. ¶ 9.)
24

25 II. Talon's Challenged Practices

26 Mr. Sypolt claims Talon deceives its clients and uses them as 'cogs in a money-making
27 machine.' (Dkt. No. 22 at 1.) First, Plaintiff claims Talon unfairly benefits from the balances

1 on its pooled accounts by earning “credits” that can be used to offset its fees with its bank.

2 Second, Mr. Sypolt claims that the large balances in the pooled accounts allow Talon to
3 access a line of credit, from which it earns secret profits.

4 a. Earnings Credits

5 Mr. Sypolt challenges the “earnings credits” Talon accumulates based on the balance of
6 its aggregated escrow account. (Dkt. No. 22 at 2.) Earnings credits are monthly rebates
7 banks offer escrow companies based on a formula that incorporates the balance of the escrow
8 account. (Braakman Decl. ¶¶ 2-3.) Talon uses these credits to pay service charges on its bank
9 accounts (with KeyBank) and, if Talon has left over credits at the end of a given month, it
10 uses them to pay off charges on its other accounts and those of its affiliates. (Id. ¶ 4.) Talon
11 asserts that its earnings credits arrangements are standard and used by other escrow agents
12 and banks across the state and nation. (Id.)

14 b. Low Interest Loans/Line of Credit

15 Sypolt also argues that Talon’s escrow account unfairly provides FAC with a low
16 interest line of credit. (Dkt. No. 22 at 3-4.) Pursuant to a Business Loan Agreement between
17 FAC and KeyBank, KeyBank extends a line of credit to FAC based on the average escrow
18 balance of FAC’s subsidiaries. (Braakman Decl. ¶ 5-6.) FAC may only use the line of credit
19 to purchase short-term investments from KeyBank, which it sells monthly to repay amounts
20 drawn against the line of credit. (Id.) FAC allocates the income it earns on the short term
21 investments to its subsidiaries based each one’s proportion of the percentage of the average
22 escrow balance. (Id.)

25 Sypolt claims these two practices are problematic because (1) Talon does not share the
26 proceeds with customers and (2) Talon does not disclose its procedures to its customers.

27 Based on these “retained interest” violations, Sypolt seeks to certify a class to assert claims

1 based on (1) the Washington Consumer Protection Act, (2) breach of fiduciary duty, (3)
2 breach of duty as agent, (4) unjust enrichment, and (5) breach of contract. (Dkt. No. 22 at 6-
3 8.)

4 **Discussion**

5 Talon argues that summary judgment is appropriate because Plaintiff lacks standing to
6 sue and, even if he has standing, he cannot allege an injury as required by each cause of
7 action.

8 I. Summary Judgment Standard

9
10 Summary judgment is not warranted if a material issue of fact exists for trial. Warren
11 v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996).

12 The underlying facts are viewed in the light most favorable to the party opposing the motion.

13 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Summary
14 judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict

15 for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The

16 party moving for summary judgment has the burden to show initially the absence of a genuine
17 issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970).

18 However, once the moving party has met its initial burden, the burden shifts to the nonmoving
19 party to establish the existence of an issue of fact regarding an element essential to that party’s

20 case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett,
21 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on

22 its pleadings, but instead must have evidence showing that there is a genuine issue for trial.

23 Id. at 324.

24 II. Standing

25
26 A plaintiff has standing when (1) he has “suffered an ‘injury in fact,’” (2) that is causally

1 connected to the purportedly offensive conduct, and (3) that injury can be redressed by a
2 ‘favorable decision.’ Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations
3 omitted). Injury in fact is defined as ‘an invasion of a legally protected interest which is (a)
4 concrete and particularized and (b) ‘actual or imminent.’ Id. at 560 (citations omitted).

5 First, Defendant argues Plaintiff lacks standing because, by law, Talon was obliged to
6 place Sypolt’s funds in the IOLTA account. (See Dkt. No. 19 at 7-8.) Defendant’s argument
7 here confuses the interest earned by the Legal Foundation of Washington (‘LFW’), pursuant to
8 APR 12.1, with the institutional benefits provided by KeyBank. (See Kinkead Decl., Ex. C.)
9 Plaintiff concedes he does not seek the interest on the accounts and the parties agree that
10 earnings credits and lines of credit do not constitute ‘interest.’ (Dkt. No. 28 at 8-9; Dkt. No. 19
11 at 11-12.) Thus, whether Plaintiff has standing to sue for the interest earned is irrelevant to
12 this matter.

13
14 Second, Defendant argues Plaintiff lacks standing because he has no legally protected
15 interest in the earnings credits or the line of credit profits. (Dkt. No. 39 at 5.) Plaintiff asserts
16 that, because LFW only has standing to sue for interest, but not earnings credits of line of
17 credit profits, he must have standing to assert the claims. (Dkt. 28 at 10.) The mere fact that
18 LFW lacks standing does not confer standing to Mr. Sypolt. In Washington Legal Foundation
19 v. Legal Foundation of Washington, the Ninth Circuit described earnings credits in the
20 context of First and Fifth Amendment challenges to the use of IOLTA accounts. 271 F.3d
21 835, 858 (9th Cir. 2001) (en banc) (plaintiffs challenging the decision to stop the use of
22 earning credits). The court described earnings credits as ‘nothing but incentive payments to
23 repeat customers, the escrow companies’ which are ‘never the property of the escrow
24 companies’ customers.’ Id. at 859-60 (further holding that customers could not sustain a
25 takings claim based on the escrow company’s loss of earnings credits). Though their opinion
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1 is not binding on this court, Washington's LPO Board has identified the non-interest benefits
2 closing firms receive as "discretionary on the part of the banks and would not otherwise be
3 available to the clients making the deposits." (Kinkead Decl., Ex. D at 7.)

4 Mr. Sypolt does not have standing to sue for "retained interest" benefits. Because
5 earnings credits are a function of the relationship between the bank and the escrow company,
6 Mr. Sypolt would never be able to earn them individually. He has failed to describe how he
7 suffers from Talon's relationship with KeyBank. Thus, Plaintiff cannot articulate a legally
8 protectable interest sufficient to confer standing. The earnings credits analysis is equally
9 applicable to the context of line of credit benefits. Like earnings credits, a line of credit arises
10 out of the escrow company's relationship with the bank and would not otherwise be available
11 to an individual customer like Mr. Sypolt.

13 III. Washington CPA Claim/Breach of Contract/Unjust Enrichment

14 Even if Mr. Sypolt had standing to sue for the non-interest benefits Talon earned,
15 Defendant is entitled to summary judgment on Plaintiff's CPA, contract, and unjust
16 enrichment claims.
17

18 First, under the Consumer Protection Act, a plaintiff must demonstrate "a loss of use of
19 property which is causally related to an unfair or deceptive act." Mason v. Mortgage America,
20 Inc., 114 Wn.2d 842, 854 (1990); see also Hangman Ridge Training Stables, Inc. v. Safeco
21 Title Ins. Co., 105 Wn.2d 778, 792 (1986) ("The fourth element of a private CPA action
22 requires a showing that plaintiff was injured in his or her business or property." (citing RCW
23 19.86.090)). Second, a breach of contract is actionable where the contract "imposes a duty, the
24 duty is breached, and the breach proximately causes damage to the claimant." Northwest
25 Independent Forest Mfrs. V. Department of Labor and Industries, 78 Wn.App. 707, 712
26 (1995); see also Norm Advertising v. Monroe Street Lumber Co., 25 Wn.2d 391, 398 (1946).
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1 In general, each breach of a contract gives rise to cause of action, even if a plaintiff has not
2 suffered any actual damage. See Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC, 139
3 Wn.App. 743, 754 (2007) (citations omitted). However, in a suit for damages only, a Court
4 may dismiss a breach of contract claim where damages have not been suffered. Id. Third, a
5 claim for unjust enrichment can be sustained only where (1) a benefit is conferred on one
6 party by the claimant, (2) the defendant receives the benefit knowingly, and (3) the defendant
7 retains the benefit under inequitable circumstances. Dragt v. Dragt/DeTray, LLC, 139 Wn.
8 App. 560, 576 (2007) (citation omitted).
9

10 In short, all three causes of action require that Mr. Sypolt demonstrate some form of
11 actual damage or injury. The Court is persuaded by the Ninth Circuit's description of non-
12 interest benefits as "never the property of the escrow companies' customers." Washington Legal
13 Foundation, 271 F.3d at 858. Mr. Sypolt could not earn these credits on his own and he
14 cannot describe any out-of-pocket loss from Talon's retention of these benefits. He does not
15 describe what he would have done differently if he had known Talon's practices. Plaintiff
16 cannot demonstrate that a material issue of fact exists as to an essential element of these
17 claims; Defendant is entitled to summary judgment. See Celotex, 477 U.S. at 323-24.
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19 IV. Duty as Fiduciary/Agent

20 Similarly, even if Plaintiff had standing to sue, Talon is entitled to summary judgment
21 on Mr. Sypolt's breach of duty claims. The Washington Supreme Court defined the fiduciary
22 nature of an escrow agent in National Bank of Washington v. Equity Investors. 81 Wn.2d
23 886, 910 (1973). The court described the relationship as follows:
24

25 As agent, trustee or holder, the escrow holder owes a fiduciary duty to his
26 principals in the same way that all agents are held to such standards. The
27 escrow agent's duties and limitations are defined, however, by his instructions .
. . . As a general rule, the escrow holder must act strictly in accordance with
the provisions of the escrow agreement . . . In his fiduciary capacity, he must

1 conduct the affairs with which he is entrusted with scrupulous honesty, skill,
2 and diligence.

3 Id. (internal citations omitted). In Denaxas v. Standstone Court of Bellevue, L.L.C., the
4 Washington Supreme Court reiterated this standard while ruling against a plaintiff who could
5 not “allege any deviation from the agreed-upon instructions.” 148 Wn.2d 654, 663 (2003) (en
6 banc).

7 Plaintiff urges the Court to emphasize the “scrupulous honesty” aspect of the
8 relationship above all others. It is not apparent from the briefing or argument, however, how
9 Talon’s failure to describe its non-interest benefits falls short of this standard. Moreover, as
10 Denaxas makes clear, the relevant inquiry is determining whether the Talon deviated from its
11 escrow agreement. In pertinent part, the escrow agreement provides that “the closing agent’s
12 fee is intended as compensation for the services set forth in these instructions.” (Weaver Decl.,
13 Ex. 5.) Mr. Sypolt implies that, because Talon earned non-interest benefits, their fee cannot
14 be fairly described as compensatory. This would require too narrow a reading of
15 “compensation,” particularly in light of the other “services” outlined in the contract. Id. Mr.
16 Sypolt has not demonstrated any deviation from the contract or pointed to any provision of the
17 contract that was dishonest. Thus, Plaintiff cannot demonstrate that Talon breached a duty as
18 fiduciary or agent. Defendant is entitled to summary judgment.

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21 **Conclusion**

22 Though Plaintiff might believe Talon’s practices are unfair, he has not articulated an
23 injury that would either confer standing or preserve his claims past summary judgment. The
24 Court ORDERS as follows:

- 25 1. The Court GRANTS Defendant’s motion for partial summary judgment. (Dkt. No.
26 19.) Plaintiff’s “retained interest” claims are dismissed with prejudice.
27

1 2. Plaintiff's motion for class certification (Dkt. No. 22) is MOOT.

2 3. Plaintiff's motion to compel (Dkt. No. 55) is MOOT.

3 4. The parties' joint motion to vacate and reset the case schedule is MOOT.

4 It is SO ORDERED. The Clerk is directed to transmit a copy of this Order to all counsel of
5 record.

6 Dated this 25th day of February, 2009.

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10 Marsha J. Pechman
United States District Judge