HAROLD HALL,
Plaintiff,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY AND OCWEN LOAN SERVICING LLC,
Defendant.

County Court
13th Judicial Circuit in and for Hillsborough County, Civil Division.
Case No. 13-CC-13185, Division M.
August 25, 2015.
Herbert M. Berkowitz, Judge.

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S OFFER OF JUDGMENT

THIS MATTER came on to be heard on July 2, 2015 on the Plaintiff's Motion to Strike Defendant's Offer of Judgment, counsel for the respective parties being present, and having submitted case law and having made argument, and the Court, after taking this matter under advisement to consider Defendant's late filed case law, and now being fully advised in the premises, finds as follows:

1. In May, 2013, Plaintiff filed a one count Complaint alleging a violation of the Florida Consumer Collection Practices Act ("FCCPA"). After some discovery, several hearings, and mediation have taken place, Defendant has now filed an offer of judgment pursuant to Fla. Stat. 768.79, which the Plaintiff now seeks to have stricken.

2. Defendant argues that Plaintiff's Motion to Strike its offer of judgment is premature, as it can only take effect after a verdict or final judgment is rendered. It is true that the effect of an offer of judgment cannot be determined until a verdict or final judgment quantifies the damages, thereby establishing whether the offer of judgment even applies. However, Plaintiff's Motion to Strike is based on the question of preemption, and is, therefore, a legal argument as to the inherent propriety of an offer of judgment in this case. The Court finds that whether the offer of judgment statute is being properly applied herein, is not premature. The Defendant's procedural point, therefore, is not well taken.

3. The question before this Court, then, is whether Florida Statute 768.79, the offer of judgment statute, can be applied to causes of action under Florida Statute 559.72, ("FCCPA").

4. Plaintiff argues that he would be "unduly prejudiced and irreparably harmed" by allowing the offer of judgment to stand because he would not be "afforded any form of legal certainty as to its economic exposure in the pending litigation". Plaintiff argues that it would subject the Plaintiff to "punishment for merely guessing wrong regarding the validity, effect or extent of an offer of judgment as opposed to a penalty for perpetuating unnecessary litigation caused by an unrealistic evaluation of a litigant's case." While the Plaintiff is correct that an effect of an offer of judgment might result in an uncertain economic exposure if he unrealistically evaluates his case, this is exactly the legislative intent of the offer of judgment statute. The very purpose and effect of the offer of judgment statutory scheme is most eloquently described by the Dissent in Clayton v. Bryan, 753 So. 2d 632, 634-636 (5 DCA, 2000) [25 Fla. L. Weekly D505a].

5. A compelling analysis as to whether F.S. §768.79 is preempted by federal consumer protection statutes is made by the Second District Court of Appeal in Talbott v. American Isuzu Motors, 934 So.2d 643 (Fla. 2nd DCA, 2006) [31 Fla. L. Weekly D2021b] and the Fifth District Court of Appeal in Marcy v. DaimlerChrysler Corp., 921 So.2d 781 (Fla. 5th DCA 2006) [31 Fla. L. Weekly D627a]. The Talbott opinion specifically adopted the Marcy Court's decision: "While this appeal was pending, the Fifth District, in Marcy v. DaimlerChrysler Corp., 921 So.2nd 781 (Fla.5th DCA 2006), issued its opinion explaining why the Magnuson-Moss Act does not preempt Florida's offer of judgment statute. We write to express our agreement with the result in Marcy." Talbott, at 644.

6. These cases dealt specifically with the Magnuson-Moss Warranty Act, and because that Act is silent on the question of an attorneys' fees entitlement to a successful defendant, the Talbott and Marcy Courts found no preemption and held that Fla. Stat. 768.79 and the Magnuson-Moss Act are not in conflict and can mutually exist.

7. These cases, however, do not deal with either the Federal Fair Debt Collection Practices Act ("FDCPA"), nor the FCCPA, and while highly persuasive, are not controlling on this singular issue now before the Court. Clayton v. Bryan, supra, on the other hand, does deal directly with the FDCPA and the FCCPA, and holds that Fla. Stat. §559.72 does preempt the application of F.S. §768.79.

8. While an enticing argument can certainly be made that Talbott, a Second DCA opinion, by expressly agreeing with Marcy, implicitly applies Fla. Stat. §768.79 to FCCPA claims, this Court must conclude that the Talbott opinion does not apply to the FCCPA. "While no section of the MMWA [Magnuson-Moss Act] either allows or denies a defendant the ability to recover its fees and costs, . . . the Federal Fair Debt Protection Collection Act . . . specifically address[es] the subject of attorneys' fees for successful defendants. We conclude that this distinction is critical." Marcy, at 786.

9. If the Fifth District Court of Appeal had wished to recede from its Clayton decision issued six years earlier, it certainly could have done so in the Marcy case. It must be assumed, therefore, that it chose not to do so. This, however, cannot necessarily be said of the Second District Court of Appeal in Talbott.

10. Peeples v. Ugly Duckling Credit Corporation, 15 Fla L. Weekly Supp. 900b (13th Jud. Cir. Ct., Hills. Co., Fla, 2003), is a 13th Circuit Court Order that specifically addresses the issue now under consideration. Because Peeples is a trial court Order rather than one written in the Circuit Court's appellate capacity, the ruling is not binding, but is persuasive. "Fla. Stat. §559.72 provides the sole fee remedy for litigation brought under Florida Stat. §559.72, Florida Consumer Collection Practices Act. Further, this Court is bound by Clayton v. Bryan, 753 So.2d 632 (5th DCA, 2000) [25 Fla. L. Weekly D505a]". Peeples, Id.

It is therefore ORDERED AND ADJUDGED that Plaintiff's Motion to Strike Defendant's Offer of Judgment is GRANTED.

Because of the interplay between the legislature's consumer protection goals of Fla. Stat.559.72, et. seq. and the legislature's goal of encouraging settlements as embodied in Fla. Stat. 768.79, together with the apparent absence of any Second District Appellate opinions addressing this interplay, this Court would deem this a matter of great public importance.

However, this is a non-final Order and certification is premature. But for the current status of this Order, this Court would certify the following question to the Second District Court of Appeal, pursuant to Rule 9.030(b)(4)(A), Fla. R. App. P.:

DOES A CLAIM MADE PURSUANT TO FLA. STAT. 552.72 (FCCPA) PRE-EMPT THE APPLICATION OF THE OFFER OF JUDGMENT PROVISIONS OF FLA. STAT. 768.79?

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