

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONSUMER FINANCE
PROTECTION BUREAU,

Plaintiff,

v.

THE MORTGAGE LAW GROUP, LLP,
CONSUMER FIRST LEGAL GROUP, LLC,
THOMAS G. MACEY, JEFFREY J. ALEMAN,
JASON E. SEARNS and HAROLD E. STAFFORD,

Defendants.

OPINION and ORDER

14-cv-513-bbc

Plaintiff Consumer Finance Protection Bureau has filed a motion for clarification and partial reconsideration of rulings made in an order entered on July 20, 2016, dkt. #191, granting in part and denying in part the parties' cross motions for summary judgment. Dkt. #195. Plaintiff's concerns relate to the individual liability of defendants Thomas G. Macey and Harold E. Stafford. Specifically, it asserts that in the order the court (1) made conflicting rulings with respect to both Macey and Stafford by granting defendants' motion for summary judgment with respect to certain claims while also stating that those claims would be resolved at trial; (2) improperly dismissed the claims against Stafford for the period of January to July 2012, when Stafford had sole authority over defendant Consumer First Legal Group, LLC; and (3) improperly granted defendants' motion for summary judgment with respect to Macey's individual liability for violations involving defendant The Mortgage

Law Group, LLP's telephonic communications with consumers, television or internet advertising (including company websites) or welcome letters. For the reasons explained below, I am granting plaintiff's motion with respect to 1) the conflicting language relating to the claims against Macey and Stafford; and 2) Stafford's individual liability during the January to July 2012 period. I am denying the motion in all other respects.

OPINION

A. Conflicting Rulings

In the July order, I stated the following:

Plaintiff's motion for summary judgment will be granted with respect to certain matters. I conclude that:

* * *

9) Macey may be held individually liable for any violations of the Act or regulation on the part of The Mortgage Law Group at any time during its operations and of Consumer First Legal Group beginning in July 2012 related to related to the receipt of advanced fees, misrepresentations made in the retainer agreement about consumers' receipt of legal services and any failures to disclose a consumer's right to reject services in the retainer agreement.

* * *

Plaintiff's motion will be denied with respect to the following issues, which will be resolved at trial:

* * *

7) Defendant Macey's individual liability for any of the companies' violations involving their telephonic communications with consumers, television or internet advertising (including company websites) or welcome letters.

8) Defendant Stafford's individual liability.

Defendants' motion for summary judgment will be granted with respect to the individual liability of defendant Stafford and plaintiff's claims against him will be dismissed. Also, defendant's motion will be granted with respect to Macey's individual liability for any of the companies' violations involving their telephonic communications with consumers, television or internet advertising (including company websites) or welcome letters. Defendants' motion for summary judgment will be denied in all other respects as it relates to the individual liability of defendant Macey.

Dkt. #191 at 2-5. I repeated this ruling at the end of the order.

Plaintiff argues that the quoted language gives conflicting directives because it states both that the claims against Stafford will be resolved at trial *and* dismissed. The order makes a similar mistake with respect to Macey's individual liability for both companies' violations involving telephonic communications with consumers, television or internet advertising (including company websites) or welcome letters. The general introductory statement that "plaintiff's motion will be denied with respect to the following issues, which will be resolved at trial" is incorrect as it relates to these specific claims against Macey and Stafford; I dismissed those claims and should not have stated that they would be resolved at trial. However, as discussed below, I am reinstating plaintiff's claim for individual liability against Stafford for any violations committed on the part of Consumer First Legal Group between January and July 2012.

B. Stafford's Liability between January and July 2012

As explained in the July 2016 order, an individual defendant may be held liable for a corporate defendant's violations of the Consumer Protection Act or Regulation O if the

individual 1) participated directly in the illegal practices or acts or had the authority to control them; and 2) knew or should have known about the illegal practices. Federal Trade Commission v. Bay Area Business Council, Inc., 423 F.3d 627, 636 (7th Cir. 2005) (discussing individual liability for corporate violations of Federal Trade Commission Act); Federal Trade Commission v. Amy Travel Service, Inc., 875 F.2d 564, 573 (7th Cir. 1989) (same). The knowledge requirement “may be fulfilled by showing that the individual had ‘actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.’” Amy Travel, 875 F.2d at 574 (quoting Federal Trade Commission v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1292 (D. Minn. 1985)). In addition, the degree to which the individual participates in business affairs is probative of knowledge. Id.

After considering the evidence presented by plaintiff in conjunction with its motion for summary judgment, I determined that “it is not reasonable to conclude that Stafford had the type of authority or knowledge required to hold him individually liable for the company’s actions after July 2012.” I then granted defendants’ motion for summary judgment with respect to Stafford’s individual liability and dismissed all of plaintiff’s claims against Stafford. Dkt. #191 at 46. contends that it was error to dismiss all of its claims against Stafford, arguing that I should have considered separately whether he should be held liable for Consumer First Legal Group’s violations between January and July 2012, when he was the sole owner and manager of that company. Plaintiff is correct.

Plaintiff alleged in its complaint that Stafford could be held individually liable for all of Consumer First Legal Group's statutory and regulatory violations related to advance fees, misrepresentations, failure to make certain disclosures and deceptive acts. Dkt. #1 at 14-20. Although plaintiff did not argue the point clearly in its opening brief, it sought summary judgment with respect to all of its claims against Stafford. Dkt. #99 at 26 ("Stafford is individually liable as a related person, and as someone who had managerial responsibility for CFLG, who was a controlling shareholder of CFLG at its inception and for a significant period thereafter, who materially and directly participated in CFLG's affairs, who had authority to control CFLG's conduct, and who knew or should have known about CFLG's deception and other violative acts."). In addition, plaintiff made it clear in its response to defendants' motion for summary judgment that Stafford should be found liable for Consumer First Legal Group's illegal conduct through July 2012. Dkt. #118 at 54.

In the summary judgment order, I determined that the parties did not dispute that between January and July 2012, Stafford was the sole owner of Consumer First Legal Group and oversaw the operation of the company, managing the company's day-to-day activities and making all business decisions for the company. (As I explained in the July 2016 order, Stafford's involvement in the company became more limited after he sold most of his ownership interest in July 2012.) In response to plaintiff's argument that Stafford could be held individually liable for all of Consumer First Legal Group's alleged violations of the Consumer Protection Act and Regulation O, defendants argued only that "Stafford had no operational control, management, or direction over CFLG after July 2012." Dkt. # at 33.

Although I found that the evidence supported defendants' position, I failed to consider the period between January and July 2012, during which the parties agreed that Stafford had operational control, management or direction over the company. Defendants never disputed plaintiff's contention that Stafford could be held individually liable for the company's actions during this limited period, thus waiving their right to do so in the future.

Plaintiff did not present any evidence that Stafford actually knew about Consumer First Legal Group's illegal practices, but the undisputed evidence shows that Stafford was in control of the company between January and July 2012 and, therefore, would have had reason to know that it was charging advance fees, making misrepresentations to consumers and failing to make required disclosures. Amy Travel, 875 F.2d at 574-75 (agreeing with district court's finding that individual defendants' level of admitted participation in the business "more than adequately supported a finding that these individuals had knowledge of the practices at issue"). Although defendants now assert that plaintiff did not present any evidence of the company's unlawful acts in the pre-July 2012 time period, they forfeited the argument by not raising it previously in response to plaintiff's motion for summary judgment. (Defendants addressed various aspects of Consumer First Legal Group's allegedly illegal actions but never argued that plaintiff had failed to adduce any evidence of such acts occurring between January and July 2012.)

In a separate argument, defendants assert that plaintiff is not entitled to summary judgment on its claims against Stafford because he should be permitted to present evidence showing that he qualifies for the attorney exemption under the Consumer Protection Act and

Regulation O. I agree. As I stated in the July 2016 order, whether any of the defendants were “attorneys engaged in the practice of law and therefore exempt” is an issue that “remains in dispute and will be resolved at the court trial on a state-by-state basis.” Dkt. #191 at 21. I noted that I was addressing the parties’ arguments with respect to liability in an effort to streamline the issues for trial because of “the possibility that not every individual or corporate defendant will qualify for the attorney exemption in all of the jurisdictions relevant in this case.” Id. Therefore, to the extent that plaintiff is asking that Stafford not be allowed to present an attorney exemption defense, that request is denied. Plaintiff’s motion for summary judgment will be granted on the issue whether defendant Stafford may be held individually liable for any violations committed by Consumer First Legal Group from January 2012 through June 2012. Stafford remains free to present an attorney exemption defense at trial.

Finally, plaintiff asks that I make a ruling related to damages by finding as an undisputed fact that the total advance fees and net revenues of Consumer First Legal Group amounted to \$94,730 for the period January to July 2012. However, plaintiff did not propose this as a finding of fact in conjunction with its motion for summary judgment or seek a specific award of damages for the January to July 2012 period. In this new proposed finding of fact plaintiff states only that “[d]efendants’ records show that CFLG collected \$3,082,055, while CFLG issued \$89,759 in refunds, resulting in CFLG receiving a net amount of \$2,992,296 from consumers.” Dkt. #101 at ¶ 180. It does not identify what the company collected from consumers specifically between January and July 2012. Therefore,

plaintiff's request is denied. The amount of damages owed by any particular defendant remains an issue to be resolved at trial.

C. Macey's Liability for Certain Conduct by The Mortgage Law Group

Plaintiff asks for reconsideration of the ruling that Macey could not be held individually liable for any misrepresentations or deceptive practices on the part of The Mortgage Law Group involving telephonic communications with consumers, television or internet advertising (including company web sites) or welcome letters. (Plaintiff is not challenging a similar ruling with respect to Macey's individual liability for Consumer First Legal Group's conduct.) It asserts that I failed to consider evidence showing that Macey was aware that the state attorneys general in Arizona, Missouri and Indiana had alleged in 2012 that The Mortgage Law Group had made misrepresentations about its services in documents and communications directed to consumers.

In the July order, I found that even though Macey had the legal authority to control The Mortgage Law Group as its majority partner and to make final decisions on the company's behalf, there was no evidence that Macey knew or should have known about the content of the companies' marketing materials, welcome letters or script used by employees. I also noted that Macey made clear in his deposition testimony that he did not review or negotiate contracts related to advertising, review any materials provided to consumers except for the retainer agreement, have direct contact with clients, review client files or supervise, train or hire and fire employees. As evidence of knowledge, plaintiff had cited email

communications showing that Macey was aware of settlement negotiations with the Arizona attorney general, who sued The Mortgage Law Group. Dkt. #122, exh. ##3-7. (The emails did not discuss the Missouri or Indiana lawsuits.) However, I found that because neither plaintiff nor the emails identified the subject of the Arizona lawsuit or any particular misrepresentations allegedly made by The Mortgage Law Group, I could not conclude from that evidence alone that Macey knew about the types of misrepresentations at issue in this case.

In its motion for reconsideration, plaintiff admits that its “presentation of evidence [in conjunction with its motion for summary judgment] was inartful at best.” Dkt. #195 at 9. Although it states that it “inadvertently omitted” citations to the Indiana and Arizona complaints in its proposed findings of fact, those complaints allege that The Mortgage Law Group committed the same type of deceptive practices at issue in this case. Plaintiff argues that when considered together, the complaints and the emails show that as of June 2012, Macey was on notice that The Mortgage Law Group was making unlawful representations in its communications to consumers. However, because plaintiff failed to clearly raise this argument in either its brief in support of its motion for summary judgment or brief in response to defendants’ motion for summary judgment, the argument is forfeited. Campania Management Co., Inc. v. Rooks, Pitts & Poust, 290 F.3d 843, 852 (7th Cir. 2002) (“Perfunctory and undeveloped arguments are waived, especially when, as here, a party fails to develop the factual basis of a claim . . . and, instead, merely draws and relies upon bare conclusions.”).

In its opening brief, plaintiff discussed only Macey's general decision-making authority with respect to The Mortgage Law Group and did not make any argument related to the state lawsuits against the company. Dkt. #99 at 23-24. In addition, plaintiff's initial proposed findings of fact contained only a vague reference to the state lawsuits, stating that "[t]he State Attorneys General in Arizona, Missouri, and Indiana sued TMLG for violations of state law, and they have entered into consent orders with TMLG prohibiting the company from doing business in those states." Dkt. #101 at ¶ 51. Plaintiff discussed Macey's alleged knowledge of the company's deceptive acts for the first time in response to defendants' motion for summary judgment, arguing that "the advent of several state attorney general investigations put him on notice that there was a serious problem with the Companies' deceptive acts or practices." Dkt. #118 at 51-52. In support of that argument, it proposed the following two additional findings of fact:

21. As early as January 2012, Macey was aware that TMLG was "under scrutiny" by state regulators. The Arizona attorney general sued TMLG in February 2012, the Indiana attorney general sued TMLG in October 2012, and the Oregon Department of Justice investigated TMLG in July 2012. The Connecticut Department of Banking sued TMLG in April 2012, and Searns emailed Macey about it.

22. Macey directed settlement negotiations with the Arizona attorney general on behalf of TMLG. He provided detailed instructions to TMLG's counsel regarding settlement amount and other settlement terms. Macey also provided instructions to other TMLG managing attorneys on what to communicate to TMLG's counsel regarding the settlement negotiations.

Dkt. #120 at ¶¶ 21-22.

As discussed above, these facts show only that The Mortgage Law Group had been sued and that Macey participated in settlement negotiations in the Arizona lawsuit. Plaintiff

did not make any argument in its brief or propose any findings of fact explaining what kind of scrutiny The Mortgage Law Group was under in these various states or whether Macey was aware of the particular allegations against the company. In deciding a motion for summary judgment, the court is not obligated to sift through the record in search of evidence to support plaintiff's claim. D.Z. v. Buell, 796 F.3d 749, 756 (7th Cir. 2015) ("At the summary judgment level, . . . [t]he court is only tasked with deciding whether, based on the evidence of record, there is any material dispute of fact that requires a trial. As D.Z.'s failure to cite to the expert's testimony with specificity left the district court to sift through hundreds of pages of expert testimony, it was not improper for the district court to decline to consider the expert's statements."). Although plaintiff has now corrected its mistake in its motion for reconsideration, it is too late. Goodman v. National Security Agency, Inc., 621 F.3d 651, 654 (7th Cir. 2010) (internal citations omitted) ("We often call summary judgment, the 'put up or shut up' moment in litigation, . . . by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case."). Accordingly, plaintiff's motion to reconsider the rulings with respect to Macey's individual liability will be denied.

ORDER

IT IS ORDERED that plaintiff Consumer Financial Protection Bureau's motion for clarification and partial reconsideration, dkt. #195, is GRANTED IN PART as follows:

The July 20, 2016 order, dkt. #191, is AMENDED as follows:

1. The phrase “which will be resolved at trial” is struck from the sentence “Plaintiff’s motion will be denied with respect to the following issues, which will be resolved at trial” in lines 11 and 12 in the middle of page 4.

2. The following is ADDED to the end of paragraph 1 on page 52:

k. Stafford may be held individually liable for any violations of the Act or regulation on the part of Consumer First Legal Group from January 2012 through June 2012.

3. The text in paragraph 3.a. on page 53 shall be replaced with the following:

a. Stafford’s individual liability for any of Consumer First Legal Group’s violations of the Act or regulation beginning in July 2012.

The motion is DENIED in all other respects.

Entered this 23d day of November, 2016.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge