IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAVID J. STRECKER,

OPINION and
ORDER

Plaintiff,

04-C-440-C

v.

LaSALLE Bank, N.A., f/k/a
LaSALLE NATIONAL BANK and
EMC MORTGAGE CORP.,

Defendants.

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This is a civil action for monetary and injunctive relief. Plaintiff David Strecker contends that defendants LaSalle Bank, N.A., f/k/a/ LaSalle National Bank and EMC Mortgage Corp. (1) violated the Federal Deposit Insurance Corporation Act; (2) violated the Truth in Lending Act; (3) breached a contract; (4) enforced a contract that was void for lack of consideration; (5) committed fraud in connection with a loan transaction; (6) breached an implied contract; (7) breached the covenant of good faith and fair dealing; (8) breached a fiduciary duty; (9) enforced a contract that was entered into by an individual who lacked the authority to contractually bind defendants; (10) engaged in deceptive trade practices;

(11) illegally held property of plaintiff; and (12) converted plaintiff's property to themselves. Now before the court is defendants' motion to dismiss for lack of subject matter and for failure to state a claim. Fed. R. Civ. P. 12(b)(1) and (6). Plaintiff has not responded to this motion.

Defendants' motion will be granted. Although plaintiff invokes two federal statutes, he has not stated a claim under either. The Federal Deposit Insurance Act does not provide a cause of action for private individuals. The Truth in Lending Act provides for private civil suits but it does not require lenders to disclose the information that plaintiff alleges was withheld from him. The remainder of plaintiff's claims arise under state law. Because plaintiff has failed to state a claim arising under federal law, I decline to exercise supplemental jurisdiction over his state law claims. 28 U.S.C. § 1367(c). Moreover, plaintiff has failed to meet his burden of showing that the court has diversity jurisdiction, so there is no subject matter jurisdiction over plaintiff's state law claims.

OPINION

A. Failure to Identify Statutory Provision Conferring Subject Matter Jurisdiction

Defendants' first argument is that plaintiff has failed to identify any statutory basis for a private cause of action arising under state law. As the party asserting jurisdiction, plaintiff bears the burden of proving its existence. United Phosphorus, Ltd. v. Angus

Chemical Co., 322 F.3d 942, 946 (7th Cir. 2003). As defendants note in their brief, plaintiff cites as the basis for jurisdiction, "15 U.S.C. 1601, 12 U.S.C. 1828(g)(2) [and] 12 U.S.C. 1601," none of which allow individual causes of action. (Defendants overlook plaintiff's later invocation of 28 U.S.C. §§ 1331 and 1332. Plt. Cpt., dkt. #2, at ¶¶ 2-3.) However, a litigant need not set forth the statutory basis for a district court's jurisdiction in order to meet the pleading requirements of Fed. R. Civ. P. 8(a)(i). Caldwell v. Miller, 790 F.2d 589, 595 (7th Cir. 1986). It is sufficient that he "allege[] facts sufficient to bring the case within the court's jurisdiction." Id. (emphasis added). Plaintiff's failure to cite to appropriate statutory provisions is not a ground for dismissal.

B. Failure to Assert Non-Frivolous Federal Claim

Although it is enough that a litigant allege facts that if true would make out a claim arising under federal law, even claims "arising under" federal law do not confer federal question jurisdiction if they are frivolous. United Phosphorus, 322 F.3d at 950; see also Bell v. Hood, 327 U.S. 678, 682-83 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."). In his complaint, plaintiff asserts claims under two federal statutes: the Federal Deposit Insurance Corporation Act and the Truth in

Lending Act. Both of these claims are frivolous and for that reason do not confer jurisdiction.

1. Federal Deposit Insurance Corporation Act

As defendants suggest, the Federal Deposit Insurance Corporation Act does not create a cause of action under which private individuals may seek relief against a bank. The Act does contain a provision for civil penalties. 12 U.S.C. § 1833a. However, the provision makes clear that "a civil action to recover a civil penalty under this section shall be commenced by the Attorney General." 12 U.S.C. § 1833a(d). See also Hicks v. Resolution Trust Corp., 767 F. Supp. 167 (N.D. Ill. 1991), aff'd, 970 F.2d 378 (7th Cir. 1992). In addition, the Act provides that "a director or officer of an insured depository institution may be held personally liable for monetary damages in a civil action" but such an action must be brought "by, on behalf of, or at the request or direction of the [Federal Deposit Insurance] Corporation" and must be prosecuted "for the benefit of the Corporation." 12 U.S.C. § 1821(k). Plaintiff is not suing an individual bank director or officer and there is no indication that he is pursuing this action either on behalf of or for the benefit of the FDIC.

Moreover, there is no basis for inferring that the act creates an implied private cause of action. In Cort v. Ash, 422 U.S. 66, 78 (1975), the Supreme Court laid out a four-part test to determine whether Congress intended to create a private right of action: 1) whether

the plaintiff is a member of the class for whose benefit the statute was enacted; 2) whether there is any indication of legislative intent to create or deny such a remedy; 3) whether an implied remedy is consistent with the underlying purposes of the statutory scheme; and 4) whether the cause of action is one traditionally relegated to the states so that it would be inappropriate to infer a federal remedy.

Although the Court has not overruled this test explicitly, it has criticized and retreated from the Cort framework in more recent cases. Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring in judgment) ("It could not be plainer that we effectively overruled the Cort v. Ash analysis . . . ."). Instead, the Court focuses primarily on the test's second factor, evidence of legislative intent to create a private cause of action. Mallett v. Wisconsin Div. of Vocational Rehabilitation, 130 F.3d 1245, 1249 (7th Cir. 1997) (citing Suter v. Artist M., 503 U.S. 347, 364 (1992); Karahalios v. National Federation of Federal Employees, 489 U.S. 527, 532 (1989); Thompson, 484 U.S. at 179; Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)). Plaintiff has failed to point to any evidence that Congress intended to create a private cause of action against insured banks under the Federal Deposit Insurance Corporation Act. See Curiale v. Reissman, 798 F. Supp. 141, 148 (S.D.N.Y. 1992) ("Nothing in the words of the [Federal Deposit Insurance Corporation Act] or any legislative history suggests that the statute impliedly provides a private cause of

action."). Moreover, the fact that Congress provided for a private cause of action for civil penalties but limited its availability to the Attorney General is a strong indication that Congress considered and rejected the idea of providing a civil remedy for private individuals.

I conclude that the Federal Deposit Insurance Act does not expressly or impliedly creates a cause of action through which a private individual may sue a bank or mortgage company for monetary damages. Accordingly, plaintiff's claim under the Act is dismissed for lack of subject matter jurisdiction.

2. Truth in Lending Act

Unlike the Federal Deposit Insurance Corporation Act, 15 U.S.C. §§ 1601-49, the Truth in Lending Act provides for private causes of action through which individuals may sue their creditors for monetary damages for failure to comply with the act's disclosure requirements. 15 U.S.C. § 1640. However, plaintiff has failed to state a claim under this act for a number of reasons. First, the Act does not require lenders to disclose the information plaintiff alleges defendants withheld from him. Plaintiff's claim is based on the following factual allegations:

> Plaintiff[] w[as] never fully informed of the costs of this alleged loan. Plaintiff executed and delivered his promissory note to Defendant. Defendant merely deposited this "money" into its account and loaned it back to Plaintiff, thereby incurring no cost and no risk to Defendant whatsoever. Plaintiff was never

informed of this, in violation of the statute.

Plaintiff is mistaken that a promissory note is the equivalent of "money." To the contrary, it is a certificate acknowledging debt. In this case, it is likely that the note reflects plaintiff's promise to repay defendant the real money defendant lent plaintiff. The Truth in Lending Act does not require lenders to disclose this sort of false information.

In addition, plaintiff's claim is barred by the Act's statute of limitations. Civil actions brought by private individuals under § 1640 must be commenced "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). The Act contains exceptions but none that would apply in this case. Id. (limitation does not apply to person claiming violation as a defense in action to collect debt and state attorney general may bring enforcement action up to three years after date of violation). In his complaint, plaintiff indicates that the loan on which he bases his claim was obtained on March 31, 2000. Cpt., dkt. #2, at ¶ 14, Exh. 7. "There is abundant authority for the proposition that a violation of the [Truth in Lending] Act occurs when the new credit transaction is 'consummated,' or when credit is extended, without the requisite disclosure having been made." Nash v. First Financial Savings and Loan Association, 703 F.2d 233, 238 (7th Cir. 1983) (citations omitted). Plaintiff did not file this suit until July 2, 2004, over three years after the limitations period expired.

Some federal courts of appeals have concluded that equitable tolling of the statute of

limitations is available. Jones v. TransOhio Savings Assn., 747 F.2d 1037 (6th Cir. 1984); King v. California, 784 F.2d 910 (9th Cir. 1986); Ramadan v. Chase Manhattan Corp., 156 F.3d 499 (3d Cir. 1998). But see Hardin v. City Tile & Escrow Co., 797 F.2d 0137 (D.C. Cir. 1986) (suggesting in dicta that equitable tolling not available under Truth in Lending Act). Although the Court of Appeals for the Seventh Circuit has not addressed the issue directly, it has expressed approval of the reasoning in King and Jones and rejected that of Hardin in a case arising under the Real Estate Settlement Procedures Act. Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1166-67 (7th Cir. 1997). Even assuming equitable tolling might be available in certain circumstances, plaintiff has failed to identify any reason why it should apply in this case. Accordingly, I conclude that plaintiff's claim under the Truth in Lending Act is both frivolous and time-barred.

C. State Law Claims

The remainder of plaintiff's claims arise under state law. Because plaintiff has no viable federal claim, I decline to exercise supplemental jurisdiction over his state law claims. Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims). See also 28 U.S.C. § 1367(c) (listing circumstances in which district courts may decline to exercise supplemental jurisdiction); Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) ("federal courts are without power to

entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit,' 'wholly insubstantial,' 'obviously frivolous,' 'plainly unsubstantial,' or 'no longer open to discussion'") (internal citations omitted).

In addition, plaintiff has failed to meet his burden to show that there is diversity jurisdiction over his claims. Diversity jurisdiction exists where all plaintiffs are citizens of states different from the states of citizenship of all defendants and the amount in controversy exceeds $75,000. 28 US.C. § 1332; Strawbridge v. Curtiss, 2 U.S. 267 (1806) (holding that complete diversity is necessary for jurisdiction). In his complaint, plaintiff alleges that he is a citizen of Wisconsin, defendant does not have its principal place of business in Wisconsin and that the amount in controversy exceeds $75,000. First, plaintiff's allegations are insufficient. Plaintiff has sued two defendants. He alleges that one has its principal place of business in a state other than Wisconsin but does not indicate where the "other" defendant has its principal place of business. If it is in Wisconsin, the complete diversity requirement is not satisfied. Moreover, corporations are citizens of both the state in which they have their principal place of business and the state in which they are incorporated. Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F. 2d 1220, 1223 (7th Cir. 1991). If either defendant is incorporated under the laws of Wisconsin, the diversity requirement is not satisfied.

Although plaintiff's allegations leave open the possibility of diversity jurisdiction in this case, the filing of a motion to dismiss triggers his burden to prove it. Chase v. Shop n' Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997) ("party seeking to invoke federal diversity jurisdiction [] bears the burden of demonstrating that the complete diversity and amount in controversy requirements are met."); NFLC, Inc. v. Devcom Mid-America, Inc., 45 F.3d 231, 237 (7th Cir. 1995) (jurisdictional allegations must be supported by "competent proof"). Because plaintiff has failed to adduce evidence showing the citizenship of the parties in this action, he has not met his burden. Accordingly, his state law claims will be dismissed.

ORDER

IT IS ORDERED that the motion of defendants LaSalle Bank, N.A., f/k/a/ LaSalle National Bank and EMC Mortgage Corp. to dismiss the complaint of plaintiff David

Strecker for lack of jurisdiction and failure to state a claim is GRANTED. Plaintiff's complaint is DISMISSED and the clerk of court is directed to close this case.

Entered this 3rd day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge