FORMATTED FOR ELECTRONIC DISTRIBUTION NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In Re:

FABIAN P. MOODIE, and
DEBRA A. MOODIE

Debtors.

CASE NO: 00-10501
Chapter 7

FABIAN P. MOODIE and
DEBRA A. MOODIE,

Plaintiffs

v.

THRIFTY RENT-A-CAR SYSTEM, INC., and TAMARACK SERVICES OF VERMONT, INC.

Defendants.

Adv.Proc. No. 00-01056 cab

#54

Appearances of Counsel: *Christopher O'C. Reis, Esq.*
Randolph, VT
Attorney for Debtors/Plaintiffs

Jennifer Emens-Butler, Esq.
Bethel, VT
Attorney for Tamarack

MEMORANDUM OF DECISION
DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court pursuant to the Motion for Summary Judgment on Count II of the Complaint filed by the defendant, Tamarack Services of Vermont, Inc. ("hereafter "Tamarack"), on April 30, 2001 [Dkt. #28-1]. The Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 157 and 1334. This Court having considered the matters filed of record and applicable case law, the Defendant's summary judgment motion is denied.

BACKGROUND

On May 1, 2000, a voluntary petition for bankruptcy relief was filed by the debtors, Fabian P. and Debra A. Moodie, pursuant to Chapter 7 of 11 U.S.C. ("the Bankruptcy Code"). Thereafter, the debtors initiated this adversary proceeding by filing a two-count Complaint against Thrifty Rent-A-Car System, Inc. (hereafter "Thrifty") and Tamarack seeking relief for violations of the automatic stay (Count I) and the Vermont Consumer Fraud Act, 9 V.S.A. 2451, *et seq.* (Count II). Tamarack seeks summary judgment concerning Count II only. Thrifty has been dismissed voluntarily from this action[1].

In pertinent part, the Complaint alleges that Tamarack operates a car rental facility in Vermont. The plaintiffs allegedly went to defendant's location and rented a vehicle under a written contract filed of record [see Complaint, exh. A], and that the plaintiffs were directed by their insurance company to obtain a vehicle from defendant pursuant to a claim that the plaintiffs had made under an insurance policy. Plaintiffs allegedly provided the defendant with a debit card for payment of the difference between the vehicle costs allowed by the insurance company and the vehicle costs for the car selected by plaintiffs. Both parties inspected the rental vehicle at the time of the rental, and plaintiffs returned the vehicle thereafter with damage. Plaintiffs further allege that the damage to the vehicle was "taken care of" by the plaintiffs because a third party, who caused the accident, paid for the repairs to the vehicle. Nonetheless, shortly after the vehicle was returned by plaintiffs to Tamarack, plaintiffs allege that they determined that Tamarack had, without their permission and without notice, withdrawn funds from plaintiffs' checking account. Numerous discussions between the parties to resolve this dispute were unavailing. Plaintiffs further allege that Tamarack's representatives were "abusive and unreasonable at all times regarding the dispute."

---

[1] Thrifty's motion to dismiss [Dkt. # 36-1} was unopposed and granted pursuant to a hearing held on June 5, 2001 [Dkt. #48-1}. A proposed order is being submitted.

In response, defendant essentially denies that there were the limitations as alleged on its ability to withdraw funds utilizing plaintiffs' debit card and that the plaintiffs had taken care of the damage to the rental vehicle. Defendant also denies that the disputed funds were debited without permission or notice to the plaintiffs. Defendant further denies that its representatives were abusive or unreasonable with the plaintiffs at times material to this dispute. Defendant also asserts the affirmative defenses of laches, waiver, estoppel, abandonment, unclean hands, set-off, breach of contract, and a failure to mitigate damages or plead a claim upon which relief may be granted.

The parties filed a Joint Statement of Undisputed Facts on May 15, 2001 (hereafter "the undisputed facts") [Dkt. # 34-1]. The undisputed facts essentially acknowledge that the debtors signed the subject rental agreement that contained a provision authorizing Tamarack "to process or submit a charge to [plaintiff's] credit, debit or charge card for the estimated charges for this rental ... and for all additional charges upon return of the vehicle"[para. 3]. The undisputed facts also acknowledge that the agreement provided that the plaintiffs knew that of they declined the Physical Damage Waiver ("PDW") that they would be responsible for all loss regardless of fault [para. 4]. It is stipulated that the initials "DM" are affixed to the rental agreement at the provision indicating that "I have declined PDW." [para. 5]. The vehicle was returned in damaged condition with a police report indicating damage to the rear door caused by the driver who hit the rented vehicle [paras. 7, 8]. It is also stipulated by the parties that Tamarack received payment from an insurance company insuring the at-fault driver for the damage sustained to the right rear door only, and that on over three occasions Tamarack caused the plaintiffs' debit card to be charged an aggregate charge of approximately $752.00 [paras. 9, 10]. Other than the subject rental agreement, no affidavits, other verified papers or joint exhibits were filed by either party pertaining to the pending summary judgment motion.

Pursuant to its summary judgment motion regarding the consumer fraud claim only, Tamarack claims that the allegations of the Complaint, even if taken as true, fail to support recovery under the Vermont Consumer Fraud Act. Relying solely upon the terms of the subject rental agreement, Tamarack denies that it charged the plaintiffs debit card without notice or permission. Defendant also denies that its representatives were "abusive and unreasonable" and asserts that these allegations, even if true, are immaterial to recovery under the Act. Defendant argues that under analogous case law, a rental agency is not liable under comparable consumer fraud laws for an alleged failure to disclose to renters the possibility that its damage waiver might be duplicative of a insurance coverage already in existence. Absent an allegation that a misrepresentation or practice by a defendant affected a consumer's decision regarding a product, defendant contends that it cannot be liable for plaintiffs' claim. Tamarack contends that any dispute regarding the existence of debtors' consent to the debit charges is immaterial because Tamarack had no practice and made no representation which would have affected the plaintiffs decision to enter into the subject car rental transaction. In essence, Tamarack urges summary judgment based upon the terms of the rental agreement and joint statement of undisputed facts.

In their opposition memorandum, plaintiffs contend that their Complaint and the undisputed facts preclude summary judgment. Plaintiffs point to disputed facts regarding whether there was any damage at all to the vehicle related to the funds of the plaintiffs that were withdrawn by defendant and any additional damage attributable to plaintiffs not covered by their insurance. Plaintiffs also contend that material facts exist concerning the nature and extent of the parties' communications leading up to and following the withdrawals from their debit account by Tamarack and their treatment by defendant.

Tamarack responds that the terms of its agreement with the plaintiffs clearly authorized Tamarack to withdraw the subject funds from the debit account for the damages to the vehicle. Defendant contends

that plaintiffs fail to allege any false representation by Tamarack and that the plaintiffs are bound by the conspicuous terms of the contract.

ISSUE

Whether there exists any genuine issue of material fact sufficient to preclude summary judgment as a matter of law in favor of the car rental agency.

DISCUSSION

1. Summary Judgment Standard

Summary judgment is proper only if the record reflects that there is no genuine issue as to any material fact and if so, that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Bankr. R. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record opponent's failure to introduce evidence in support of essential element of claim). "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id. In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14.

Finally, in determining whether there is a genuine issue of material fact, this Court must view the record and construe all ambiguities and inferences in a light most favorable to the party opposing summary judgment. *See* Foucher v. First Vermont Bank & Trust Company, 821 F.Supp. 916, 922 (D.Vt. 1993). Accordingly, a genuine issue of material fact precludes summary judgment relief.

2. The Consumer Fraud Claim

Both parties agree that plaintiffs consumer fraud claim is governed by the Vermont Consumer Fraud Act, 9 V.S.A. 2451 *et seq*. To establish a "deceptive act or practice" under the Act a consumer must prove three elements: (1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the product. Carter v. Gugliuzzi, 716 A.2d 17, 23, 168 Vt. 48 (1998). Furthermore, the Act does not require a showing of intent to mislead, but only an intent to publish the challenged statement. Id.

The purpose of the Act is to protect Vermont citizens from unfair and deceptive business practices and to encourage a commercial environment highlighted by integrity and fairness. *See* Gramatan Home Investors Corp. v. Starling, 470 A.2d 1157, 143 Vt. 527 (1983). The Act is remedial in nature and must be construed liberally so as to furnish all the remedy and accomplish all the purposes intended. *See* Carter v. Gugliuzzi, 716 A.2d at 21; State v. Custom Pools, 556 A.2d 72, 150 Vt. 533 (1988). Intentional misrepresentation or bad faith is not required for liability under the Act. *See* Winston v. Johnson & Dix Fuel Corp., 515 A.2d 371, 147 Vt. 236 (1986). Lastly, in addition to construing the provisions of the Act liberally to ensure its remedial purposes, it should be noted that Vermont courts carefully scrutinize claims of unfairness and unintended consequences to consumers of damage waiver provisions in vehicle rental agreements. *See, e.g.*, Val Preda Leasing, Inc. v. Rodriguez, 540 A.2d 648 (Vt. 1987). Where genuine

issues of material fact remain regarding a consumer's entitlement to recover for the an alleged deceptive act or practice, summary judgment should be denied. *See, e.g.,* Russell v. Atkins, 679 A.2d 333, 165 Vt. 176 (1996); State v. Heritage Realty, 407 A.2d 509, 137 Vt. 425 (1979); *see also* Carter v. Gugliuzzi, *supra* (remand required to determine if certain representations by business operator were material or deceptive).

In this instance, the record is inadequate to conclude as a matter of law that plaintiffs have failed to raise a genuine issue of material fact sufficient to subject Tamarack to potential liability under the Vermont Consumer Fraud Act. While the parties' joint undisputed statement of fact is helpful in narrowing the facts in dispute, these undisputed facts alone do not warrant summary judgment as a matter of law. While the express terms of the rental agreement as acknowledged by the plaintiffs tend to support Tamarack's claim that the plaintiffs' received the benefit of their bargain and that debit withdrawals were generally authorized when warranted, the Court is not convinced that the record is adequate to deny recovery to plaintiffs as a matter of law.

Based upon a review of the Complaint, the terms of the rental agreement, and the undisputed facts, the Court discerns the existence of a genuine issue of material factual regarding (i) whether the circumstances of the transaction limited the debit card authorization to an amount less than the sums actually withdrawn by the car rental agency; (ii) whether the car rental agency was adequately reimbursed for all damage to its vehicle pursuant to payments received from a third party; and (iii) whether the factual circumstances of this transaction were sufficient as to undercut the enforcement of the two provisions authorizing the car rental agency to debit plaintiffs' account and to render plaintiffs liable for all additional charges upon return of the vehicle and for all loss regardless of fault.

While the Court declines to render any determination regarding the ability of the plaintiffs to

overcome the plain language of the car rental agreement, the Court is not convinced that the defendant is entitled to prevail upon summary judgment. The Court is constrained to interpret the Act liberally and in favor of its remedial purposes and to view the record and construe all ambiguities and inferences in favor of the party opposing summary judgment. While the plaintiffs burden appears formidable under the circumstances, the record does not require this Court to deem their burden insurmountable.

Based upon the foregoing, the defendant's motion for summary judgement is denied.

June 7, 2001
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge