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May 24, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP201 Quorum Federal Credit Union p/k/a Kraft Foods Federal Credit Union v. Timothy R. Rumpf (L.C. #2012CV4714)

Before Lundsten, Sherman and Blanchard, JJ.

Timothy R. Rumpf appeals from a final judgment in favor of Quorum Federal Credit Union in the amount of $21,760.39 which was entered upon the circuit court's order granting summary judgment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We summarily reverse.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

As recited by the circuit court in its decision and order, the factual basis of the dispute here is:

> [Rumpf] applied for and was issued a credit card from Kraft Foods Federal Credit Union, now known as Quorum Federal Credit Union, in December of 1997. [Quorum] sent [Rumpf] monthly statements. The last payment [made by Rumpf] was received [by Quorum] on February 7, 2012. On March 27, 2012, [Quorum] sent [Rumpf] a Notice of Default ("Notice"), which gave him until April 8, 2012 to cure the default by paying the amount due.… [Quorum] filed this lawsuit on December 3, 2012 ….

Both Quorum and Rumpf moved for summary judgment. The circuit court granted summary judgment in favor of Quorum. Rumpf appeals.

We review summary judgments de novo, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

On appeal, Rumpf challenges only the validity of the notice of default and right to cure default given to him by Quorum prior to filing this lawsuit, specifically challenging as too short the twelve days between the day on which notice was given and the deadline to cure stated on the notice. A merchant may commence an action on a consumer credit transaction "'only upon the expiration of 15 days after a [valid] notice is given.'" ***Indianhead Motors v. Brooks***, 2006 WI App 266, ¶¶7, 14, 297 Wis. 2d 821, 726 N.W.2d 352 (quoted source omitted); WIS. STAT. § 425.105(2).

In response to this argument, Quorum argues that Rumpf had adequate time to cure his default, since this lawsuit was not commenced until more than eight months after the notice of default was sent to Rumpf. Quorum also argues that a second notice of default sent to Rumpf on

June 18, 2014, fully complies with WIS. STAT. § 425.104. Both of Quorum's arguments here miss the point.

In ***Indianhead Motors***, we concluded that a notice of default was not validly given if the notice was not given within the prescribed time period. ***Indianhead Motors***, 297 Wis. 2d 821, ¶6. In reaching that result, we held:

> It is important to note that along with timing requirements, [WIS. STAT.] § 425.104 also imposes content requirements for the notice. If the defect here is "technical," as Indianhead argues, virtually all defects in a notice could be considered "technical," and the specific listed requirements in § 425.104 would be rendered optional. This result would be contrary to § 425.105(1) and also contrary to the Consumer Act's goals, which include protecting consumers from misleading practices and encouraging fair practices in consumer transactions. *See* WIS. STAT. § 421.102(2).

Id., ¶13. In a footnote, we noted that "[a]mong other things, a notice must include certain information identifying the creditor and the transaction, a statement of the total amount due, *and an exact date on which payment is due*." ***Id.***, ¶13 n.4 (emphasis added). Finally, we concluded that "[t]he statute requires a notice that fully complies with [] § 425.104." ***Id.***, ¶14.

In the case before us, the first notice of default given to Rumpf stated that Rumpf had until April 8, 2012 to cure his default. However, that date was only twelve days from the date the notice was sent. WISCONSIN STAT. §425.105(2) unambiguously requires that the customer has fifteen days from the date that the notice of default is given to cure any default.[2] Therefore,

[2] WISCONSIN STAT. § 425.105(2) states: "Except as provided in subs. (3) and (3m), *for 15 days after such notice is given, a customer may cure a default* under a consumer credit transaction by tendering the amount of all unpaid installments due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges, and by tendering performance necessary to cure any default other than nonpayment of amounts due. (Emphasis added.)

the notice did not include the "exact date on which payment [was] due" in order to cure default, as required by WIS. STAT. § 425.104. ***Indianhead Motors***, 297 Wis. 2d 821, ¶13 n.4. Section 425.105(1) "requires a notice that fully complies with WIS. STAT. § 425.104." ***Id.***, ¶14. The first notice of default did not meet the requirements of § 425.104(1).

The second notice given by Quorum was sent more than one year after the commencement of the action. WISCONSIN STAT. § 425.105(1) provides that "A merchant may ... commence any action ... only upon the expiration of 15 days after a notice is given pursuant to [WIS. STAT. §] 425.104 if the customer has the right to cure under this section." Because Quorum does not contest that Rumpf has "the right to cure under this section," this language requires the expiration of 15 days, after the notice, before an action may be commenced. Obviously, any notice sent after the action was commenced does not satisfy the requirement that the notice precede the filing of the action. Thus, the second notice might have had some effect if Quorum had attempted to file a second action, but as to the action here, which Quorum had already filed, it is superfluous.

Quorum also argues that the use of the word "may" in WIS. STAT. § 425.104(1) indicates that Quorum has discretion whether or not to give a notice of default. Section 425.104(1) provides: "A merchant who believes that a customer is in default may give the customer written notice of the alleged default and, if applicable, of the customer's right to cure any such default." However, this interpretation ignores the effect of WIS. STAT. § 425.105(2). The merchant "may" decide not to accelerate the loan or commence an action, but if he makes the decision to do so, such action is not allowed until fifteen days after a notice complying with § 425.104 is given. The "may" argument is, thus, without substance because it fails to address the issue before us.

Quorum also raises several collateral issues. The following three issues, as denominated in Quorum's responsive brief, were not raised in the circuit court: (1) the relationship between Rumpf and Quorum is not governed by the Wisconsin Consumer Act; (2) Rumpf specifically waived his right to receive a notice of right to cure default; and (3) billing statements sent to Rumpf served as notices of default. Rumpf argues in his reply brief that these issues have been forfeited, citing ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997), which states that generally, arguments raised for the first time on appeal are deemed "waived." Quorum also argues that federal law preempts the notice provisions of the Wisconsin Consumer Act. Rumpf replies that this argument is not well developed. Whether or not Rumpf is correct, we choose to address these arguments and conclude that they lack merit.

Quorum argues that the relationship between Rumpf and Quorum is not governed by the Wisconsin Consumer Act because Rumpf has not set forth in his summary judgment materials that the credit card was used for personal, family, household or agricultural purposes. It was Quorum who sought summary judgment and never disputed in its summary judgment materials that Rumpf was a consumer. The agreement governing the transaction, which was drafted by Quorum and attached to its summary judgment affidavit, is entitled: Consumer Credit Card Agreement. Quorum never explains, let alone sets forth any authority for, why Rumpf is required to present proof for what appears to be undisputed. This argument has no merit.

Quorum next argues that Rumpf specifically waived notice of default in his application for credit. This argument likewise lacks merit as it fails to explain or cite any authority for how such a waiver is permissible notwithstanding WIS. STAT. § 421.106(1), which states that "a customer may not waive or agree to forego rights or benefits under chs. 421 to 427."

Quorum argues that a notice of default is not required because Rumpf received statements every month showing that he was delinquent in his account. However, once again, Quorum does not explain or provide authority for how such statements meet the requirements for content or timing necessary for a proper notice of default and right to cure default. Instead, Quorum uses provisions in the initial credit application to supplement the information in the monthly statement, essentially arguing that the two documents, taken together, are the equivalent of the notice of default. Quorum offers no authority for this proposition, nor explains why WIS. STAT. §§ 425.104 and 425.105 would not be rendered superfluous if this assertion were successful.

As to federal preemption, Quorum relies on an opinion letter of the National Credit Union Administration, No. 07-0562A (Dec. 21, 2007).[3] The NCUA opinion letter is quoted in Quorum's brief as stating:

> [12 C.F.R. §] 701.21 is promulgated pursuant to the NCUA Board's exclusive authority as set forth in Section 107(5) of the Federal Credit Union Act (12 U.S.C. § 1757(5)) to regulate the rates, terms of repayment and other conditions of Federal credit union loans.

The quoted portion of the NCUA opinion letter is merely interpretive and it does not explain what issues other than rates and terms of repayment ("and other conditions") are preempted.

[3] As persuasive authority, Quorum also relies on ***American Bankers Ass'n v. Lockyer***, 239 F.Supp. 2d 1000, 1018 (E.D. Cal. 2002), and ***WFS Financial, Inc. v. Superior Court***, 44 Cal. Rptr. 3d 561 (Cal. Ct. App. 2006). However, Quorum fails to develop an argument that these opinions apply to the fact situation in this case, and we do not find them persuasive. Accordingly, we do not discuss them further.

Accordingly, rather than rely on the NCUA opinion, we turn directly to 12 C.F.R § 701.21, upon which the opinion letter is based.

Section 701.21 of 12 C.F.R. clearly states that it is promulgated pursuant to the NCUA's authority to preempt state laws. *See* 12 C.F.R. § 701.21(b)(1). However, the language of the regulation does not preempt *all* state laws. First, a number of areas where state law is clearly preempted are listed. *See* 12 C.F.R. § 701.21(b)(1)(i - iii). Nothing on this list appears to include default and curing default. On the other hand, this section of the rule is followed by a section entitled "Matters not preempted." 12 C.F.R. § 701.21(b)(2). Among the matters not preempted are "Conditions related to ... [t]he circumstances in which a borrower may be declared in default and may cure default." 12 C.F.R. § 701.21(b)(2)(iii)(C). Clearly, the requirement for notice of default and right to cure default is a "circumstance[] in which a borrower may be declared in default and may cure default." ***Id.*** Thus, this provision of the Wisconsin Consumer Act is specifically not preempted by the regulation.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily reversed and remanded for further proceedings consistent herewith, pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals