

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Randy Merle Holte, on behalf of himself
and all other similarly situated,

Judge Thomas M. Sipkins
Court File No. 27-CV-15-18990

Plaintiff,

ORDER

v.

PayDay America, Inc.,

Defendant.

The above-entitled matter came on before the Honorable Thomas M. Sipkins, Judge of District Court, on February 16, 2016 pursuant to Defendant's Motion to Dismiss.

Marisa Katz, Esq. and Vildan Teske, Esq. appeared representing Plaintiff. Marc Simpson, Esq. and Calvin Hoffman, Esq. appeared on behalf of Defendant.

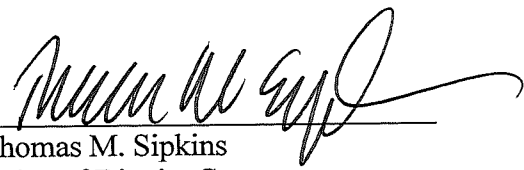
Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

IT IS HEREBY ORDERED:

1. Defendant's Motion to Dismiss is DENIED.
2. The attached memorandum is made a part of this Order.

Dated: May 16, 2016

BY THE COURT:


Thomas M. Sipkins
Judge of District Court

MEMORANDUM OF LAW

I. Introduction

Plaintiff received money on three occasions from Defendant PayDay America, Inc. (“Payday”). Plaintiff claims that the fees charged by Payday were in excess of those allowed by statute. Additionally, Plaintiff claims that Payday failed to provide the disclosures required by statute and used prohibited debt collection practices. Plaintiff seeks individual and class damages related to Payday’s loan practices. Defendant denies Plaintiff’s allegations and seeks to dismiss pursuant to Rule 12 of the Minnesota Rules of Civil Procedure.

II. Statement of Facts

Defendant PayDay is a payday lender licensed with the Minnesota Commissioner of Commerce to conduct business as an industrial loan and thrift company. Payday has several stores located throughout Hennepin County. On April 28, 2015, Plaintiff Randy Merle Holte (“Holte”) went to a Payday store in Hopkins, Minnesota seeking a loan. Instead of a loan, however, Payday presented Holte with a “Consumer Note, Disclosure and Open-End Credit Agreement” (“Agreement”). The Agreement was signed by both Holte and Payday’s manager.

1. Cash Advances¹

Plaintiff received cash from Payday on three occasions pursuant to the Agreement. The first advance (“Advance 1”) was taken on April 28, 2015, the same date as the Agreement. Holte received \$400 from Payday; signing a corresponding “Periodic Statement with Cash Advance Feature” (“Periodic Statement”) with an advance number of 1292816 (“Advance 1”). Advance 1 was due in full on May 8, 2015 in the total amount of \$438.68. This sum was composed of the \$400.00 principal; a \$30.00 cash advance charge; \$5.00 annual fee and \$3.68 in interest. The actual

¹ The parties dispute whether Plaintiff received advances on a credit limit or a series of loans. The term “advance” is being used for the sake of convenience.

APR for Advance 1 was 352.96%; which was designated in 12-point type. Within a week after May 8, 2015, Defendant, with Plaintiff's authorization, automatically withdrew \$438.68 from Plaintiff's personal checking account.

On May 13, 2015, Plaintiff went to Payday and received a \$200.00 cash advance; signing a corresponding Periodic Statement with an advance number of 1300638 ("Advance 2"). Advance 2 was due in full on May 22, 2015 in the total amount of \$228.65. This sum was composed of the \$200.00 principal; a \$25.00 cash advance charge; \$2.00 annual fee; and \$1.65 in interest. The actual APR for Advance 2 was 580.96%; which was designated in 12-point type. Within one week following the May 22, 2015 due date, Defendant, with Plaintiff's authorization, automatically withdrew \$228.65 from Plaintiff's personal checking account.

The final advance occurred on June 3, 2015; with Plaintiff receiving a \$180.00 cash advance and signing a corresponding Periodic Statement with advance number 1311031 ("Advance 3"). Advance 3 was due in full on June 19, 2015 in the total amount of \$209.64. This sum was comprised of the \$180.00 principle; a \$25.00 cash advance charge; \$2.00 annual fee; and \$2.64 in interest. The actual APR for Advance 3 was 375.65%; which was designated in 12-point type. Within one week following the June 19, 2015 due date, Defendant tried to withdraw the funds owed. Holte, however, did not have sufficient funds to cover the entire amount, resulting in an account overdraft. For the three advances, Plaintiff was charged a total of \$876.97 in principal plus cash advance, annual, and finance charges.

2. June 30, 2015 Letter

On June 30, 2015, Payday sent Plaintiff a "Notice of Dishonor and Demand of Payment" ("Demand Letter"). Pursuant to the Demand Letter, Plaintiff was notified that he was in "default under the terms of the Consumer Note, Disclosure and Open-End Credit Agreement (Advance No.

1311031) dated 6/03/2015, made by [Holte] in favor of Payday America, Inc, Note in the amount of \$209.64 for failing to pay the Note when due.” Payment, together with a \$9.00 delinquency charge, and a \$30.00 service charge was requested within 30 days. If Plaintiff failed to make payment as requested, Payday would commence a conciliation court action.

Plaintiff failed to pay and Payday initiated a conciliation court action, 27-CO-15-5327, seeking the total sum of \$318.64. This sum was comprised of the \$209.64 owed for Advance 3 plus \$39.00 in check return and late fees and a \$70.00 filing fee. Pursuant to Minn. Gen. R. Prac. 510, this conciliation court action was administratively closed after Holte filed an “Affidavit of Removal from Conciliation Court.”

III. Legal Analysis

A. Motion to Dismiss

A pleading must “contain a short plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.” *Minn. R. Civ. P. 8.01*. In ruling on a motion to dismiss under Rule 12.02(e) of the Minnesota Rules of Civil Procedure, the allegations in the complaint are assumed to be true and “all reasonable inferences” are construed “in favor of the nonmoving party.” *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). “A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014).

Pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure, if, “on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . .” A court,

however, “may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment.” *N. States Power Co. v. Minnesota Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004).

In ruling on this motion, the Court has considered the allegations made in the Complaint, together with the Agreement, Periodic Statements and letter dated June 30, 2015; as these documents were referred to in the Complaint and central to its allegations. For the purposes of this motion, Plaintiff’s factual allegations are assumed to be true; with all reasonable inferences construed in Plaintiff’s favor.

1. The Agreement

Although referred to, the Agreement is not mentioned in the Complaint. According to its terms, the Agreement provides Plaintiff with “a revolving Line of Credit loan” with a credit limit of \$400.00. Under the Agreement, Payday would provide Holte with “loan advances and re-advances in \$10 increments up to [Holte’s] Credit Limit until the Maturity Date.” The Agreement’s Maturity Date was April 27, 2016 or the date the Agreement was terminated by either party. As defined in the Agreement, the due date for the advance is the earlier of the date of Holte’s next paycheck or the date set forth in the Periodic Statement. Pursuant to the Agreement, it was assumed that Plaintiff would take 10 advances in the full amount of the Credit Limit during a one-year term; with each advance being paid in full within fourteen days.

Under the Agreement, a finance charge would accrue on any unpaid balance at the rate of 33% per annum. The Agreement stated that “this corresponds to an example ANNUAL PERCENTAGE RATE of 229.103%.” Although most of the Agreement is in less than 12-point type, the example APR is in 24-point type. In addition to the finance charge, the APR included “other charges” including a “cash advance charge” and “annual charge.” The cash advance charge

was \$25.00 for “credit limits” of \$100 to \$350.00 and \$30.00 for “credit limits” of \$351.00 to \$1,000.00. The annual charge was \$2.00 for “credit limits” up to \$300.00 with a \$5.00 charge for “credit limits” between \$301 and \$400.00. Plaintiff could prepay the full amount owed; but Payday did not accept partial payments and the cash advance charge and annual charge were not refundable. On the advance due date, Holte authorized Payday to satisfy any unpaid balance by withdrawing the funds from his bank account.

2. The Periodic Statements

According to the Agreement, periodic statements would be delivered to Holte which would include a record of his “[l]ine of Credit loan advances, charges, credits and payments made during the billing cycle covered by that statement.” Despite this language, no periodic statements were ever generated or delivered to Holte. Instead, when requesting additional funds, Holte was presented with, and signed a Periodic Statement. The Periodic Statement contains, in grid form, information concerning the previous balance, the amount of the cash advance, applicable finance charges, the due date and total amount due. Each Periodic Statement contains the Actual APR for that specific advance in regular 12-point type. All of the actual APR’s reflected on the Periodic Statements were well in excess of the example APR found in the Agreement.

When Plaintiff signed the Periodic Statements, the amount due and the due date were fixed. Plaintiff never had a previous balance reflected on any of the Periodic Statements and the date of the new advance was listed as the closing date of the prior billing cycle. Although the Periodic Statements indicated that Plaintiff had a \$400.00 credit limit; the advance was used as the “credit limit” in determining the amount of the cash advance charge and annual charge. For instance, if an “advance” was less than \$300.00, the cash advance and annual fee charged would correspond in the Agreement to a “credit limit” between \$100.00 and \$300.00.

B. Consumer Short-Term Loans

“Payday loans, most often used by low-income or financially strapped consumers who lack access to other forms of credit, are short-term, high-interest-rate loans.” *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 92 (Minn. 2015). “The maturity date of these loans is typically less than one month and generally coincides with the date on which borrowers receive their next paycheck.” *Id.* Although Minnesota allows payday loans, their terms and conditions are regulated, including under Minn. Stat. §47.601 which regulates consumer short-term loans. *Id.* Consumer short-term loans are defined as:

“a loan to a borrower which has a principal amount, or an advance on a credit limit, of \$1,000 or less and requires a minimum payment within 60 days of loan origination or credit advance of more than 25 percent of the principal balance or credit advance. For the purposes of this section, each new advance of money to a borrower under a consumer short-term loan agreement constitutes a new consumer short-term loan.”

Minn. Stat. § 47.601 Subd. 1(d). Given this definition, the advances from Payday to Holte are consumer short-term loans; regulated by Minn. Stat. §47.601.

1 Open-End Credit and Closed End Loans

The central issue in this case is whether the Agreement is an open-end credit plan or, as Plaintiff alleges, the advances, as evidenced by the Periodic Statements, were separate closed-end loans. Minnesota Statute §47.601 does not contain a definition of open-end credit. With respect to open-end credit plans, Minnesota courts have adopted the definition set out in the federal Truth-in-Lending Act (“TILA”). *Minn. Stat. §334.16 Subd. 2*; See also, *John David Contracting, Inc. v. Brozek*, 535 N.W.2d 397, 398 (Minn. App. 1995). The purpose of TILA is to:

“assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.”

15 U.S.C. § 1601(a); See also, *Wise Furniture v. Dehning*, 343 N.W.2d 26, 28 (Minn. 1984).

“Protection of unsophisticated consumers is the overriding purpose of TILA and consequently creditors are required to comply with both the letter and spirit of the law.” *Wise Furniture* at 28.

Under TILA, an open-end credit plan is defined as:

“a plan in which: (i) The creditor reasonably contemplates repeated transactions; (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.”

12 C.F.R. § 1026.2(a) (20); See also, 15 U.S.C. §1602(j).

Payday contends that the terms of the Agreement meet all three elements of an open-end credit plan. It is called an Open-End Credit Agreement; it specifically assumes there will be 10 advances; it charges a finance charge on the unpaid balance; and it states that the \$400.00 credit limit is available to Plaintiff to the extent he repaid any outstanding balance. In determining whether an open-end credit agreement exists, however, the fact that the Agreement states that it is an “Open-End Credit Agreement” is not determinative. As previously stated, Payday is required to comply with the “spirit” of the TILA. *Wise Furniture v. Dehning*, 343 N.W.2d 26, 28 (Minn. 1984). As such:

“[t]he meaning of the term ‘open end credit’ under the regulations indicates that more is required to establish that a purchase is made under an ‘open end credit’ arrangement than the recitations in the agreement upon which defendants rely. If it were otherwise, a creditor could easily exempt what is in reality a single credit sale from the disclosures required and thereby frustrate the . . . purpose of providing meaningful disclosure of credit terms to the consumer merely by including such language in the agreement of sale-when in fact no continuing or revolving credit plan was contemplated by the parties.”

Maes v. Motivation for Tomorrow, Inc., 356 F. Supp. 47, 50 (N.D. Cal. 1973).

According to Plaintiff, he went to Payday for a loan. There is no indication that he requested a credit plan. Additionally, there is no indication that, when the Agreement was

executed, Plaintiff contemplated making additional loan requests or that the 10 advances assumed in the Agreement constitutes anything other than boilerplate language inserted solely to comply with the Open-End credit definition.

“Generally in open-end plans, the balance due on each previous contract is carried forward; the final amount of the contract is not ascertainable when it is signed. *Peterson v. Gustafson*, 584 N.W.2d 660, 662 (Minn. App. 1998). In this case, the Periodic Statements resemble closed-end transactions; with a fixed amount due when they were executed. Additionally, although not determinative, the Agreement does not have attributes generally associated with open-end plans. Plaintiff had no ability to make partial payments and, given the due date of each loan, no balance was ever carried forward. See, *John David Contracting, Inc. v. Brozek*, 535 N.W.2d 397, 398 (Minn. App. 1995). Finally, it is unclear whether Payday would generally make available a \$400.00 credit limit to Plaintiff. Pursuant to the Agreement, the fees charged on the second two advances were equal to the fees charged on a “credit limit” under \$300.00.

Based on the above, and assuming all the facts asserted by Plaintiff to be true, while giving Plaintiff the benefit of all reasonable inferences, Plaintiff has stated a claim that the “advances” taken by Plaintiff were, in actuality, a series of closed-end loans.

2. Fees Allowed

In Count I of the Complaint, Plaintiff claims that Payday charged fees in excess of those permitted for consumer short-term loans. Pursuant to Minn. Stat. §47.601 Subd. 2(a)(3)(ii), no contract or agreement between a consumer short-term loan lender and borrower may contain “interest rates, fees, charges, or loan amounts” which exceed those allowable under Minn. Stat. §47.59 “other than by de minimis amounts if no pattern or practice exists.” In the Complaint,

Plaintiff concedes that the 33% finance charge, while the maximum-allowed under Minn. Stat. §47.59 Subd. 3(2)(i) is not excessive. With respect to the “other charges,” different fees are allowed depending on whether there is an open-end credit plan or a closed-end loan.

Under a closed-end loan, charges are limited to a \$25.00 administrative fee. *Minn. Stat. § 47.59 Subd. 6(d)*. An open-end credit plan, however, allows a cash advance fee in an amount not exceeding \$30.00. *Minn. Stat. §47.59 Subd 6(c)(4) and Minn. Stat. §604.113 Subd. 2(a)*. Additionally, an open-end credit plan may contain “annual charges, not to exceed \$50 per annum, payable in advance, for the privilege of opening and maintaining open-end credit.” *Minn. Stat. §47.59 Subd. 6(c)(1)*. As stated previously, Plaintiff has stated a claim that he entered into a series of closed-end loans with Payday. As closed-end loans, Payday, over the course of the three “advances,” charged Plaintiff fees \$14.00 in excess of those allowed by statute. This is a Rule 12 motion and, applying the rules at this stage of the proceeding, Defendant’s motion to dismiss Count I of the Complaint is denied.

3. Disclosures

In Count II of the Complaint, Plaintiff claims that Defendant did not make the required disclosures under Minn. Stat. §47.601 Subd. 2(c). Among other things, a consumer short-term loan lender is required to “furnish a copy of the written loan contract to each borrower. The contract and disclosures must be written in the language in which the loan was negotiated with the borrower and must contain . . . (4) in bold, 24-point type, the annual percentage rate . . .” *Minn. Stat. §47.601 Subd. 2(c)(4)*.

The Periodic Statements fail to comply with this disclosure requirement. Defendant, however, contends that the Agreement, as the written loan contract, was the only contract that had to comply with disclosure requirements. As stated above, however, there are sufficient

allegations and inferences to support Plaintiff's contention that the "advances" represented by the Periodic Statements were a series of closed-end loans. Therefore, Defendant's motion to dismiss Count II of the Complaint is denied.

4. Debt Collection Practices

In Count III of the Complaint, Plaintiff contends that Defendant violated applicable debt collection practices. Pursuant to Minn. Stat. §47.601 Subd. 3, "a consumer short-term lender collecting or attempting to collect on an indebtedness in connection with a consumer short-term loan must not engage in the prohibited debt collection practices referenced in section 332.37." Minn. Stat. §332.37 Subd. 12 provides that no collection agency or debt collector shall "violate any of the provisions of the Fair Debt Collection Practices Act of 1977, Public Law 95-109, while attempting to collect on any account, bill or other indebtedness." Under the Fair Debt Collection Practices Act of 1977:

"a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section The threat to take any action that cannot legally be taken or that is not intended to be taken."

PL 95-109 (HR 5294), PL 95-109, September 20, 1977, 91 Stat 874.

As stated previously, there is sufficient evidence which might be produced to establish that the "advances" taken by Plaintiff were, in actuality, a series of closed-end loans. As such, the fees charged are excessive and the disclosures are insufficient. Pursuant to Minn. Stat. §47.601 Subd. 2(b), any provision providing excessive fees is void and unenforceable. Additionally, charging excessive fees or providing improper disclosures subjects a lender to liability to the borrower for, among other things, "all money collected or received in connection with the loan." *Minn. Stat. §47.601 Subd 6(a)(1)*. Therefore, Defendant's attempts to collect Advance 3 in the Demand Letter may be viewed as a threat to take an action that could not

legally be taken. Accordingly, Defendant's motion to dismiss Count III of the Complaint is denied.

IV. Conclusion

Accepting Plaintiff's factual allegations as true, and construing all reasonable inferences in Plaintiff's favor, at this stage of the proceedings Plaintiff has stated a claim that the advances were, in effect, closed-end loans; with Payday charging excessive fees; making inadequate disclosures and committing debt collection practices violations. Accordingly, Defendant's motion to dismiss is denied in its entirety

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